No. 24-5381

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

Brief *Amici Curiae* of Gun Owners of America, Gun Owners Fdn., Gun Owners of Calif., Heller Foundation, Tenn. Firearms Assn., Tenn. Firearms Fdn., America's Future, U.S. Constitutional Rights Legal Def. Fund, Restoring Liberty Action Committee, and Conservative Legal Def. and Education Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* filed an *amicus* brief in a prior unsuccessful effort to urge this Court to reassess its *Terry* Stop-and-Frisk decision: *Amicus Curiae* Brief of Downsize DC Foundation, *et al.* in *Johnson v. United States*, U.S. Supreme Court, No. 18-9399 (June 24, 2019).

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

After being subjected to a stop-and-frisk at his place of employment based on only "reasonable suspicion," Petitioner Nathan Cooper was arrested for being a felon-in-possession of a firearm and ammunition. His motion to suppress evidence obtained from the search was denied, and he was convicted in the Southern District of Florida in an unreported 2023 case. *See* Petition for Certiorari ("Pet.") at 1.

The Eleventh Circuit affirmed. *United States v. Cooper*, 2024 U.S. App. LEXIS 9940 at *1 (11th Cir. 2024). The court found that the district court did not err in finding that the officer had "reasonable suspicion" to stop and frisk Petitioner because the officer reasonably believed criminal activity was about to occur. *Id.* at *4. The court also affirmed the district court's finding that the officer had reasonable grounds to believe Petitioner was armed and dangerous. *Id.* at *5. Lastly, the court rejected Cooper's challenge to the constitutionality of the rule of *Terry v. Ohio*, 392 U.S. 1 (1968), that "reasonable suspicion" is sufficient grounds for a law enforcement officer to conduct a search for weapons when an individual is lawfully detained.

Petitioner asks this Court to grant certiorari to "overrule the frisk holding of *Terry* .... which allows police officers to search people absent probable cause to arrest" as required by the text of the Fourth Amendment and this Court's jurisprudence prior to 1968 when *Terry* was decided. Pet. at i.

SUMMARY OF ARGUMENT

Petitioner ably demonstrates that there are no historical analogues for the *Terry* decision to authorize police to conduct a search based on mere "reasonable suspicion." The *Terry* decision is egregiously wrong, but has been allowed to stand for well over half a century. This Court has had other opportunities to review this decision, including *Johnson v. United States*, U.S. Supreme Court, No. 18-9399 (2019), where some of these *amici* filed the only *amicus* brief in support of review. There, after the Solicitor General waived the right to respond, this Court ordered a response but eventually denied review. This Court should not let *Terry* stand unreviewed again. The case here provides the Court with another excellent vehicle to re-examine the deeply flawed *Terry* decision and the stop-and-frisk line of cases which it has spawned, which represent a radical departure from the historical understanding that a search may only be performed based on the existence of probable cause.

There is an additional Fourth Amendment originalist reason supporting review. The *Terry* decision violates the rule adopted in this Court's recent return to the historic property principles undergirding the Fourth Amendment. For the first 176 years of our nation, the first clause of the Fourth Amendment — "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" — protected the specified common law property rights from government searches and seizures **unless** the government could demonstrate a **property right**

superior to the individual right. Only if the property at issue was contraband, the fruit of a crime, the instrumentality of a crime, or suffered some defect of title would it then be subject to the further limitations of the second clause of the Amendment: "[N]o 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."

This orderly process came to an abrupt end with this Court's May 29, 1967 decision in *Warden v. Hayden*. Expressing dissatisfaction with the "fictional and procedural barriers [of] property concepts,"[2] Justice William Brennan convinced four of his colleagues to abandon the Court's well-established Fourth Amendment jurisprudence grounded upon "property rights," in favor of one based on "an emerging right of privacy." Having set the Court free from the Fourth Amendment's original text and history, just over six months later — on December 18, 1967 — the Warren Court decided *Katz v. United States*, ushering onto the Fourth Amendment stage the "reasonable-expectation-of-privacy" test. And only six months after that — on June 10, 1968 — Chief Justice Warren penned for an almost unanimous court the stop-and-frisk regime of *Terry v. Ohio*. In both *Katz* and *Terry*, the Court employed a standardless "totality-of-the-circumstances" test to determine if the search or seizure was "unreasonable."

