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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, INDIANA, MICHIGAN, TEXAS, AND UTAH IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, in a State that permits residents to legally carry firearms while in public, a law enforcement officer's belief that an individual stopped during a lawful *Terry* stop has a firearm on his or her person provides a sufficient basis—standing alone—for the officer to conclude that the armed individual is "presently dangerous" and thus allow the officer to lawfully engage in a warrantless "frisk" of that individual.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The work of our nation's law enforcement officers is both important and dangerous. Recognizing those twin truths, this Court held in *Terry v. Ohio*, 392 U.S. 1 (1968), that a law enforcement officer may, in certain circumstances, both stop and frisk an individual without violating the Fourth Amendment's protection against unreasonable searches or seizures. A *Terry* stop may occur when "specific and articulable facts" lead an officer to reasonably believe that criminal activity is occuring. *Id.* at 21-22. The officer may then undertake a *Terry* frisk—a "limited search for weapons," *id.* at 25,—if the officer "is justified in believing that the [detained] individual . . . is armed and presently dangerous to the officer or others," *id.* at 24. The authority granted to police officers in *Terry* has played and will continue to play a critical role in law enforcement efforts.

But in the decision below, the *en banc* Fourth Circuit interpreted *Terry* in a way that significantly and unnecessarily burdens the right to bear arms protected by the Second Amendment. Specifically, the court collapsed the requirements for a *Terry* frisk into a single question: whether the officer reasonably suspects that the detained individual is armed. The court held that when 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,

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file a brief in support of the Petitioner.

thus justifying a *Terry* frisk." *United States v. Robinson*, 846 F.3d. 694, 699 (CA4 2017) (en banc) (internal citations and alterations omitted).

This novel, unitary inquiry effectively forces an individual to choose between her right to bear arms under the Second Amendment and her right to be free from searches under the Fourth Amendment. If she exercises her right to bear arms and and is subject to a lawful *Terry* stop, the Fourth Circuit's test is likely to permit a pat-down. No matter how cooperative or passive she is, the officer is permitted to conduct a *Terry* frisk based solely on suspicion that a weapon is present.

Amici curiae—the States of West Virginia, Indiana, Michigan, Texas, and Utah—have an interest both in protecting their law enforcement officers and in upholding the constitutional rights of their citizens. All of the *amici* States have enacted laws that promote the lawful carry of firearms. More than half of all West Virginians own a firearm.[2] This brief seeks to highlight the unacceptable and unnecessary burden the Fourth Circuit's approach imposes on the right to bear arms, as well as the ways in which it will frustrate state laws that advance that right.

Amici urge that the way to protect police officers without burdening the right to bear arms lawfully is

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[2] See Andy Kiersz & Brett LoGiurato, *Here's where you're most likely to own a gun*, Business Insider (July 3, 2015) (54.2% of West Virginians own a firearm), available at http://www.businessinsider.com/gun-ownership-by-state-2015-7

to faithfully apply the requirements set forth in *Terry*. A *Terry* frisk is permissible when an officer has a reasonable suspicion *both* that a stopped individual is armed *and* that she is dangerous. *Amici* do not opine on whether the facts and circumstances in this case satisfy that correct standard and therefore justify the frisk that occurred. But the Fourth Circuit's novel and problematic interpretation of *Terry*, which departs from that standard, cannot be permitted to stand.

SUMMARY OF ARGUMENT

This Court's intervention is warranted for at least the following reasons.

I. A. The Fourth Circuit's novel standard creates an unacceptable tension between an individual's right to bear arms under the Second Amendment and her right to be free from searches under the Fourth Amendment. It predicates the exercise of one constitutional right on the surrender of another, a condition this Court has previously found to be unlawful. It also disproportionately burdens certain groups, like women and members of minority communities, that may especially benefit from the right to bear arms but may also be more sensitive to frisks by law enforcement.

B. Furthermore, the Fourth Circuit's test contravenes state laws that promote the lawful carry of firearms. For example, by concluding that the potential presence of a weapon makes even a law-abiding individual *automatically* dangerous, the Fourth Circuit effectively declares invalid the judgment of state lawmakers in more than 35 States,

all of which have laws making it relatively easy to carry a concealed firearm. The Fourth Circuit's test also will discourage at least some individuals from lawfully carrying a firearm, frustrating one of the purposes behind these state laws.

