No. 16-___

IN THE

Supreme Court of the United States

SHAQUILLE M. ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Terry v. Ohio*, 392 U.S. 1 (1968), officers who lack probable cause or a warrant may search a person they have lawfully stopped only if they have specific and articulable reason to believe that person is "armed and presently dangerous." *Id.* at 30. This case presents the following question:

In a state that permits residents legally to carry firearms while in public, whether, or under what circumstances, an officer's belief that a person is armed allows the officer to infer for purposes of a *Terry* search that the person is "presently dangerous."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shaquille M. Robinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit sitting en banc (Pet. App. 1a) is reported at 846 F.3d 694 (4th Cir. 2017). The panel opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 49a) is reported at 814 F. 3d 201 (4th Cir. 2016). The opinion of the District Court (Pet. App. 89a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 23, 2017. Pet. App. 1a. On April 18, 2017, the Chief Justice extended the time to file this petition for a writ of certiorari to and including June 22, 2017. *See* No. 16A969. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

The Fourth Amendment protects "the right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court established a narrow exception to the general Fourth Amendment prohibition on conducting a search without either a warrant or probable cause. *Terry* allows officers to stop an individual without probable cause when they have reasonable suspicion that the individual has committed or is about to commit a crime. *Id.* at 22-23. As is relevant here, *Terry* also permits officers, after a lawful stop, to conduct a limited search when officers have a "specific and articulable" reason to believe that the person they have stopped is "armed and presently dangerous to the officer or to others." *Id.* at 21, 30.

In this case, the Fourth Circuit held that the test for conducting a search in conjunction with a lawful *Terry* stop requires only that the officer "reasonably suspect that the person is armed." Pet. App. 13a. This holding deepens a split among federal and state courts over whether, in states that allow residents to carry firearms, officers may conduct a *Terry* search of anyone they believe to be armed, without a particularized basis for believing the person poses a present danger to the officers' safety.

A. Factual background

Ranson, West Virginia, is a small town of approximately 4500 people. On an afternoon in March 2014, the Ranson Police Department received an anonymous telephone call. The caller stated that he had seen "a black male" with a firearm in the parking

lot of one of the town's two 7-Eleven stores. Pet. App. 4a. The caller reported that the man was a passenger in a car being driven by a white woman that had just left the parking lot. *Id.*

The information provided by the caller "was, in fact, not reporting a crime or any criminal activity," Pet. App. 128a, because it was legal in West Virginia to openly carry a firearm without a license and to carry a concealed firearm with a license, which was issued to any applicant who met certain statutory criteria. W. Va. Code § 61-7-4 (2014) (amended 2016); W. Va. Const. art. III, § 22. (Since 2016, West Virginia has allowed concealed carry without a license for people age twenty-one or older. W. Va. Code § 61-7-7(c)).

Nevertheless, Ranson Police Officer Kendall Hudson was dispatched in a patrol vehicle, and within a few minutes spotted a car that matched the tipster's description. Pet. App. 5a. Hudson noticed that the driver was not wearing a seatbelt and decided to use that as a basis to stop the car. *Id.* 101a. When he turned on his patrol lights, the car immediately pulled over. C.A. App. 75. Holding his service revolver at his side, Hudson approached the driver's side of the car and asked the driver for her license, registration, and insurance information. *Id.* 66.

While Hudson was still engaged with the driver, Ranson Police Captain Robbie Roberts arrived at the scene, opened the passenger-side car door, and asked petitioner to step out. As petitioner stepped out of the vehicle—Hudson testified that petitioner was cooperative throughout the encounter, Pet. App. 121a—Roberts asked whether petitioner was carrying a weapon. C.A. App. 88. Without waiting for an answer, Roberts "just started" to search petitioner,

finding a gun "protruding" from petitioner's pants pocket. *Id.* 90. Hudson promptly handcuffed petitioner and seated him on the sidewalk. *Id.* 90-91. "Following the frisk and after [petitioner] was handcuffed, Captain Roberts recognized [him] as Mr. Robinson and connected him to being a convicted felon." Pet. App. 103a. Petitioner was then formally arrested. *Id.* 6a. Officer Hudson ultimately released the driver without a citation, warning her "[j]ust make sure you wear your seat belt" in the future. C.A. App. 70.

B. Procedural history

1. The United States indicted petitioner for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet. App. 6a.

Petitioner moved to suppress the firearm found during the search. He argued that the search violated the Fourth Amendment because the officer lacked an articulable basis to believe that petitioner was dangerous.