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[2] *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

Departures from the Fourth Amendment's history and text caught the attention of Justice Thomas and the late Justice Scalia. Justice Scalia, writing the majority opinion in both *United States v. Jones* (2012) and *Florida v. Jardines* (2013), re-established the Fourth Amendment property "baseline," below which the stop-and-frisk privacy-based doctrine may not go. The totality-of-the-circumstances test for "unreasonableness" is totally incompatible with a properly stated and applied 18th century standard of "unreasonableness," as explained by Justice Thomas in dissent in *Carpenter v. United States*, 585 U.S. 296, 347-50 (2018) (Thomas, J., dissenting).

Lastly, the Court should reconsider the premise of a *Terry* stop-and-frisk in the light of *District of Columbia v. Heller,* 554 U.S. 570 (2008). At the time that *Terry* was decided, it was thought by many that almost every citizen carrying a gun did so for a nefarious reason, which would pose a threat to officer safety. Today, however, millions of Americans routinely carry firearms for purposes of self-defense or other valid reasons, in no way related to criminal activity. In 2023, 21.8 million Americans had concealed carry permits, and many more millions live in states with constitutional carry which do not require permits. In 1968, a police encounter with an armed citizen might have given rise to a concern for officer safety, but in 2024, no such assumption to support a "frisk" of an American citizen can be made.

ARGUMENT

I. THIS COURT'S FOURTH AMENDMENT "STOP-AND-FRISK" DOCTRINE IS ILLEGITIMATE, WITHOUT TEXTUAL OR HISTORICAL SUPPORT.

Petitioner correctly asserts that "*Terry*'s invasive and degrading frisk authority is profoundly ahistorical." Pet. at 2. The Petition cites Justice Scalia for the unchallengeable proposition that "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).[3]" Pet. at 2. And Petitioner quotes Justice Scalia's description of Terry's "frisk holding as the byproduct of the Court's then-prevailing '**original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence**.'" *Id.*; *Dickerson* at 382 (Scalia, J., concurring) (emphasis added). There could be no better description of the *Terry* decision, nor could there be a more compelling reason for this Court to reconsider it.

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[3] When government seeks to narrow the scope of a constitutional protection, the requirement it demonstrate relevant "framing-era precedents" was reaffirmed with respect to the Second Amendment in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022) ("government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition....").

A. The Genesis of the Stop-and-Frisk Rule.

Fifty-six years ago, this Court in *Terry v. Ohio* sanctioned what has become one of the most contentious yet common police practices — stopping and searching persons on the nation's sidewalks and streets, on suspicion that the person is up to no good. A nearly unanimous Court invented the rule of "stop-and-frisk," enabling the police, with only reasonable suspicion, to interfere with a person's freedom of movement and at the same time, pat down the suspect for weapons in the name of protecting public safety. *Id.* at 22-27. *See Minnesota v. Dickerson* at 379-83 (Scalia, J., concurring).

In support of its brand new doctrine, this Court quoted the first phrase of the Fourth Amendment, which states: "'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....'" *Terry* at 8. Completely missing at the outset of the genesis of this new doctrine was that Amendment's second phrase stating that "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." Amendment IV. This omission was caught by the lone dissenting voice, Justice William O. Douglas, who pointed out that it was agreed by all that the "stop" in *Terry* was a Fourth Amendment "seizure" and that the "frisk" was a Fourth Amendment "search," and neither would have been permissible under the Warrant Clause unless based upon "probable cause." *Terry* at 35-36 (Douglas, J., dissenting).

How, Justice Douglas asked, under the new *Terry* rule, could it be "that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action?" *Id.* at 36.

Chief Justice Warren's quick response was that not all "police conduct [was] subject to the Warrant Clause of the Fourth Amendment" and its "probable cause" requirement, discerning a new "practicality" exception within the Amendment. *Id.* at 20:

> But we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and **as a practical matter could not be, subjected to the warrant procedure**. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures. [*Id.* at 9 (emphasis added).]

After all, the Chief Justice opined: "For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.'" *Id.* at 9.

One might first inquire, what "general proscription against unreasonable searches and seizures" did Chief Justice Warren have in mind? He asserted that "the **central** inquiry under the Fourth Amendment [is] — the **reasonableness** in all the circumstances of the particular governmental invasion of a citizen's **personal security**." *Id.* at 18 (emphasis added). But

the Fourth Amendment text is both more specific, and at the same time more comprehensive, than that. As Justice Scalia observed in *United States v. Jones*:

> The **text** of the Fourth Amendment reflects its close connection to **property,** since otherwise it would have referred simply to "the right of the people to be **secure** against unreasonable searches and seizures"; the phrase "in their persons, houses, papers and effects" would have been superfluous. [*United States v. Jones*, 565 U.S. 400, 405 (2012) (emphasis added).]