II. Finally, the Fourth Circuit's unitary inquiry contravenes several of this Court's precedents. It is inconsistent with *Terry* itself, which clearly sets forth *two* independent requirements for a protective frisk: an officer must reasonably suspect the individual to be both "armed" *and* "dangerous." That is because the question under *Terry* is not whether a weapon alone poses a threat to the officer or others, but rather whether "an officer is justified in believing that *the individual* whose suspicious behavior he is investigating at close range" is a danger. 392 U.S. at 24 (emphasis added). The decision below also conflicts with cases of this Court that apply *Terry*, and other Fourth Amendment precedents that have rejected categorical rules based on generalized perceptions of dangerousness.

REASONS FOR GRANTING THE PETITION

I. The decision below has far-reaching consequences on the right to bear arms and a State's ability to advance that right.

A. The Fourth Circuit's novel standard for a *Terry* frisk creates an unacceptable tension between the rights protected by the Second and Fourth Amendments.

1. As this Court has explained, a police officer's authority to conduct a *Terry* frisk stems from a recognition of the very real dangers that law enforcement officers face everyday while doing their critical work. "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." 392 U.S. at 23. "[I]nvestigative detentions involving suspects in vehicles are especially fraught with danger to police officers." *Michigan v. Long*, 463 U.S. 1032, 1047 (1983). The *Terry* frisk recognizes "the need for law enforcement officers to protect themselves and other prospective victims of violence" when they have conducted a lawful *Terry* stop. 392 U.S. at 24.

But that authority, while important, is not without a cost to the public. "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security." *Id.* at 24–25. A *Terry* frisk is a "far from inconsiderable[] intrusion upon the sanctity of the person," *id.* at 26, and potentially "traumatic,"

Wyoming v. Houghton, 526 U.S. 295, 303 (1999). As this Court acknowledged in *Terry* itself, "it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 25. Ordinarily, unless authorized by a warrant or the existence of probable cause, the Fourth Amendment would shield an individual from such a search. But where an officer has conducted a lawful *Terry* stop and the requirements for a *Terry* frisk are met, the search, though intrusive, is considered reasonable and thus permissible under the Fourth Amendment.

The Fourth Circuit's unitary inquiry—where the propriety of a *Terry* frisk turns solely on whether an officer reasonably suspects that a lawfully detained individual is armed—introduces a further significant cost to the equation. Under that interpretation of *Terry*, an individual effectively must choose between her Second Amendment right to bear arms and the Fourth Amendment's protection against warrantless searches. If she exercises her right to bear arms and and is subject to a lawful *Terry* stop, there is little under the Fourth Circuit's test to protect her from a pat-down. Conversely, if that individual forgoes her right to bear arms, she can greatly reduce the possibility that she must endure a lawful *Terry* frisk. As Judge Wynn explains in his concurrence, "the majority decision today necessarily leads to the conclusion that individuals who elect to carry firearms forego other constitutional rights." See *Robinson*, 846 F.3d at 706 (Wynn, J., concurring).

2. This choice is unacceptable for several reasons.

First, this Court has found imposing such a choice—predicating the exercise of one constitutional right on the surrender of another—to be unlawful. In *Simmons v. United States*, 390 U.S. 377 (1968), this Court considered whether a criminal defendant could be made to choose between testifying in support of a Fourth Amendment claim on a motion to suppress and invoking his Fifth Amendment right against self-incrimination. The Court found it "intolerable," in those circumstances, "that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394; see also *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (CA3. 1977) ("When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted."); *Miller v. Smith*, 115 F.3d 1136, 1150–51 (CA4 1997) ("Forcing an [individual] to choose between two rights guaranteed by the Constitution results in the denial of one right or the other . . . . [and] affronts our notions of basic fairness.").

Second, in practical effect, the choice may be disproportionately burdensome on certain groups of people. As this Court observed in *McDonald v. City of Chicago*, some have suggested that "the right to keep and bear arms . . . is especially important for women and members of other groups that may be especially vulnerable to violent crime." 561 U.S. 742, 790 (2010) (citing *amicus* briefs).[3] But at the same time, for those

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[3] See also *id.* at 856–57 (Thomas, J., concurring) (describing historical conditions in which "the use of firearms for self-defense

same groups, being subject to a *Terry* frisk by a police officer may carry a particularly acute sting. For example, because police officers are statistically more likely to be male than female,[4] *Terry* frisks may seem more intrusive to women than men. And as Justice Sotomayor has noted, "it is no secret that people of color are disproportionate victims of [police] scrutiny." *Utah v. Strieff*, --- U.S. ---, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting); see also *Terry*, 392 U.S. at 14 (discussing the perception in minority communities that they are subject to harassment by the police).