The magistrate judge who conducted the suppression hearing recommended granting petitioner's motion. Pet. App. 131a. He found that the initial traffic stop was valid because "Officer Hudson had probable cause to believe a seat belt violation occurred." *Id.* 107a.[1] Nonetheless, the *Terry* search

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[1] *See* W. Va. Code § 17C-15-49(a) ("A person may not operate a passenger vehicle on a public street or highway of this state unless the person . . . and any person in the front seat of the passenger vehicle is restrained by a safety belt meeting applicable federal motor vehicle safety standards."). The law provides that "[a]ny person who violates the provisions of this section shall be fined $25. No court costs or other fees may be assessed for a violation of this section." *Id.* § 17C-15-49(c).

was unreasonable. The anonymous tip that petitioner had put a gun in his pocket was "insufficient to support reasonable suspicion of criminal activity," *id.* 126a, because under West Virginia law, "residents may conceal a loaded firearm with the issuance of a license," *id.* 127a. The tip "provided no information indicating that the person observed in the parking lot was engaging in an illegal activity, making threats, brandishing the weapon or conducting himself in any manner that others would perceive as dangerous." *Id.* 128a. Furthermore, "the officers testified to no objective and particularized facts demonstrating that [petitioner] was dangerous at the time of the traffic stop." *Id.* The magistrate judge rejected the Government's argument that a "weird look" petitioner had given Roberts in response to his question whether petitioner was armed could "transform his silence into dangerousness." *Id.* 129a. Nor could the fact that the stop occurred in a high-crime neighborhood "justify the officer's suspicion that [petitioner] was dangerous." *Id.* 130a.[2]

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[2] The Government claimed in its pre-hearing brief that the officers were entitled to search petitioner because the stop took place in a "high crime area" and not "a nice neighborhood." C.A. App. 100-01. The government witnesses evinced some confusion on this point: After initially suggesting that the 7-Eleven where the anonymous caller claimed to have seen petitioner was a "particular" high crime area within Ranson, one officer testified that "all" of Jefferson County was considered "a high crime area." *Id.* 38.

This contention, unsupported with "any statistics, reports, [or] crime data," C.A. App. 40a, is inaccurate. Jefferson County is one of the safest counties in West Virginia. *See* Dan Keating & Denise Liu, *Here's What Crime Rates by County Actually Look*

Although it accepted the magistrate judge's statement of the facts, the district court rejected the magistrate's recommendation, and it denied the motion to suppress. Pet. App. 98a. The court did not directly address the question whether the police had reasonable suspicion that petitioner was engaged in criminal activity; instead, it focused its discussion on whether the tip that petitioner was carrying a gun was reliable. *See id.* 93a-96a. The court pointed to "[t]he fact that the officers found and stopped the vehicle in the same high-crime area as the 7-Eleven" and that petitioner did not immediately answer Captain Roberts' question whether he was armed. *Id.* 96a. These circumstances provided a basis "to believe that the officer's safety or that of others was in danger" regardless of the "possibility" that petitioner "could have lawfully possessed the firearm." *Id.*

Petitioner entered a conditional guilty plea, reserving his right to appeal denial of the motion to suppress. Pet. App. 7a. He was sentenced to thirty-seven months in prison and three years of supervised release.

2. A panel of the Fourth Circuit reversed. The majority held that "in states like West Virginia, which broadly allow public possession of firearms, reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the

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Like, Wash. Post (Nov. 16, 2016), https://tinyurl.com/ybcbhbbm (using crime data from 2014). And the crime rate in Ranson itself is "55.36% lower than the national average." *See* City of Ranson, West Virginia, Fiscal Year 2016-17 Budget at 31, http://www.cityofransonwv.net/Archive/ViewFile/Item/100 (last visited June 19, 2017).

person is dangerous for *Terry* purposes." Pet. App. 61a. Given "that the only 'crime' of which the police reasonably suspected Robinson was a seatbelt violation," *id.* 66a n.5, there was no basis for inferring danger to the police from the report that he had a gun. Nor could the totality of the circumstances, including the look petitioner gave Captain Roberts and petitioner's presence in a high-crime area, justify the search. *Id.* 66a.

Judge Niemeyer dissented, arguing that "the danger posed by an individual's possession of a firearm" categorically authorizes police to search that person. Pet. App. 72a.

3. The Fourth Circuit granted the Government's petition for rehearing en banc, and a sharply divided court affirmed the district court.

Judge Niemeyer's opinion for the en banc majority announced a rule of per se Fourth Amendment reasonableness: Whenever an "officer reasonably suspects that the person he has stopped is armed, the officer is 'warranted in the belief that his safety . . . [is] in danger,' thus justifying a *Terry* [search]." Pet. App. 11a (quoting *Terry*, 392 U.S. at 27) (alterations in original). In support of that rule, the majority seized on language from *Terry* and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), where this Court had described the individuals being searched as "armed *and thus*" dangerous. Pet. App. 13a (emphasis added by the Fourth Circuit) (quoting the same phrase from both *Terry*, 392 U.S. at 28, and *Mimms*, 434 U.S. at 112). According to the en banc majority, "[t]he use of 'and thus' recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed." Pet. App. 13a. In light of that conclusion,

"[t]he presumptive lawfulness of an individual's gun possession in a particular State does next to nothing" to limit an officer's authority to search. *Id.* 14a.

Finally, although it was "not necessary to the conclusion in this case," Pet. App. 16a, the en banc majority thought that petitioner's demeanor—namely, that he had given Captain Roberts a "weird," or "'oh, crap'" look, *id.* 6a, 16a—and prior presence in a parking lot known for drug activity reinforced the reasonable suspicion, "created simply" by the belief that petitioner was armed, *id.* 13a, that petitioner was also dangerous.