Thus, the Amendment "secures" the People in four categories of fixed common law property rights — their "persons, houses, papers, and effects" — not just their personal private interests, as determined by a judicially contrived and administered standard of "reasonableness." As Justice Scalia put it in *Jones*:

> What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at *a minimum* the degree of protection it afforded when it was adopted. [*Id.* at 411.[4]]

In contrast, the *Terry* ruling laid down by Chief Justice Warren is not fixed based on the

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[4] *See generally* H. Titus & W. Olson, "United States v. Jones: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE UNIV. J. OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Spring 2012).

understanding of the framers and ratifiers of the Fourth Amendment, but fluctuating, with the outcome dependent upon an assessment of "reasonableness" made by modern judges in light of all the relevant circumstances, as the court below noted. *Cooper* at *3 ("[W]e evaluate the totality of the circumstances to determine whether such suspicion was reasonable."). In short, the job of the judge in a Fourth Amendment stop-and-frisk case does not require an examination of what the Fourth Amendment framers deemed to be an unreasonable search, but rather is like that of a jury in an automobile accident case, applying a standard of reasonable care under the "totality-of-the-circumstances test" in order to ascertain fault.

B. Privacy Versus Property.

The modern American practice to address constitutional issues with only passing reference to the text, history, and purpose of the relevant constitutional text has been especially pronounced in Fourth Amendment litigation. Since *Katz v. United States*, 389 U.S. 347 (1967), decisions have been dominated by discussions and analyses governed by a standard of "reasonable expectation of privacy." Indeed, the *Terry* decision (June 10, 1968) invoked the newly minted (Dec. 18, 1967) *Katz* privacy doctrine to support its foray into the brand new world of "stop-and-frisk," with the **Katz** justifying statement that "'the Fourth Amendment protects people, **not places**.'" *Terry* at 9 (emphasis added). Completely overlooked by the Court, however, is not only the fact that "**privacy**" is not found anywhere in the Fourth

Amendment text, but also that several categories of **property** are.

However, the Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects...." Recognizing that one has a property interest even in one's own person,[5] this list establishes a property rights baseline, and when the government physically intrudes "in a constitutionally protected area," a Fourth Amendment "search" has occurred.

To be sure, in his 1993 concurring opinion in *Dickerson*, Justice Scalia expressed his opinion that "[t]here is good evidence ... that the 'stop' portion of the Terry 'stop-and-frisk' holding accords with the common law[,] [but] no clear support at common law for physically searching the suspect." *Id*. at 380-81. Drawing on this statement and other references to Justice Scalia's *Dickerson* opinion, Petitioner urges this Court to grant his petition to determine if this Court's stop-and-frisk jurisprudence conforms to the "original" meaning of the Fourth Amendment text. *See* Pet. at 10-13. But Justice Scalia's initial probe into the validity of stop-and-frisk under the Fourth Amendment is not the only reason to grant this petition.

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[5] *See* W. Blackstone, I Commentaries on the Laws of England (1765-1769), Chapt. 1 (Of the Absolute Rights of Individuals) ("The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.").

C. Unreasonable: The Property Principle of the Fourth Amendment.

In 2018, this Court wrestled with yet another Fourth Amendment challenge to a widely used high-tech investigative practice, in which the meaning and application of the *Katz* two-pronged privacy test was hotly contested. *See Carpenter v. United States*. In his dissenting opinion, Justice Thomas reminded us that the adoption of that test of reasonableness "profoundly changed our Fourth Amendment jurisprudence[,] [taking] only one year for the [*Terry*] Court to adopt [the *Katz*] test" (*id.* at 346), which soon thereafter became the "lodestar" for determining whether a particular "search" or "seizure" was "unreasonable." *Id.* at 355. But Justice Thomas observed that:

> the *Katz* test invokes the concept of reasonableness in a way that would be foreign to the ratifiers of the Fourth Amendment. **Originally**, the word "**unreasonable**" in the Fourth Amendment likely meant "against reason" — as in **"against the reason of the common law**...." [*Id.* at 355 (emphasis added).]