3. Though it is true that a *Terry* frisk must be preceded by a lawful *Terry* stop, that requirement provides only a small check on the Fourth Circuit's novel approach. A *Terry* stop requires an officer's "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry*, 392 U.S. at 30). But as this Court has explained, that means a stop can be based on very minor infractions (like jaywalking), entirely pretextual reasons, see *Whren v. United States*, 517 U.S. 806, 813 (1996), and even completely innocent conduct, see *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (noting that "wholly lawful conduct" can

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was . . . the only way black citizens could protect themselves from mob violence").

[4] See Val Van Brocklin, *Why aren't there more women in policework?* PoliceOne.com (Oct. 23, 2013) ("As of 2010, women still made up just 11.9 percent of all sworn police positions in America."), available at https://www.policeone.com/women-officers/articles/6539439-Why-arent-there-more-women-in-policework/.

"justify the suspicion that criminal activity was afoot").

Indeed, the very circumstances that might lead a law-abiding individual to be armed in public could cause that individual to exhibit behaviors sufficient to put them at risk of a *Terry* stop even if that person is only exercising his or her constitutional right to carry a firearm. An individual who arms herself because her daily commute passes through a high-crime neighborhood might quite innocently be nervous,[5] avoid sustained eye contact,[6] and walk at a brisk pace.[7] Yet these lawful behaviors have also been endorsed by courts as predicates of reasonable suspicion sufficient to justify a *Terry* stop.

The way to best balance the critical need to protect police officers without the imposition of this unconstitutional dilemma on law-abiding citizens is to faithfully apply the requirements plainly set forth in *Terry*. As discussed in more detail in Section II.A below, *Terry* makes clear that a frisk is permissible when an officer has a reasonable suspicion *both* that a detained individual is armed *and* that he is dangerous. This two-pronged test avoids the constitutional tension created by the Fourth Circuit's novel standard. The additional requirement of dangerousness means that an individual choosing to

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[5] See *Wardlow*, 528 U.S. at 124.

[6] See, *e.g.*, *United States v. Montero-Camargo*, 208 F.3d 1122, 1136 (CA9. 2000).

[7] See, *e.g.*, *United States v. Roelandt*, 827 F.3d 746, 747–48 (CA8 2016).

carry a weapon may not be searchedsimply for exercising that constitutional right,, but rather only if she gives law enforcement officers some additional reason to believe she poses an imminent threat. This leaves law enforcement officers the ability to protect themselves when circumstances suggest a violent encounter is possible, without directly burdening the right to bear arms secured by the Second Amendment.

B. The Fourth Circuit's unitary inquiry contravenes state laws that advance the right to bear arms.

Many States have chosen to enact laws that advance the right to bear arms. At present, more than 25 States have laws stating that appropriate authorities "shall" issue permits to citizens for concealed carry of firearms, provided the applicant has satisfied certain statutory prerequisites.[8] Another group—at least 12 States—has gone even further, enacting laws that allow concealed carry without a

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[8] See ALA. CODE § 13A-11-75; COLO. REV. STAT. § 18-12-203; FLA. STAT. § 790.06; GA. CODE § 16-11-129; 430 ILL. COMP. STAT. 66/10; IND. CODE § 35-47-2-3; IOWA CODE § 724.11; KY. REV. STAT. § 237.110; LA. STAT. § 40:1379.3; MICH. COMP. LAWS § 28.425B; MINN. STAT. § 624.714; NEB. REV. STAT. § 69-2430; N.C. GEN. STAT. § 14-415.12; NEV. REV. STAT. § 202.3657; OHIO REV. CODE § 2923.125; OR. REV. STAT. § 166.291; 18 PA. STAT. AND CONS. STAT. § 6109; S.C. CODE § 23-31-215; S.D. CODIFIED LAWS § 23-7-7;TENN. CODE § 39-17-1351; TEX. GOV'T CODE § 411.172; UTAH CODE § 53-5-704; VA. CODE § 18.2-308.02; WASH. REV. CODE § 9.41.070; WIS. STAT. § 175.60. See also *Gun Laws,* National Rifle Association-Institute for Legislative Action (providing a color-coded, interactive map detailing the permitting regime in all 50 States), available at https://www.nraila.org/gun-laws/.

license.[9] At the time that Robinson was stopped, West Virginia was a "shall issue" permit State, but it has since adopted permitless concealed carry.