Judge Wynn concurred in the judgment. He "disagree[d] with the majority opinion's contention that 'armed and dangerous' is a unitary concept," Pet. App. 19a, pointing out that many items individuals regularly have with them, ranging from forks to wine bottles, can be used as weapons, *id.* 20a (citing cases that so held). The *Terry* exception would swallow up the rule if police could search all individuals believed to be carrying these items without particularized reason to believe the individuals were dangerous. Accordingly, Judge Wynn proposed instead that officers have categorical authority to search without other factors showing a suspect's dangerousness "*only* when law enforcement officers reasonably suspect that a detainee has a *firearm* or other inherently dangerous weapon." *Id.* 22a (emphasis in original).

In a dissenting opinion written by Judge Harris, four judges rejected the majority's "bright-line rule." Pet. App. 28a. Judge Harris reiterated that in states like West Virginia where public possession of firearms is presumptively legal, there is no reason for assuming that a person carrying a gun during a stop "is anything

but a law-abiding citizen who poses no threat to the authorities." *Id.* By automatically equating "armed" with "dangerous," she explained, the majority's rule would subject lawfully armed citizens to an array of "special burdens." *Id.* 37a. Citizens whom police believe carry a firearm could be subjected to searches any time they are lawfully stopped, no matter how minor the infraction. *Id.* 37a.

The dissent saw nothing in "the rest of the circumstances surrounding this otherwise unremarkable traffic stop"—namely, the neighborhood where it occurred or petitioner's demeanor—that could "add appreciably to the reasonable suspicion calculus" regarding whether petitioner was dangerous to the officers. Pet. App. 48a. Thus, the dissenters would have suppressed the gun found during the search.

The dissent also warned that the majority's categorical rule regarding *Terry* searches "gives rise to 'the potential for intentional or unintentional discrimination based on neighborhood, class, race, or ethnicity.'" Pet. App. 38a (quoting *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment)). By leaving to "unbridled police discretion the decision as to *which* legally armed citizens will be targeted" for searches, *id.* 29a (emphasis in original), the majority's rule implicated "concerns about the abuse of police discretion that are fundamental to the Fourth Amendment." *Id.* 38a. Like Judge Wynn, *see id.* 25a, the dissenters recognized that the majority's categorical rule might result in "the price for exercising the right to bear arms [being] the forfeiture of certain Fourth Amendment protections." *Id.* 29a.

But they took the position that "unless and until the Supreme Court takes us there," they could not endorse that rule. *Id.*

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's en banc decision illustrates fault lines that have played out in decisions across the country. Federal courts of appeals and state courts of last resort are divided over whether, or under what circumstances, officers in states that allow people to carry guns in public are permitted to conduct a *Terry* search whenever they have reason to believe the person they have stopped is armed.

The answer to this question affects millions of Americans. Governments also need to know what the Fourth Amendment requires in order to implement their policy objectives regarding the carrying of firearms.

Furthermore, the Fourth Circuit's decision is wrong. In deciding that officers can search any individual they believe to be carrying a firearm, the Fourth Circuit misread this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny. Those decisions require police to have "specific and articulable" facts suggesting an individual's dangerousness before they can inflict an "invasion of [his] personal security." *Id.* at 21, 23. In the growing number of jurisdictions like West Virginia that freely permit the carrying of firearms, an individual's possession of a gun is not itself a sufficient basis for concluding he is dangerous. Furthermore, the few additional facts to which the Fourth Circuit pointed after announcing its categorical rule cannot justify the search in this case.

I. Federal and state courts are sharply divided over the question presented.

1. Four courts—including the Fourth Circuit here—have concluded that a reasonable belief that a weapon is present is enough by itself to make a person "presently dangerous" and thus subject to search under *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

The Ninth Circuit has held that "an officer's reasonable suspicion" that an individual possesses a gun "is all that is required for a protective search under *Terry*." *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007), *cert. denied*, 552 U.S. 1313 (2008). Like the en banc court here, the Ninth Circuit posited that officers may search "regardless of whether carrying a concealed weapon violates any applicable state law." *Id.*

The Tenth Circuit has similarly held that an officer's knowledge that an individual is carrying a handgun is "enough to justify" a search, without regard whether state law permits concealed carry. *United States v. Rodriguez,* 739 F.3d 481, 491 (10th Cir. 2013).

Finally, the Supreme Court of Illinois has held that an officer's "reasonable suspicion that a gun [is] present" justifies a *Terry* search because any individual with a gun is "potentially dangerous." *People v. Colyar*, 996 N.E.2d 575, 587 (Ill. 2013); the danger is the same regardless of whether possession of the weapon is legal, *id.*[3]

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[3] The Eleventh Circuit has adopted a similar position. In Florida, it is unclear whether carrying a concealed weapon can

2. Two federal courts of appeals and three state supreme courts have reached the contrary conclusion. These courts have rejected the proposition that an officer's belief that an individual is armed categorically justifies a *Terry* search in jurisdictions that allow people to carry guns in public.