Emphasizing this point, Justice Thomas recounted that:

> Locke, Blackstone, Adams, and other influential figures shortened the phrase "against reason" to "unreasonable." Thus, by prohibiting "unreasonable" searches and seizures in the Fourth Amendment, the

> Founders ensured that the newly created Congress could not use legislation to abolish the established common-law rules of search and seizure. [*Id*. at 356 (citation omitted).]

This understanding of the meaning of "unreasonable" in the Fourth Amendment in this Court prevailed until *Warden v. Hayden*, decided just seven months before *Katz*, which was the vehicle chosen by Justice Brennan to replace property with privacy "as the organizing constitutional idea of the 1960s and 1970s" in contrast to "[t]he organizing constitutional idea of the founding era ... property." *See Carpenter* at 351 (Thomas, J., dissenting).

Although the Fourth Amendment prohibition is directed at "unreasonable" searches and seizures, the meaning of "unreasonable" is contextual and unique — different from the meaning of that word as applied by juries in tort cases, or by judges in suits for an injunction, where competing interests may be properly balanced *ad hoc*. Rather, the Fourth Amendment's meaning of "unreasonable" was designed as an **objective, fixed rule** to govern the relationship between the government and its citizens — a direct product of specific historic events involving the abusive exercise of government power against the liberty and property of individual citizens. *See, e.g., Hayden* at 313-21 (Douglas, J., dissenting). As the Court in *Heller* has reminded us, "[t]he very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller* at 634. In short, there is no

judicial balancing to be done — as the Fourth Amendment, like the Second and the First, "is the very *product* of an interest balancing by the people." *Id*. at 635.

D. The Property Principle Explained and Applied.

In the seminal case of *Boyd v. United States*, 116 U.S. 616 (1886), a statute authorized a court, on motion of the prosecuting attorney, to issue a subpoena requiring a defendant to produce books, invoices, and papers in a forfeiture proceeding against goods that had been allegedly imported without payment of the requisite duties. In opposition to this subpoena, *Boyd* interposed the Fourth Amendment. According to the Court, the threshold question was whether "a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws [is] an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution." *Boyd* at 622. In response, the Court stated:

> The search for and seizure of **stolen or forfeited goods,** or goods liable to duties and concealed to avoid the payment thereof, are **totally different** things from a search for and seizure of a man's **private books and papers** for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. **In the one case, the government is**

> **entitled to the possession of the property; in the other it is not.** [*Id.* at 623 (emphasis added.]

The *Boyd* Court instructed that the Fourth Amendment's first freedom — from unreasonable searches and seizures — protected one's property from a government search and seizure unless the government demonstrated a **superior property right** to the thing to be seized, no matter how particularized the search and seizure, or how well supported by probable cause, even if authorized by a disinterested magistrate. *See id.* at 623-29. *See also Hayden* at 318-19 (Douglas, J., dissenting). In conclusion, the *Boyd* Court stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security.... [T]hey apply to all invasions on the part of the Government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his **indefeasible right of personal security, personal liberty and private property**, where that right has never been forfeited by his conviction of some public offence. [*Boyd* at 630 (emphasis added).]

The *Boyd* decision spawned what later became known as the **"mere evidence" rule**, namely, that search warrants may be:

> resorted to **only** when a **primary right** to such search and seizure may be found in the interest which the public or the complainant may have **in the property to be seized**, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. [*Gouled v. United States*, 255 U.S. 298, 309 (1921) (emphasis added).]

Thus, *Gouled*, in turn, brought the *Boyd* "doctrine" into its "full flowering ... where an opinion was written by ... Justice Clarke for a unanimous Court that included both ... Justice Holmes and ... Justice Brandeis"[6] stating that:

> The prosecution was for defrauding the Government under procurement contracts. Documents were taken from defendant's business office under a search warrant and used at the trial as evidence against him. **Stolen or forged papers could be so seized**....; so could lottery tickets; **so could contraband;** so could property in which the public had an interest.... **But** the papers or documents fell in none of those categories and the Court therefore held that even though they had been taken under a warrant, they were inadmissible at the trial as **not even a warrant, though otherwise proper and**

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[6] *Hayden* at 319 (Douglas, J., dissenting).

> **regular, could be used 'for the purpose of making search to secure evidence'** of a crime. [*Hayden* at 319 (Douglas, J., dissenting) (emphasis added).]