These laws reflect state-level policy judgments about the right to carry firearms. In part, they reflect a robust view of individual liberty. But they also likely reflect a view, supported by empirical evidence, that promoting the lawful carry of firearms is not a danger to society, but rather may even reduce crime and make society safer.

Statistics show that individuals legally carrying a firearm—especially those who posess a concealed carry permit—are less likely to be involved in criminal activity. See generally John R. Lott, Jr., MORE GUNS, LESS CRIME (University of Chicago Press, 3d ed. 2010); see also Florenz Plassmann & John Whitley, *Confirming "More Guns, Less Crime*," 55 Stan. L. Rev. 1313 (2003). One recent article examining data from Texas found that permit holders are, compared to the general public, "ten times less likely to commit a

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[9] Twelve States have "full" permitless concealed-carry regimes—that is, they have extended the right to all qualifying citizens. See ALASKA STAT. § 11.61.210; ARIZ. REV. STAT. § 13-3102; IDAHO CODE § 18-3302; KAN. STAT. § 75-7c03; ME. STAT. TIT. 25, § 2001-A; MISS. CODE § 45-9-101; MO. STAT. § 571.030; N.D. CENT. CODE § 62.103-01, 62.1-04-02, 04 (effective August 1, 2017); N.H. REV. STAT. § 159:6; W. VA. CODE § 61-7-7; WYO. STAT. § 6-8-104; *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903) (establishing permitless carry in Vermont as a matter of state constitutional law). Four more States have "limited" permitless concealed-carry regimes that impose various restrictions. See ARK. CODE § 5-73-120; MONT. CODE § 45-8-317; N.M. STAT. § 30-7-2; OKLA. STAT. TIT. 21, § 1290.26. See also *Gun Laws*, *supra* n.8.

crime, eleven times less likely to commit an aggravated assault with a deadly weapon, and seven times less likely to commit deadly conduct with a firearm." Kevin Ballard, Peruta v. County of San Diego*: An Individual Right to Self-Defense Outside the Home and the Application of Strict Scrutiny to Second Amendment Challenges*, 47 Golden Gate U. L. Rev. 25, 59 (2017). Another article examining statistics related to concealed carry permit holders in Minnesota, Michigan, Ohio, Louisiana, Texas, and Florida concluded that "[i]t would be difficult to find a significant demographic group in the United States with a lower rate of handgun crimes." David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 Conn. L. Rev. 515, 564–70 (2009).[10]

The Fourth Circuit's test contravenes these state laws in several ways.

First, by concluding that the potential presence of a weapon makes an individual *automatically* dangerous, the Fourth Circuit effectively declares invalid a key policy judgment likely motivating these laws. In the Fourth Circuit's view, an individual reasonably suspected of possessing a weapon during a

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[10] See also Christopher Ingraham, *New Evidence Confirms What Gun Rights Advocates Have Said For A Long Time About Crime*, The Washington Post (July 27, 2016) (citing a University of Pittsburgh study which concluded that "lawful gun owners commit less than a fifth of all gun crimes"); John R. Lott, Jr. & John E. Whitley, *Concealed Carry Permit Holders Across the United States* 13 (July 16, 2015), available at https://crimeresearch.org/wpcontent/uploads/2015/07/2015-Report-from-the-Crime-Prevention-Research-Center-Final.pdf.

lawful *Terry* stop is, as a matter of law, "therefore dangerous." *Robinson*, 846 F.3d at 700. That is difficult to square with the willingness of an increasing number of state lawmakers, who undoubtedly place a high value on public safety, to make it *easier* to carry a concealed firearm.[11] As discussed above, those lawmakers likely believe that promoting the lawful carry of firearms is not a danger to society, but a benefit.