In *Northrup v. City of Toledo Police Department*, 785 F.3d 1128 (6th Cir. 2015), Judge Sutton's opinion for the court explained that in a state that permits public carrying of firearms, a person's being armed does not make that person "armed *and dangerous*." *Id.* at 1132 (emphasis supplied by the Sixth Circuit) (quoting *Sibron v. New York*, 392 U.S. 40, 64 (1968)). In such a jurisdiction, a police officer who encounters an individual must "ascertain[]" some particularized "evidence of criminality or dangerousness" before he may "disarm a law-abiding citizen." *Northrup*, 785 F.3d at 1133.

Similarly, the Seventh Circuit has concluded that the *Terry* exception to the probable-cause requirement allows searches only if officers "have an articulable suspicion that the person is *both* armed *and* a danger

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justify a *Terry* stop and search, given Florida's law permitting concealed weapons if the carrier has a permit. *Compare State v. Burgos*, 994 So.2d 1212, 1213-14 (Fla. Dist. Ct. App. 2008) (finding that police nonetheless have reasonable suspicion of criminal activity based on the presence of a weapon alone), *with Regalado v. State,* 25 So.3d 600, 601 (Fla. Dist. Ct. App. 2009) (finding that merely knowing an individual has a gun provides no basis for a stop or search). In light of this uncertainty, the Eleventh Circuit has held that a reliable tip that an individual is carrying a gun is enough to permit "a *Terry* stop and search." *United States v. Montague*, 437 F. App'x 833, 835-36 (11th Cir. 2011), *cert. denied*, 565 U.S. 1272 (2012).

to the safety of officers or others." *United States v. Leo*, 792 F.3d 742, 748 (7th Cir. 2015) (emphasis added). The court explained that given "the right to carry a gun in public," courts must resist the suggestion that the possible presence of a weapon inevitably poses a threat justifying a search. *Id.* at 752; *see also United States v. Williams*, 731 F.3d 678, 686–87 (7th Cir. 2013) (holding that an officer's decision to conduct a *Terry* search was not justified by a 911 call reporting weapons in a high-crime area and an individual's avoidance of eye contact with the police).

The highest courts of Arizona, Idaho, and New Mexico agree. In *State v. Serna*, 331 P.3d 405 (Ariz. 2014), the Arizona Supreme Court declared that in a state that "freely permits citizens to carry weapons," "the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous," *id.* at 410. A contrary rule, the court warned, "would potentially subject countless law-abiding persons to patdowns solely for exercising their right to carry a firearm." *Id.*

Similarly, in *State v. Bishop*, 203 P.3d 1203 (Idaho 2009), the Idaho Supreme Court held that, given Idaho's law authorizing people to carry concealed firearms, "weapon possession, in and of itself, does not necessarily mean that a person poses a risk of danger" sufficient to justify a search. *Id.* at 1218; *see also id.* at 1219 n.13. And given the prevalence of legal firearms among the state's population, "[i]f an officer's bare assertion that a suspect 'could possibly' be carrying a weapon was enough to establish that a person posed a risk of danger, officers could frisk any person with whom they come into contact"—a patently unconstitutional result. *Id.*; *see also State v. Henage*,

152 P.3d 16, 22 (Idaho 2007) ("A person can be armed without posing a risk of danger.")

Finally, the New Mexico Supreme Court has held that "[t]o justify a frisk for weapons, an officer must have a sufficient degree of articulable suspicion that the person being frisked is both armed *and* presently dangerous. Any indication in previous cases that an officer need only suspect that a party is either armed *or* dangerous is expressly disavowed." *State v. Vandenberg*, 81 P.3d 19, 25 (N.M. 2003) (emphases in original).

3. The conflict among the lower courts is particularly striking because federal and state courts reviewing searches in the same jurisdiction disagree on whether evidence is admissible. Consider an individual subjected to a search in Arizona or Idaho based solely on an officer's belief that the individual is armed. If the search turns up evidence, the individual's motion to suppress the evidence will succeed if he is prosecuted in state court. *See Serna*, *supra* (Arizona); *Bishop*, *supra* (Idaho). But the same evidence will be admissible if local police turn the case over to the federal government to prosecute. *See Orman*, *supra* (Ninth Circuit). Indeed, the Arizona Supreme Court expressly declared its "disagree[ment] with the Ninth Circuit's determination that mere knowledge or suspicion that a person is carrying a firearm satisfies the second prong of *Terry*." *Serna*, 331 P.3d at 410. The same conflict exists in the Tenth Circuit with respect to cases from New Mexico. *Compare Vandenberg*, *supra* (forbidding such searches), *with Rodriguez*, *supra* (permitting them). Conversely, in Illinois, the state courts will admit evidence that the Seventh Circuit would suppress.

Compare Colyar, *supra*, *with Leo*, *supra*. The conflict thus incentivizes the sort of prosecutorial forum shopping that this Court long ago condemned. *Cf. Elkins v. United States*, 364 U.S. 206, 221-22 (1960).

