No. 16-1532

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

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

The Government acknowledges that even when police have reasonable suspicion sufficient to stop someone, the lawfulness of any subsequent search "turns on the separate issue of the officer's and public's safety." BIO 11. But it claims that this Court's precedents already "recognize" blanket authorization for such searches whenever officers have reason to believe the individual they stopped is armed, regardless why they initiated the stop and regardless whether the jurisdiction generally permits individuals to carry firearms. BIO 8.

Courts, States, and scholars deny that this issue is settled. Given the sea change in recent decades regarding the entitlement of individuals lawfully to carry firearms in public, courts "need to reevaluate [their] thinking" about the interaction between the Fourth Amendment and individuals' possession of firearms. *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment). "[T]he calculus is now quite different," *id.*, than when *Terry v. Ohio*, 392 U.S. 1 (1968), was decided. In states where large numbers of persons are authorized to carry weapons on a regular basis (and actually do so), there is "legal uncertainty regarding what police can do when they observe, or learn of, a person carrying a firearm." Jeffrey Bellin, *The Right to Remain Armed*, 93 Wash. U. L. Rev. 1, 25 (2015). And there is practical uncertainty as well: individuals need to know whether, when they legally carry a firearm (or even are believed to be doing so), a police officer who stops them on nothing more than suspicion of a minor violation can "feel with sensitive fingers every portion"

of their bodies, "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," *Terry*, 392 U.S. at 17 & n. 13. Five states—including West Virginia, where the officers who searched Robinson patrol—urge the Court here to reject the premise that "potential presence of a weapon makes even a law-abiding individual *automatically* dangerous." Amicus Br. of States of West Virginia, Indiana, Michigan, Texas, and Utah 3 (States Amicus Br.). The Fourth's Circuit's categorical rule has been rejected by other courts, is not dictated by precedent, and is wrong.

## I. There is a genuine conflict among lower courts on whether suspicion that a person is armed invariably makes that person dangerous enough to justify a *Terry* search.

The Government strains to downplay the existence of disagreement among the lower courts by arguing that the cases petitioner cites involve an array of fact patterns. BIO 14. But this factual variation is relevant only to show that the question presented arises frequently and is important. *See* Pet. 15-17. At the end of the day, the courts are intractably divided over whether 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." And courts acknowledge it: for example, the Arizona Supreme Court has expressly "disagree[d] with the Ninth Circuit's determination that mere knowledge or suspicion that a person is carrying a firearm satisfies the second prong of *Terry*" in a jurisdiction "that freely permits citizens to carry weapons." *State v. Serna*, 331 P.3d 405, 410 (Ariz. 2014).

1. The Government does not dispute that three courts of appeals and the Illinois Supreme Court have adopted a categorical rule permitting searches of any individual whom police are entitled to stop whenever police reasonably believe the individual is armed. *See* Pet. 11.

2. Numerous other courts have squarely rejected that rule. Pet. 12-14.

For starters, consider the supreme courts of Idaho and New Mexico—each within a circuit that takes the approach adopted by the Fourth Circuit here. The Government asserts that no decision from either state involves a search "during a valid traffic stop." BIO 14. But this is flatly untrue.

With respect to Idaho, the Government emphasizes that *State v. Bishop*, 203 P.3d 1203 (2009), did not involve a traffic stop. BIO 17. But the Government ignores *State v. Henage*, 152 P.3d 16 (2007), the other Idaho high court decision petitioner cited. Pet. 13-14. That case, on which *Bishop* relied, *did* involve "a routine traffic stop that turned into a contraband-yielding roadside pat down search" of a passenger the officer had reason to suspect possessed a weapon. *Henage*, 152 P.3d at 18. Focusing on the language from *Terry* that permits an officer, "where he has reason to believe that he is dealing with an armed and dangerous individual," to search for weapons, 392 U.S. at 27, the Idaho Supreme Court rejected the State's argument "that a person need only be armed in order to perform such a search," *Henage*, 152 P.3d at 22. Indeed, that court deemed the principle that "[a] person can be armed without posing a risk of danger" to be part of "the essence of *Terry*." *Id.*