Second, the Fourth Circuit's approach may make it more likely that an individual in these States will be subject to a *Terry* frisk, when the opposite should be true. As many courts have recognized, the existence of these state laws should create the presumption that an individual suspected of carrying a firearm is doing so lawfully. See, *e.g.*, *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132 (CA6 2015) ("Where it is lawful to possess a firearm, unlawful possession 'is not the default status.'"). In light of the statistics discussed above, that presumption should also mean there is a lower likelihood of a violent confrontation with police, and therefore less need for a protective search. As this Court explained in *Maryland v. Wilson*, 519 U.S. 408 (1997), the "possibility of a violent encounter" during a *Terry* stop often stems from "the fact that evidence of a more serious crime might be uncovered during the stop." *Id.* at 414. The statistics above suggest that is

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[11] Prior to 2003 (when Alaska eliminated its permit requirement), Vermont was the only State that allowed permitless carry of concealed firearms. Every other State that has adopted that regime, see n.9, *supra*, has done so since 2010.

less likely where someone is lawfully carrying a firearm.

But the Fourth Circuit's novel standard may actually increase the likelihood that law-abiding citizens will be subjected to *Terry* frisks in States that promote lawful carry. In such States, courts may take into account the relative ease of carrying a concealed firearm lawfully when assessing whether an officer has articulated the required reasonable suspicion necessary for a *Terry* frisk. That would make it easier to satisfy the Fourth Circuit's test, which requires only reasonable suspicion that a weapon is present, and thus may result in a greater number of frisks.

Third, the Fourth Circuit's test practically impedes the States' efforts to promote lawful carry. As discussed in Section I.A. above, the Fourth Circuit has effectively forced an individual to choose between her Second Amendment right to bear arms and her Fourth Amendment protection against being searched. That burden will discourage at least some individuals from lawfully carrying a firearm, frustrating at least one of the purposes behind these state laws.

II. The decision below contravenes this Court's jurisprudence by permitting a *Terry* frisk based solely on reasonable suspicion that a detained individual is armed.

Beyond its significant and unnecessary impact on the right to bear arms, the Fourth Circuit's unitary inquiry also contravenes this Court's precedent in several ways, while doing nothing to enhance the interest of officer safety already recognized in (and protected by) *Terry*. The Fourth Circuit's interpretation is inconsistent with *Terry* itself, this Court's cases applying *Terry*, and other Fourth Amendment precedents that have rejected categorical rules based on generalized perceptions of dangerousness. For those reasons, as well, certiorari should be granted.

A. The Fourth Circuit's unitary inquiry cannot be squared with *Terry*.

Contrary to the conclusion of the Fourth Circuit below, the discussion in *Terry* of the requirements for a frisk of a lawfully detained individual clearly sets forth *two* independent elements: an officer must reasonably suspect the individual to be both "armed" *and* "dangerous."

The threshold requirement is a reasonable suspicion that the individual is armed. As the Court stressed repeatedly, the only purpose of a *Terry* frisk is to "search for weapons." 392 U.S. at 24–26. The power to conduct a *Terry* frisk is "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer" after a lawful

Terry stop. *Id.* at 27. The "*sole* justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other [arms]." *Id.* at 29 (emphasis added). It is "*not* justified by any need to prevent the disappearance or destruction of evidence of crime." *Ibid.* (emphasis added).

But suspicion of the presence of a weapon is not alone enough. Were that true, the *Terry* Court would not have additionally stressed the officer's "reasonable apprehension of danger." *Id.* at 26. Nor would the Court have refused to adopt any bright-line rules, concluding that each *Terry* case must "be decided on its own facts." *Id.* at 30. As the Court summarized, "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

As the dissent below observed, the question under *Terry* is not whether a weapon alone poses a threat to the officer or others, but rather "whether a *person* carrying [the weapon] is a danger to the police or others." *Robinson*, 846 F.3d at 708 (Harris, J., dissenting) (emphasis in the original) (citing *Terry*, 392 U.S. at 24). A *Terry* frisk is permissible "[w]hen an officer is justified in believing that *the individual* whose suspicious behavior he is investigating at close range" poses a threat of physical harm. 392 U.S. at 24 (emphasis added). The *Terry* Court was concerned with whether the officer has "reason to believe that he

is dealing with an armed and dangerous *individual*." *Id.* at 27 (emphasis added).

Thus, the *Terry* Court repeatedly qualified its discussion of weapons throughout the opinion. It did not suggest that an officer could conduct a pat-down for just *any* weapon. Rather, the Court said that a police officer could perform a limited search for "a weapon *that could unexpectedly and fatally be used against him*," "weapons *which might be used to harm the officer or others nearby*," "hidden instruments *for the assault of the police officer*," and "weapons *which might be used to assault him*." *Id.* at 23, 26, 29, 30 (emphases added).