II. The question presented is important.

1. According to the National Rifle Association's Institute for Legislative Action, twelve states currently allow individuals to carry concealed firearms for lawful purposes without a permit. NRA-ILA, *Gun Right to Carry Laws*, https://www.nraila.org/gun-laws (last visited June 16, 2017). Twenty-nine additional states allow residents to carry concealed firearms in public with permits that the government must issue as a matter of right whenever specified prerequisites are met. *Id.*; *see also* Br. of Amici Curiae Western States Sheriffs' Association *et al.* in Support of Petitioners at 8-9, *Peruta v. California*, No. 16-894 (U.S. Feb. 16, 2017) (collecting state laws).

As of 2015, almost 13 million Americans had permits to carry concealed handguns. Christopher Ingraham, *After San Bernardino, Everyone Wants To Be a 'Good Guy With a Gun'*, Wash. Post (Dec. 10, 2015), http://tinyurl.com/l6n9d8f. That number has been rising rapidly—almost tripling from 4.6 million in 2007. *Id.* (And of course the total number of persons who legally can carry firearms in public is much higher considering the number of states that require no permit in the first place.)

Depending on whether carrying a firearm is, by itself, sufficient to justify a *Terry* search, each of those individuals may be opening himself or herself up to a physical search by the police any time he or she engages in any of the myriad aspects of daily life that,

because they may support a police officer's belief that an individual has violated some ordinance or another, justify a police stop.

As this Court has recognized, searches of a person's body can be "humiliating." *Terry v. Ohio*, 392 U.S. 1, 25 (1968). The millions of Americans who have the right under state law to carry a concealed weapon need to know whether exercising that right means they risk having officers "feel with sensitive fingers every portion of [their] bod[ies]" including their "arms and armpits, waistline and back, [and] the groin," *id.* at 17 n.13 (internal quotation marks omitted), the next time a car in which they are a passenger is pulled over.

Indeed, as the Idaho Supreme Court pointed out, the question presented is important not just to individuals who themselves are lawfully carrying firearms, but to anyone who resides in a jurisdiction where firearms are commonly and lawfully carried because the categorical rule creates a basis for an officer to search them as well. *State v. Bishop*, 203 P.3d 1203, 1219 n.13 (Idaho 2009).

2. State and local law enforcement also have a strong interest in having this question settled. "[A]s public possession and display of firearms become lawful under more circumstances," *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment), police officers must know when they can search persons whom they believe to have firearms.

3. The question presented is important as well to state legislatures and city councils enacting firearm legislation. If police officers may constitutionally search any lawfully stopped person they believe to be

armed, some jurisdictions may choose to respond to the potential invasion of privacy by imposing restrictions on police searches that go beyond those imposed by the Fourth Amendment itself.

Conversely, if this Court rejects the categorical rule that police can search individuals based solely on the belief that the individuals are armed, some jurisdictions may decide to enact duty-to-inform laws that require gun-carrying residents to inform police officers they are armed. *See* Ariz. Rev. Stat. Ann. § 13-3112(A), (C). Other jurisdictions might require residents to disarm when stopped by police.

States that have already enacted duty-to-inform laws have a particular interest in knowing the answer to the question presented. If mere possession of a gun justifies a search, then a resident's compliance with the duty-to-inform law will automatically subject him to a search at the officer's discretion. Under those circumstances, jurisdictions that have enacted such laws may decide to revise them to avoid the unintended consequence of subjecting lawful gun owners to frequent searches.

And states that are considering liberalizing laws on carrying firearms would benefit from knowing the impact those laws would have on individuals' Fourth Amendment rights and on officers' concomitant ability to search individuals with guns.

III. This case presents an ideal vehicle for resolving the conflict.

1. This case is free from some of the complicating factors that might hinder this Court's reaching the question presented in other cases where it arises. As an initial matter, the question presented arrives

before this Court on direct review after having been briefed by both parties and squarely addressed by each court below.

Moreover, in many cases involving evidence found during *Terry* searches, both the legality of the initial stop *and* the legality of the search are contested, complicating the inquiry. Here, by contrast, petitioner acknowledges that the police "had the right to stop the vehicle in which he was a passenger after observing a traffic violation." Pet. App. 7a. Nor does petitioner ask this Court to disturb the conclusion below that the officers had reason to believe he was armed. *See id.* 8a. There is thus no barrier to this Court addressing the question whether, "simply because" the officers had reason to believe petitioner was "armed," *id.* 13a, "the officers could reasonably have suspected that he was dangerous" and thus could search him, *id.* 8a.

2. This case offers a typical example of the context in which the question presented arises. Cases on both sides of the split arise from tips about an individual carrying a gun. *See* Pet. App. 4a; *United States v. Orman*, 486 F.3d 1170, 1171-72 (9th Cir. 2007); *United States v. Williams*, 731 F.3d 678, 680 (7th Cir. 2013). In addition, cases on both sides of the split have involved traffic stops. *See* Pet. App. 5a; *State v. Henage*, 152 P.3d 16, 18 (Idaho 2007); *State v. Vandenberg*, 81 P.3d 19, 22 (N.M. 2003).

