No. 24-5381

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IN THE SUPREME COURT OF THE UNITED STATES

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NATHAN COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the holding of Terry v. Ohio, 392 U.S. 1 (1968), that the frisk of a suspect is consistent with the Fourth Amendment when an officer "has reason to believe that he is dealing with an armed and dangerous individual," id. at 27, should be overruled.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is available at 2024 WL 1765707.

## JURISDICTION

The judgment of the court of appeals was entered on April 24, 2024. On July 8, 2024, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 22, 2024, and the petition was filed on August 21, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 8a. He was sentenced to 51 months of imprisonment, to be followed by three years of supervised release. Id. at 9a-10a. The court of appeals affirmed. Id. at 1a-7a.

1. On a night in January 2022, the manager of a restaurant where petitioner worked called 911 to report that petitioner had threatened her and that she thought he had a gun. Pet. App. 4a-5a. Law-enforcement officers arrived at the restaurant, which was located in a high-crime area, and spoke to the manager outside. Id. at 5a-6a. In that interview, which was recorded by an officer's body camera, the manager stated that petitioner had been cursing, behaving aggressively, and "slinging a metal poker around." Id. at 5a. The manager also said that she believed petitioner carried a gun in a bookbag and that he had grabbed the bookbag during their dispute. Ibid. The officers went inside the restaurant, detained petitioner, and patted him down, finding a loaded Glock handgun in his waistband. C.A. App. 86-87.

2. A federal grand jury in the Southern District of Florida indicted petitioner on one count of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1). C.A. App. 11. Petitioner moved to suppress the

firearm, arguing that both the detention and the frisk were unreasonable under Terry v. Ohio, 392 U.S. 1 (1968), because the officers purportedly lacked reasonable suspicion that petitioner was involved in criminal activity or that he was armed and dangerous. C.A. App. 16-19. Petitioner also argued that, notwithstanding this Court's decision in Terry, conducting a frisk based only on reasonable suspicion violated the Fourth Amendment. Id. at 19-20.

The district court denied the motion to suppress. C.A. App. 120-122. After a stipulated bench trial, the court found petitioner guilty on the possession charge. Id. at 152. It sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Pet. App. 9a-10a.

3. The court of appeals affirmed. Pet. App. 1a-7a. Like the district court, the court of appeals found that the officers had reasonable suspicion, based on the manager's 911 call and her statements to the officers upon their arrival at the scene, that petitioner had engaged in or was about to engage in criminal activity and that he was armed and dangerous. Id. at 5a-7a. The court also rejected petitioner's argument "that Terry frisks are unconstitutional." Id. at 7a n.2.

ARGUMENT

Petitioner asks (Pet. 7-37) this Court to overrule Terry v. Ohio, 392 U.S. 1 (1968), or at least the portion of that decision that permits a law-enforcement officer to frisk a suspect if the

officer "has reason to believe that he is dealing with an armed and dangerous individual," id. at 27; see id. at 30-31. The Court should reject his request to overturn Terry. Petitioner fails to demonstrate that Terry is inconsistent with the original meaning of the Fourth Amendment. Moreover, principles of stare decisis weigh heavily against overturning Terry's longstanding rule. And this appeal in the suppression context is a poor vehicle for any reconsideration of Terry, because the exclusionary rule that petitioner seeks to enforce is itself not required by the Fourth Amendment's original meaning.

1. In Terry, this Court explained that, once an officer lawfully stops a person, the officer may, for "the protection of the police officer and others nearby," frisk the suspect for "weapons," so long as the officer "has reason to believe that he is dealing with an armed and dangerous individual." 392 U.S. at 27, 29. "The purpose of this limited search" is "to allow the officer to pursue his investigation without fear of violence." Adams v. Williams, 407 U.S. 143, 146 (1972). As a result, the frisk must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." Terry, 392 U.S. at 29.

Petitioner identifies no authority indicating that frisks of the sort that may be conducted under Terry were prohibited when the Fourth Amendment was drafted. The absence of such authority

may reflect a "paucity of framing-era concern about warrantless searches and seizures outside the home." Lawrence Rosenthal, Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio, 43 Tex. Tech L. Rev. 299, 337 n.250 (2010). Indeed, while Justice Scalia questioned the methodology of Terry, he "c[ould not] say that [Terry's] result was wrong." Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring).

Justice Scalia further recognized that "technological changes" such as the proliferation of "concealed weapons capable of harming the interrogator quickly and from beyond arm's reach" might make Terry frisks "'reasonable' under the [Fourth Amendment's] original standard." Minnesota v. Dickerson, 508 U.S. at 382 (Scalia, J., concurring). And such frisks are indeed reasonable within the meaning of the Fourth Amendment, which prohibits only "unreasonable searches and seizures," U.S. Const. Amend. IV; see Riley v. California, 573 U.S. 373, 381 (2014) ("As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is "reasonableness."'" (citation omitted); Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 St. John's L. Rev. 1097, 1108-1110 (1998) (explaining that a "freestanding reasonableness" standard is consistent with original meaning).