As for New Mexico, the Government acknowledges that *State v. Vandenberg*, 81 P.3d 19 (2003), involved a search that occurred after a vehicle was stopped for speeding, BIO 17. *Vandenberg* clearly 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." 81 P.3d at 25. In the case before it, the court held that, "[c]onsidering the totality of the circumstances," the officer had a reasonable basis for finding dangerousness. *Id.* at 27. The Government recognizes that the New Mexico court discussed extensively "whether the peculiar behavior of the particular defendants" justified the search. BIO 18 (citing *Vandenberg*, 81 P.3d at 25-28). But it fails to draw the logical conclusion: that entire discussion would have been unnecessary but for that court's express rejection of the categorical rule adopted by the Fourth Circuit here. *See Vandenberg*, 81 P.3d at 25 ("Any indication in previous cases that an officer need only suspect that a party is either armed *or* dangerous is expressly disavowed.").

Finally, the Government does not deny that the Sixth Circuit, Seventh Circuit, and Supreme Court of Arizona have each rejected the proposition on which the Fourth Circuit's decision here rests: that any person who is armed *ipso facto* poses a danger to any police officer who encounters him. *See* Pet. 12-13. To be sure, their decisions did not involve searches after traffic stops. But the Government offers no basis for believing these courts would hold that a passenger who has exited a vehicle stopped for a seatbelt violation, as petitioner had done here, Pet. App. 5a-6a, is materially different from a person police encounter

initially on the street. The special dangers potentially attendant on traffic stops explain why this Court has upheld "the 'minimal' additional intrusion of ordering a driver and passengers out of the car," *Knowles v. Iowa*, 525 U.S. 113, 117 (1998), and protective searches of a car's interior, *Michigan v. Long*, 463 U.S. 1032, 1050 (1983). But once someone is out of the car and cannot reach items inside it, he is no different from, and no more dangerous than, a pedestrian. And the Government offers neither precedent nor reasoning to suggest why a court that does not consider a person on foot dangerous simply because armed—as these three courts do not—would consider him dangerous simply because he was stopped for not wearing a seatbelt while armed.

In short, there is conflict among circuit courts and state high courts over whether a person who might be armed is *ipso facto* sufficiently "dangerous" to permit a *Terry* search.

## II. The Government's vehicle argument is meritless.

The Government argues that this case is an unsuitable vehicle because the Fourth Circuit pointed to "additional facts" that "increased" the officers' suspicion that petitioner was "dangerous." BIO 18 (quoting Pet. App. 15a.) The Government is wrong for two distinct reasons. First, as a practical matter, any case posing the question presented is likely to involve some "additional facts," but their presence poses no vehicle problem. Second, the facts to which the Government points do not justify the Fourth Circuit's decision here.

1. The Fourth Circuit's approach—adopt the categorical rule but then point to facts that "confirm" the dangerousness of the defendant, Pet. App. 16a—is typical of the cases that make up the categorical rule side of the conflict. For example, in *United States v. Orman*, 486 F.3d 1170 (9th Cir. 2007), after embracing the categorical approach, the court added "[f]urthermore" that the encounter occurred at a "crowded" shopping mall and the officer "needed to see that the gun was removed from the premises." *Id.* at 1177. Similarly, in *People v. Colyar*, 996 N.E.2d 575 (Ill. 2013), while the court adopted the categorical rule, it also emphasized that the search occurred at "dusk" and that the officers were "outnumbered by defendant and his two passengers, who were in a running car." *Id.* at 585.