Moreover, in cases on both sides of the split, courts have considered the question presented while confronted with arguments by the government pointing to minor circumstances beyond gun possession. In *United States v. Rodriguez*, 739 F.3d 481 (10th Cir. 2013), for example, the Government pointed to the following: a 911 call reporting

employees of a convenience store showing handguns to each other and "the fact that the convenience store was in a high-crime area." Appellee's Answer Br. at 6, *United States v. Rodriguez*, 739 F.3d 481 (10th Cir. 2013) (No. 12-2203). In *Williams*, the Seventh Circuit held that neither "alone [n]or together" could the following facts justify the search: that there was a 911 call reporting weapons, that the defendant avoided eye contact with the officers, and "that this all occurred in a high crime area." 731 F.3d at 686-87. Similarly, in *Henage*, the Idaho Supreme Court held that the defendant's possession of a knife and his "continued nervous behavior" could not justify the search. 152 P.3d at 23.

It makes sense to address the question presented in the context of such additional circumstances because the government rarely defends a *Terry* search based solely on officers' beliefs about the subject's possession of a gun. To the contrary, prosecutors will virtually always point to an extra, relatively minor fact or two. Therefore, issuing a decision in a case such as this—where belief that the person was armed was the driving force behind the search but the government also offered a couple of other supposedly relevant surrounding circumstances—will allow this Court to offer the genuinely meaningful guidance necessary in the real world of litigation.

3. Finally, the legality of the *Terry* search here is outcome determinative. If the officers lacked a sufficient basis to believe that petitioner posed a present danger to them, then the search violated the Fourth Amendment and the district court should have granted petitioner's motion to suppress. At that point, the charges against him—based solely on his

possessing the gun found during the search—would almost certainly have to be dismissed.

IV. The Fourth Circuit's decision is incorrect.

The Fourth Circuit's holding permits police to search any individual they lawfully stop if they have reason to believe the individual is armed, regardless of the basis for the stop and regardless of whether they have any particularized reason to believe the individual poses a present danger. Contrary to the Fourth Circuit's holding, the Fourth Amendment does not permit police officers in jurisdictions that freely permit public carrying of firearms to search persons solely because they reasonably suspect that those persons are carrying a firearm. Nor can they do so because those persons happen to be in a "high-crime" neighborhood (or give the officer a funny look).

1. The Fourth Circuit's categorical rule misreads this Court's precedents. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court held that when an officer lacks probable cause to arrest a person he has legally stopped, the officer may nonetheless conduct a limited search of that person only if the officer has reason to believe the person is "armed and presently dangerous to the officer or to others." *Id.* at 24; *see id.* at 30. The Court required lower courts to "focus[] the inquiry squarely on the dangers and demands of the particular situation," *id.* at 18 n.15, and directed that "each case of this sort" be "decided on its own facts," *id.* at 30. The Fourth Circuit's categorical rule ignores that admonition.

To reach its conclusion, the Fourth Circuit relied on short phrases in two of this Court's cases for the proposition that every person who carries a gun—that

is, who is "armed"—is automatically "dangerous" enough to forfeit the Fourth Amendment right not to be searched absent a warrant or probable cause. It posited that in both *Terry* and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), this Court "deliberately linked 'armed' and 'dangerous,' recognizing that . . . the person stopped 'was armed and thus' dangerous." Pet. App. 13a (citations omitted).

The Fourth Circuit has ripped those words out of context, ignoring the features of both cases that rendered the defendants' possession of firearms a present danger. In *Terry*, the officer had a reasonable basis for suspecting that Terry was an armed robber—a serious criminal offense—caught in the act of initiating a heist. *Terry*, 392 U.S. at 28. Moreover, at the time, it was illegal in Ohio for anyone other than a law enforcement officer to carry a concealed weapon. *Id.* at 4 n.1. Thus, anyone carrying a firearm was doing so illicitly. It is therefore no surprise that "on the facts and circumstances" that obtained at the time Terry was searched, it was entirely reasonable for the officer to believe that, if Terry was armed, he likely "presented a threat to officer safety while [the officer] was investigating his suspicious behavior." *Id.* at 28.

The search at issue in *Mimms*—a case decided without full briefing or oral argument—similarly occurred in a jurisdiction that had strict laws against carrying firearms. *See* Pet. App. 34a n.2 (citing 1943 Pa. Laws 487; 1972 Pa. Laws 1577).[4] The Court's focus

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[4] Pennsylvania did not enact a liberalized "shall-issue" concealed-carry permit regime until 1989, and did not extend that

was on the question whether police officers can order drivers stopped for traffic offenses to get out of their vehicles. *See Mimms*, 434 U.S. at 107-11.

The inference that supported the searches in *Terry* and *Mimms*—that anyone who is armed is inevitably breaking the law, and doing so in a way that poses a present danger to officer safety—does not apply to West Virginia in 2014.