E. The Property Principle Abandoned.

Forty-six years after *Gouled*, however, this Court abandoned this well-established Fourth Amendment jurisprudence based upon "property rights" in favor of one rooted in an emerging right of "privacy." *See Hayden* at 301-304. Claiming dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts," Justice Brennan — writing for a bare majority of five justices — jettisoned the time-honored rule that a search for "mere evidence" was *per se* "unreasonable." *Id.* at 295-304. Justice Brennan claimed that the distinction between (i) "mere evidence" and (ii) "instrumentalities [of crime], fruits [of crime], or contraband" was "**based on premises no longer accepted** as rules governing the application of the Fourth Amendment." *Id.* at 300-01 (emphasis added). Discarding the notion that the Fourth Amendment requires the government to demonstrate that it has a "superior property interest" in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth Amendment from "irrational," "discredited," and "confus[ing]" decisions of the past, and thereby would provide a more meaningful protection of "the principal object of the Fourth Amendment [—] the protection of privacy rather than property...." *Id.* at 302-04, 306, 309.

Concurring in the result, but not in the reasoning, Justice Fortas (joined by Chief Justice Warren) stated that he "cannot join in the majority's broad — and ... totally unnecessary — repudiation of the so-called 'mere evidence' rule." *Id.* at 310 (Fortas, J., concurring). Resting his concurrence on the time-honored "'hot pursuit' exception to the search-warrant requirement,"[7] Justice Fortas sought to avoid the creation of what he called "an **enormous and dangerous hole** in the Fourth Amendment"[8]:

> [O]pposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "**writs of assistance**," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. I fear that in **gratuitously striking down the "mere evidence" rule**, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court today **needlessly destroys, root and branch, a basic part of liberty's heritage**. [*Id.* at 312 (Fortas, J., concurring) (emphasis added).]

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[7] *Id.* at 312 (Fortas, J., concurring).

[8] *Id.* (Fortas, J., concurring) (emphasis added).

Indeed, in explaining the property principle protected by the Fourth Amendment, the *Boyd* Court warned that, although the evidence seized in that case complied with the warrant requirement:

> **[I]llegitimate and unconstitutional practices** get their first footing ... by **silent approaches and slight deviations** from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right.... It is the **duty of courts to be watchful** for the constitutional rights of the citizen, and **against any stealthy encroachments** thereon. Their motto should be **obsta principiis**. [*Boyd* at 635 (emphasis added).]

Ignoring this Court's admonition, Justice Brennan frankly admitted that, by erasing the property protection from the Fourth Amendment, his newly minted privacy-based *Hayden* rule "**does enlarge the area of permissible searches**." *Hayden* at 309 (emphasis added). Justice Brennan apparently assumed that the newly permitted intrusions for "mere evidence" would be checked by the warrant, probable cause, and magistrate requirements of the Amendment's second phrase. *See id.* However, as the intervening history and the instant case dramatically illustrate, Justice Brennan's Fourth Amendment

revolution has also undermined those requirements of the Fourth Amendment as well.

F. The Property Law Baseline Reestablished.

On January 23, 2012, this Court stepped in, in *United States v. Jones*, restoring Fourth Amendment protection of the people's property rights in their houses, persons, papers, and effects. Acknowledging that its "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century," this Court declined to even consider the government's contention that no Fourth Amendment search had occurred in the planting of a GPS device on Jones' automobile underbody, because Jones had no reasonable expectation of privacy. *See Jones* at 404-05. Thus, this Court ruled that a Fourth Amendment-based property claim cannot be diminished by any government counterclaim based on privacy, the property right fixing the "baseline" by which the search or seizure is to be measured, and below which the government cannot go. *See Florida v. Jardines*, 569 U.S. 1, 5-6 (2013).

The court of appeals below explained, "we evaluate the totality of the circumstances to determine whether such suspicion was reasonable.... Circumstances considered include 'the time of day, the location of the scene, the lighting at the scene, the number of officers, and the nature of the alleged crime.'" *Cooper* at *3 (citations omitted). It concluded, "the court did not err when it found that [Officer] Ramirez had reasonable suspicion that Cooper was armed and dangerous, and

thus, properly stopped and frisked him to search for weapons" under *Terry*. *Id.* *6-7. In short, the encounter presented for resolution is a classic stop-and-frisk case, in which the search and seizure "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry* at 20.