And regardless whether the courts below rely on additional facts to justify a *Terry* search, this Court can be sure that if it grants review in any case involving the question presented, it will be confronted with such facts. The government will surely point to details in the officers' testimony to argue that this Court should affirm the conviction even if it rejects the categorical rule. The right course for this Court in such cases—and this one—is to reject the categorical equation of arms-bearing and dangerousness. It can then remand the case for determination whether absent the constitutionally erroneous weight given to that proposition, the totality of the circumstances

would warrant concluding that the suspect was sufficiently dangerous to justify the search.[1]

2. The Government points to three facts that it claims "independently" justify suspecting that petitioner was dangerous. BIO 18. Neither separately nor together do they do so.

The first "fact" to which the Government points—"not only that petitioner was carrying a concealed firearm, but also that he had apparently not been carrying it as a matter of course," BIO 18—comes out of left field. Although the Government cites the Fourth Circuit's opinion for this claim, the Fourth Circuit never said this. Nor does the Government offer any explanation as to why petitioner's loading the gun and placing it in his pocket in the 7-Eleven parking lot, rather than at home or somewhere else, supports finding that he was dangerous. This fact ultimately collapses down to the assertion that being armed made petitioner dangerous.

Second, the Government emphasizes that "the parking lot where petitioner had loaded his pistol was specifically known as a location where drug trafficking was common, and was located in 'the highest crime area in Ranson.'" BIO 19 (quoting Pet. App. 4a). *But see* Pet. 5-6 n.2. As a general matter, an individual's presence near a high-crime neighborhood does not support an inference that he is presently dangerous to

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[1] In this case, the Fourth Circuit stated only that the additional facts to which it pointed "increased" or "confirm[ed]" the officers' suspicion that petitioner was dangerous. Pet. App. 15a, 16a. Notably, that court did not hold—and indeed, could not have so held, *see* Pet. 25-27—that those facts by themselves would have justified the search.

police. Pet. 25-26. And here, the criminal activity to which the Government points is drug trafficking, while the tip the police received said nothing to suggest petitioner had any involvement in the drug trade. *Compare* Pet. App. 4a *with Adams v. Williams*, 407 U.S. 143, 144-45 (1972) (tip that suspect was carrying both drugs and a gun). Indeed, the Government has never argued that the officers had reasonable suspicion to believe petitioner had engaged in any sort of criminal activity, drug-related or otherwise, while in the 7-Eleven parking lot. *See* Pet. App. 128a. The Fourth Circuit's speculation that a reasonable officer "could" have thought that petitioner might "well have been" loading his firearm "in connection with drug-trafficking activity," Pet. App. 16a, piles supposition on top of supposition. The Government has never argued that it would have had a basis to stop petitioner at all absent a seatbelt violation. So the fact that petitioner loaded his gun in a public parking lot, and then immediately left, cannot support a conclusion that petitioner posed a danger to the officers who stopped the car in which he was riding. And Officer Hudson's decision to begin his encounter with a routine license, registration, and insurance check of the car's driver, Pet. 3, further undercuts any such conclusion.

Third, the Government claims petitioner's dangerousness could be inferred from his giving "an 'evasive response'" to the question whether he was armed. BIO 20 (quoting Pet. App. 16a). Petitioner has already explained why the "look" he gave the officers, *id.*—the basis for the Fourth Circuit's characterization—cannot support this inference. Pet. 26-27. The Government tries to analogize the

"interchange" here to the responsibility that an arms-bearing citizen has in a "duty to inform" state. BIO 20. But West Virginia did not require petitioner to disclose his weapon. Thus, as the Government grudgingly concedes, petitioner had no "freestanding legal duty to respond to the officer's queries." *Id.*

## III. This Court's decisions do not support the Government's position.

1. Contrary to the Government's suggestion, BIO 8-12, this Court's decisions do not resolve the question presented. None of the cases on which the Government relies was asked to decide the Fourth Amendment implications of "suspected" firearm possession in jurisdictions where millions of law-abiding individuals freely carry firearms—and where state law and state officials see no inconsistency with officer safety in letting them do so.

As petitioner and his *amici* have already explained, this Court's decisions regarding *Terry* searches have focused on whether a particular individual is dangerous. Pet. 10, 22-26; States Amicus Br. 6-19. They have not established a categorical rule.