People who carry guns in West Virginia are not presumptive lawbreakers. A majority of the state's residents—54.2%—own a firearm. Bindu Kalesan et al., *Gun Ownership and Social Gun Culture*, 22 Injury Prevention 216, 218 fig. 3 (2016). At the time of the search in this case, West Virginia permitted its residents to carry firearms openly without a license and issued concealed carry permits to any applicant who met the statutory criteria and paid a $75 fee, W. Va. Code § 61–7–4(f). Over 90,000 individuals had obtained these permits. U.S. Gov't Accountability Office, Gun Control: States' Laws and Requirements for Concealed Carry Permits Vary Across the Nation 76 (2012), http://tinyurl.com/cc6uwu9 (last visited June 19, 2017). Today, West Virginia law no longer requires a permit for any type of carry. *See supra* at 3. Under these circumstances, as the dissenters below explained, there is simply no reason to believe that someone carrying a gun is "anything but a law-abiding

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regime to Philadelphia—where the search at issue in *Mimms* took place—until 1995. *See* John R. Lott, Jr., & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. Legal Stud. 1, 12 (1997).

citizen who poses no threat to the authorities." Pet. App. 59a.[5]

2. The Fourth Circuit's rule authorizes searches that cannot be justified as a matter of common sense. A parent approached by an officer after he sees her parked briefly near her own driveway to deal with her children's misbehavior, *see* W. Va. Code § 17C-13-3(a)(2), or a grandfather crossing the street without using the crosswalk, *see* W. Va. Code § 17C-10-3, can be searched so long as officers believe they have handguns. In no way does an officer's reasonable suspicion of such minor infractions create an expectation of danger; yet the Fourth Circuit's rule automatically justifies this "serious intrusion upon the sanctity of [a] person." *Terry*, 392 U.S. at 17.

Such a broad authorization is unnecessary to protect officer safety. Instead, the basis for the initial stop must play some role. When the reason for an underlying stop is "an articulable suspicion of a crime of violence," officers' right to search is "immediate and automatic." *Terry*, 392 U.S. at 33 (Harlan, J., concurring). But absent other facts indicating present dangerousness, it is not necessary to search all armed persons who are stopped in a state like West Virginia. In this case, for example, the police acknowledged that the report that prompted them to pursue petitioner

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[5] West Virginia is not alone in placing this trust in an armed public. Police officers themselves generally believe that an armed citizenry benefits public safety. In a recent survey, an overwhelming majority police professionals supported concealed carry and most thought that "legally armed citizens" are "important" to "reducing crime rates overall." *See* PoliceOne, Gun Policy & Law Enforcement Survey at 10-11 (2013), https://tinyurl.com/ d3zodtj (last visited June 19, 2017).

provided no evidence of "a crime or any criminal activity." Pet. App. 128a. Indeed, absent the fortuity that petitioner and the driver of the car in which he was traveling were not wearing their seatbelts, it is unclear that the police could have stopped petitioner at all.

The implications of the Fourth Circuit's rule go beyond infringing the privacy of individuals who actually carry a gun. Anyone whom the police merely *believe* to be carrying a firearm in public faces a *Terry* search whenever an officer has a basis for stopping him—and state criminal and vehicle codes provide a huge range of bases for a police stop. Even forgoing the right to carry a weapon thus does not protect an individual against being searched. Instead, a "large bulge in any man's pocket" will be sufficient to authorize a search, allowing "police to stop and frisk virtually every man they encounter." *See Ransome v. State*, 373 Md. 99, 108 (Md. 2003). And in states where many people carry guns, police can treat everyone they stop as sufficiently dangerous to search.

This is not merely a hypothetical concern. Officer Hudson testified that he believed if he found an individual with a gun, he should "treat them as [if] they could be a criminal." C.A. App. 72. He thought it was "best" to search "anybody that you're interviewing and question[ing] that may have a weapon." *Id.* at 68.

In addition, the Fourth Circuit's rule effectively re-creates the same "firearm exception" to *Terry* that the Court rejected in *Florida v. J.L.*, 529 U.S. 266, 272 (2000). In *J.L.*, this Court held that a "tip[] about guns," without more, could not justify a stop and search. *Id.* at 273. But under the Fourth Circuit's rule, all the officer would have had to do was wait until J.L.

showed signs of "loiter[ing]" in an unusual manner—a crime in Florida, Fla. Stat. Ann. § 856.021. He could then have stopped J.L. and conducted an "intrusive, embarrassing police search of the targeted person." *J.L.*, 529 U.S. at 272.

Finally, the implications of the Fourth Circuit rule are especially perverse in jurisdictions that have enacted "duty to inform" laws. A number of states require individuals carrying concealed weapons to inform the police of that fact during any police encounter. *See* G. Halek, *Do You Have A Duty To Inform When Carrying Concealed?*, Concealed Nation (July 26, 2015), https://tinyurl.com/ojqvbsm (last visited June 19, 2017); *see also, e.g.*, S.C. Code Ann. § 23-31-215(K) (providing that when an individual who possesses a concealed carry permit is "carrying a concealable weapon," he "must inform a law enforcement officer of the fact that he is a permit holder" when an officer "(1) identifies himself as a law enforcement officer; and (2) requests identification or a driver's license" from the individual). Under the Fourth Circuit's rule, the moment that gun-carrying individuals obey the law in these states—for example, when an officer stops them for a traffic offense—they have shown themselves to be "dangerous" and they can be subjected to a *Terry* search at an officer's discretion.