Yet, the text and history of the term "unreasonable," as employed in the Fourth Amendment, does not sanction searches and seizures under general proscriptive terms subject to a tort-like standard of care on investigative police work, but rather requires a standard of "reason," imposing upon the government certain fixed rules of the common law of property governing the people's inalienable rights to their "persons, houses, papers, and effects." *See Carpenter* at 357 (Thomas, J., dissenting). In short, frisking of Americans after stops, no matter how "reasonable" they may seem to modern judges, has no place in the pantheon of fixed common law limits protecting the people's property.

When the Solicitor General was required to file a brief in opposition to the petition for certiorari in *Johnson v. United States*, U.S. Supreme Court, No. 18-9399 (Sept. 4, 2019), he argued:

> First, *Terry* is consistent with the text and original meaning of the Fourth Amendment. *See, e.g.,* Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 St. John's L. Rev. 1097 (1998). [Opposition at 11-12.]

However, even a brief scan of the law review article relied upon reveals that "consistent with the text" is a misleading oversimplification of the article. And, it also misses the many idiosyncratic views about the Fourth Amendment contained in that article, such as that "it is the overbroad warrant, not the warrantless search, that is ipso facto unreasonable. Terry and Fourth Amendment First Principles at 1109. Additionally, "probable cause" is not a requirement for "searches and seizures, but only a requirement for warrants." *Id.* at 1115-16.

II. THE *TERRY* COURT'S ASSUMPTION THAT PERSONS CARRYING FIREARMS ARE INHERENTLY DANGEROUS IS FALSE AND OUT OF DATE.

When *Terry* was decided, the Second Amendment was generally thought to protect only the right of state governments to assemble militias. Since *Heller* in 2008, it has been clear that the Second Amendment protects an individual right. This case is a ready vehicle to reexamine the assumption that an armed citizen is a dangerous citizen. When *Terry* was decided in 1968, it was rare for Americans to be engaged in the concealed carry of firearms. A person who was carrying a firearm on his person was thought to pose a danger to the police, as few had permits to carry firearms. Today, **21.8 million Americans have permits to carry, and more live in states that do not require permits**. Consider the following highlights contained in a 2023 study:

- Last year, the number of permit holders dropped for the first time since we started collecting this data in 2011, decreasing 0.5% from 2022 record high to 21.8 million. The main reason for the drop is that the number of permits declines gradually in the Constitutional Carry states even though it is clear that more people are legally carrying.
- **8.4% of American adults have permits.** Outside of the restrictive states of California and New York, about 10.1% of adults have a permit.
- In seventeen states, more than 10% of adults have permits. Kentucky and Virginia have fallen slightly below 10% this year. Kentucky's fell after passing a Constitutional Carry law in 2019, meaning that people no longer need a permit to carry. The concealed carry rates for Michigan and Oregon have risen to above 10% in 2023.
- **Alabama has the highest concealed carry rate — 27.8%. Indiana is second with 23.0%, and Colorado is third with 16.5%.**
- Six states now have over 1 million permit holders: Alabama, Florida, Georgia, Indiana, Pennsylvania, and Texas. Florida is the top states with 2.56 million permits.
- **Twenty-seven states have adopted Constitutional Carry for their entire state**, meaning that a permit is no longer required. Because of these Constitutional Carry states, the concealed carry permits number does not paint a full picture of how many people are legally carrying across the

nation. Many residents still choose to obtain permits so that they can carry in other states that have reciprocity agreements, but while permits are increasing in the non-Constitutional Carry states (317,185), permits fell even more in the Constitutional Carry ones even though more people are clearly carrying in those states (485,013).

- A survey we conducted with McLaughlin and Associates found that **15.6% of general election voters carry concealed handguns**. [John R. Lott, Concealed Carry Permit Holders Across the United States: 2023 (Crime Prevention Research Center: Nov. 29, 2023) (emphasis added).]

No longer can police conclude when stopping an American that those who are armed are a threat of any type.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted to reconsider this Court's deeply flawed decision in *Terry v. Ohio* for being in stark violation of the Fourth Amendment's requirement for probable cause for a search, as well as the property principles undergirding the text and history of the Fourth Amendment (as recognized in *United States v. Jones*), and in light of the individual right to keep and bear arms under the Second Amendment (as recognized in *District of Columbia v. Heller*).

Respectfully submitted,

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