Each of the cases on which the Government relies differs materially from petitioner's. In *Terry* itself, the officers had reasonable suspicion to believe that an armed robbery—a violent crime—was afoot. *Terry v. Ohio*, 392 U.S. 1, 28 (1968). Moreover, it was illegal for anyone other than a law enforcement officer to carry a concealed firearm. *Id.* at 4 n.1. Gun possession was also tightly regulated in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam). *See* Pet. App. 34a n.2. Under those circumstances, once officers had good

reason to believe the defendants were armed, they also had good reason to believe they were dangerous.

*Adams v. Williams*, 407 U.S. 143 (1972), also involved suspicion of a serious crime: carrying narcotics. It was eminently reasonable for an officer to believe that such a person might be dangerous, particularly when he failed to comply with a request to get out of the car and the stop occurred at 2:15 a.m. *Id.* at 147-48.

Finally, in *Michigan v. Long*, 463 U.S. 1032 (1983), the illegal behavior that led the officers to investigate Long—erratic driving at high speed, *id.* at 1035—is itself dangerous to others. *See Scott v. Harris*, 550 U.S. 372, 379-80 (2007). And the protective search this Court upheld occurred after Long, who was out of his car when the officers arrived and appeared to be intoxicated, "began walking toward the open door of the vehicle" through which the officers saw a large hunting knife. 463 U.S. at 1036. But the Court's discussion did not adopt the syllogistic approach of the Fourth Circuit, Pet. App. 13a ("[T]he risk of danger is created simply because the person, who was forcibly stopped, is armed."). Rather, the Court was careful to explain that officers must have a "reasonable belief" that "the suspect is dangerous *and* the suspect may gain immediate control of weapons," *Long*, 463 U.S. at 1049 (emphasis added), and then to describe the "circumstances of [that] case" that justified the officers' belief in Long's dangerousness, *id.* at 1050.

In petitioner's case, by contrast, at the time of the search the only violation of law for which officers had reasonable suspicion was failure to wear a seatbelt. The Government provides no support for an inference

that that infraction correlates in any way with dangerousness.

The practical consequences of the Fourth Circuit's rule are profound. *Amici* emphasize that if an individual "exercises her right to bear arms and is subject to a lawful *Terry* stop," she will forego the Fourth Amendment protection against being searched she would otherwise possess. States Amicus Br. 6; *see also* Pet. App. 25a. But the reality is even harsher. In a jurisdiction where significant numbers of individuals are permitted to carry guns and there is evidence that they actually do so, police may suspect that *anyone* they stop is armed. So all individuals, armed or actually unarmed, may be subjected to "intrusive, embarrassing police search[es]," *Florida v. J.L.*, 529 U.S. 266, 272 (2000), without any further indication of dangerousness.

2. The Government tries to dismiss the risk of discriminatory enforcement by shunting off any such concerns to the Equal Protection Clause. *See* BIO 14 (citing *Whren v. United States*, 517 U.S. 806 (1996)). Tellingly, the Government does not deny that the Fourth Circuit's decision paradoxically increases the risks that individuals will be subjected to search in jurisdictions that protect their right to carry firearms and that those risks may fall disproportionately on members of minority groups. *See* Pet. 27-29; States Amicus Br. 7-8; Amicus Br. of NACDL 4-10. Instead, the Government asserts that petitioner offers no reason for addressing this problem "by denying officers the safety of disarming individuals whom they reasonably suspect are carrying deadly weapons." BIO 14.

Petitioner proposes no such thing. Petitioner has not argued that officers cannot disarm individuals they reasonably suspect to be dangerous. He argues only that officers cannot automatically equate the possible presence of a weapon with the dangerousness of a person. Pet. 23. That equation implicates Fourth Amendment requirements of reasonableness every bit as much it implicates Fourteenth Amendment prohibitions on discrimination.

## CONCLUSION

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

Respectfully submitted,

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