3. The Fourth Circuit's decision in this case cannot be saved by considering either the neighborhood near which petitioner's stop took place or the "look" Captain Roberts testified to seeing on petitioner's face.

"An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the

person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). As this Court explained in *Ybarra v. Illinois*, 444 U.S. 85 (1979), the "'narrow scope' of the *Terry* exception" requires "reasonable belief or suspicion directed *at the person to be frisked*" and not simply information about the "premises" on which a search occurs. *Id.* at 94 (emphasis added).

Nor does the belief that an individual in a high-crime area is armed support a conclusion that the individual is presently dangerous to the police. *See United States v. Williams*, 731 F.3d 678, 687 (7th Cir. 2013). To hold otherwise would diminish the Fourth Amendment rights of all residents of all neighborhoods with higher-than-average crime rates—that is to say, roughly half of the residents in the country. *See also supra* at 5 n.2 (pointing out that the small community where petitioner was stopped is generally safer than average).

Indeed, the Fourth Circuit's reasoning gets things exactly backwards. As the plurality opinion in *McDonald v. Chicago*, 561 U.S. 742 (2010), explained, "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials." *Id.* at 790. Thus, high-crime areas are precisely where we should expect to see law-abiding citizens carrying arms for self-defense.

Even less can an "'oh, crap' look[]," Pet. App. 16a, justify searching someone the police think may be armed in a state that allows carrying concealed firearms in public. Other courts of appeals have recognized that nervous gestures or facial expressions during an encounter with police have "very little import to a reasonable suspicion determination."

Williams, 731 F.3d at 687; *see also, e.g.*, *United States v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005) (holding that the combination of a traffic stop in a high-crime area and "nervous" look was insufficient to justify a *Terry* search because approving such searches "comes too close to allowing an automatic frisk of anyone who commits a traffic violation in a high-crime area").

Petitioner's case illustrates why facial expressions have little probative value. The car in which petitioner was a passenger was pulled over based on a seatbelt violation. Nevertheless, the officer who made the stop did not initially inform the driver or petitioner of why he had stopped them. While petitioner was attempting to comply with that officer's request to get out of the car, a second officer appeared, opened the passenger side door, and asked petitioner whether he was carrying a weapon. C.A. App. 78, 88-90. Under these perplexing circumstances, petitioner's "weird look," Pet. App. 6a, provides no support for the proposition that he was dangerous.[6]

4. Finally, and perhaps most troublingly, the Fourth Circuit's decision "giv[es] police officers unbridled discretion" to decide *which* legally armed citizens to search. *Arizona v. Gant*, 556 U.S. 332, 345 (2009). It is a staple of modern policing that police officers can stop individuals for minor infractions in order to investigate matters for which they lack even

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[6] Still less does Captain Roberts' interpretation of petitioner's facial expression provide any support for a conclusion that petitioner posed a present danger to the officers. Roberts interpreted petitioner's look as saying: "I don't want to lie to you, but I'm not going to tell you anything," Pet. App. 6a, and not that petitioner intended to attack the officers.

reasonable suspicion, let alone probable cause. *Whren v. United States*, 517 U.S. 806, 810, 819 (1996). The Fourth Circuit's rule goes far further: it permits police to layer pretextual *searches* atop these pretextual stops, despite this Court's insistence that *Terry* searches cannot be conducted for "whatever evidence of criminal activity [an officer] might find," *Terry*, 392 U.S. at 30.

It is no defense of the Fourth Circuit rule that police will not pursue distracted mothers or jaywalking grandparents, *see supra* at 23. A rule that abrogates the Fourth Amendment rights only of "black male[s]" who may be exercising their state-law rights to carry firearms, by treating (only) them as inherently "dangerous," would not be an improvement. As the dissenters below highlighted, the Fourth Circuit's rule poses grave risks of discriminatory policing. Pet. App. 38a. The blanket authority to search that the Fourth Circuit's rule provides threatens to exacerbate the problem that Justice Sotomayor pointed out in *Utah v. Strieff*, 136 S. Ct. 2056 (2016): "that people of color are disproportionate victims" of special police scrutiny. *Id.* at 2070 (dissenting opinion).

This case illustrates that point: Officer Hudson admitted that he stopped Robinson not because he suspected a seatbelt violation, but because he received a call that there was a "black male with a gun" near a 7-Eleven. C.A. App. 63; *see also* Pet. App. 17a. Without any evidence that the man had violated any law, the Ranson Police Department dispatched two officers to stop petitioner and search him. It is far from obvious that the police would have reacted similarly to an anonymous report of an armed "white male." Indeed,

the officers seemed tellingly incurious about the white female driver in this case. The "kind of standardless and unconstrained discretion" enabled by the Fourth Circuit's rule is an "evil" this Court has long condemned. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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