Terry's consistency with the Fourth Amendment does not depend on whether frisks outside the context of a full arrest were common in 1791. Founding-era arrests were not performed by professional police forces tasked with ferreting out crime, but instead by

private citizens serving as constables or night watchmen, whose limited peacekeeping duties never "developed into the job of investigative 'policing' with which modern law enforcement agencies are charged." Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 831 (1994); see id. at 830-837; Rosenthal, 43 Tex. Tech L. Rev. at 344-345. There were consequently fewer officer-citizen encounters that could lead to the kind of risks associated with modern-day investigative stops. See, e.g., Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (per curiam) (recognizing "the inordinate risk confronting an officer as he approaches a person seated in an automobile"); Rosenthal, 43 Tex. Tech L. Rev. at 345.

Moreover, firearms in the founding era "were more cumbersome to use, less reliable, and harder to conceal." Megan Walsh & Saul Cornell, Age Restrictions and the Right to Keep and Bear Arms, 1791-1868, 108 Minn. L. Rev. 3049, 3089 (2024); see Randolph Roth, Why Guns Are and Are Not the Problem, reprinted in Jennifer Tucker et al. eds., A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment 116-117, 121-123 (2019). As a result, founding-era constables did not face the same dangers from concealed weapons that confront today's officers.

Given the realities of modern policing and firearm technology, it would, as Terry observed, "be clearly unreasonable to deny the officer the power to take necessary measures to

determine whether [a detained] person is in fact carrying a weapon and to neutralize the threat of physical harm." 392 U.S. at 24 (emphasis added).

2. Even if the Court would not "agree with" the reasoning or result of Terry today, "principles of stare decisis weigh heavily against overruling it now." Dickerson v. United States, 530 U.S. 428, 443 (2000). Although "stare decisis is not an inexorable command, * * * even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." Ibid. (citations and internal quotation marks omitted). If "mere demonstration that [an] opinion was wrong" were sufficient justification for overruling it, the doctrine of stare decisis "would be no doctrine at all." Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

No "special justification" warrants overruling Terry's holding that an officer may frisk a suspect when the officer has reason to believe that the suspect is armed and dangerous. Terry has been on the books for over 50 years, and this Court has accordingly treated the decision as "settled" law for decades. Minnesota v. Dickerson, 508 U.S. at 373; see Arizona v. Johnson, 555 U.S. 323, 330 (2009) (describing Terry as a "leading decision"). Its frisk holding recognizes safety concerns that continue to have great force today. See Terry, 392 U.S. at 30.

And the Court has since emphasized that the interest in officer safety "is both legitimate and weighty" in the context of a Terry stop. Mimms, 434 U.S. at 110.

Moreover, far from being "unworkable," Pet. 29-30, Terry's authorization of a "limited search" for weapons, Adams, 407 U.S. at 146, strikes a careful balance between personal privacy and officer safety, and courts have faithfully applied its standard in thousands of cases. To the extent that application of the standard depends on the particular facts and circumstances of a specific case, that is equally true of the probable cause standard that petitioner prefers. See Ornelas v. United States, 517 U.S. 690, 696 (1996).

Petitioner contends (Pet. 18-22, 27-29) that the Court should abandon Terry's frisk holding because stops and frisks disproportionately target racial minorities. But the Court in Terry specifically addressed concerns about "harassment" of "minority groups," explaining that "courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." 392 U.S. at 14-15. Petitioner also fails to show how the resolution of the question presented, which is limited to Terry frisks and would not extend to Terry stops, would have any material impact on any racial disparities in policing.

Petitioner's suggestion (Pet. 3) that stare decisis lacks any force in this context is unsound. He relies on this Court's remark in Arizona v. Gant, 556 U.S. 332 (2009), that the Court has "never relied on stare decisis to justify the continuance of an unconstitutional police practice." Id. at 348; see Pet. 3, 33-34. But the Gant Court simply declined to adopt a "broad reading" of an earlier Fourth Amendment decision when "[t]he safety and evidentiary interests that supported" the earlier holding "[were] not present." 556 U.S. at 348-349. Gant did not hold that every Fourth Amendment decision -- particularly one as well-embedded as Terry -- should repeatedly be up for reexamination. And petitioner fails to provide a compelling basis to revisit, let alone overrule, Terry under the ordinary criteria for overturning longstanding precedent. See Janus v. American Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 917 (2018).

3. At all events, this appeal from the denial of a motion to suppress would be a poor vehicle for reviewing the question presented. If a rigid adherence to the original meaning of the Fourth Amendment were required here, petitioner's motion to suppress the firearm and ammunition would fail even if he were correct about Terry, because the Fourth Amendment did not originally require the exclusion of unlawfully seized evidence from a later criminal trial. See Collins v. Virginia, 584 U.S. 586, 602-604 (2018) (Thomas, J., concurring). The Court should reject petitioner's invitation to "engage in" a form of "halfway

originalism," Janus, 585 U.S. at 903, by overruling Terry's constitutional holding while nevertheless enforcing the exclusionary rule.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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