Consistent with this reasoning, the *Terry* Court repeatedly described the requirements for a *Terry* frisk with some variation of the phrase "armed *and* dangerous." 392 U.S. at 24–25, 27–28, 30. Absent any indication that the phrase was a preexisting term of art,[12] the words should be read in their usual sense, which means that *both* elements are independently required. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116–17 (2012) (explaining that when used in its ordinary conjunctive sense, the word "and" implies the word "both" before the first of two elements so connected). Just as Congress may enact laws that are *both*

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[12] The specific phrase "armed and dangerous" did not appear in any reported federal decision prior to 1961, and appears a total of four times in the federal reporter (twice in one district court opinion, and two separate times in the circuit courts of appeals) prior to *Terry*, where it was first used by this Court. No pre-*Terry* use had legal significance.

"necessary" and "proper,"[13] a *Terry* frisk is permissible only when an officer reasonably believes that a detained individual is *both* armed *and* dangerous.

The Fourth Circuit relied below on a single word in *Terry* to reach its contrary conclusion. In applying its new rule, the *Terry* Court determined "on the facts and circumstances" in that case that "a reasonably prudent man would have been warranted in believing [the detained individual] was armed and *thus* presented a threat to the officer's safety." *Id.* at 28 (emphasis added). Pointing to the word "thus," the Fourth Circuit read *Terry* to permit a frisk based solely on an officer's suspicion that a weapon is present.

But that one word cannot bear the weight of the Fourth Circuit's conclusion. The court of appeals ignored entirely the reasoning in *Terry*, which, as explained above, focuses not on the mere presence of a weapon but rather the case-by-case dangerousness of the detained individual. The Fourth Circuit also has no explanation, despite its hypertextual reading of one line in the opinion, for the six other times the *Terry* Court used the phrase "armed and dangerous" without the word "thus."

Read in context of the entire opinion, the word "thus" is hardly the secret decoder to *Terry* that the Fourth Circuit makes it out to be. The *Terry* Court did not, with that one word, sweep away all of its previous

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[13] See *McCulloch v. Maryland*, 17 U.S. 316, 367 (1819) ("It is not 'necessary or proper,' but 'necessary and proper.' The means used must have both these qualities.").

emphasis on both the presence of a weapon and the dangerousness of the individual. Rather, the sentence in question says little more than that the "facts and circumstances" in *Terry* met both requirements. *Ibid.* The officer was justified in suspecting not only that the detained individual possessed a weapon, but also that the presence of a weapon on that particular individual made him "a threat to the officer's safety." *Ibid.*

B. The unitary inquiry is inconsistent with subsequent jurisprudence applying the *Terry* standard.

The Fourth Circuit also relied on this Court's *per curiam* decision in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). See *Robinson*, 846 F.3d at 696, 699–701. In *Mimms*, the Court upheld a *Terry* frisk where the officer observed a "bulge" in the detained individual's jacket. The Court explained in a single sentence: "The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer." *Mimms*, 434 U.S. at 112. Pointing to this sentence, the Fourth Circuit concluded that this Court permitted a *Terry* frisk of Mimms based solely on his "status of being armed." *Robinson*, 846 F.3d at 700.

Whatever might be said of the cursory analysis in *Mimms*, the Fourth Circuit's singular focus on the presence of a weapon cannot be squared with this Court's other cases on *Terry* frisks, which the court of appeals failed to address. One such case is *Adams v. Williams*, 407 U.S. 143 (1972), in which this Court

upheld a *Terry* frisk that involved a police officer reaching through an open window to secure a weapon. The officer had received a tip that "an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist." *Id.* at 145.

In upholding the *Terry* frisk, the *Adams* Court stressed numerous factors beyond the officer's reasonable suspicion that a firearm was present. The officer had "ample reason to fear for his safety," the Court explained, because he was "investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning." *Id.* at 147–48. Moreover, "[w]hen [the individual] rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at [the person's] waist became an even greater threat." *Id.* at 148. All of these facts made it reasonable for the officer to conclude that the individual was both armed *and* dangerous.

A second case is *Ybarra v. Illinois*, 444 U.S. 85 (1979), in which this Court held a *Terry* frisk of a tavern patron unlawful. The subject of the frisk, Ybarra, was searched even though he had made "no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers" who had a search warrant for the tavern where Ybarra was a patron. *Id.* at 91. Because the warrant did not apply to Ybarra, the government

relied on *Terry* to justify the frisk, but the Court disagreed.

Ybarra reaffirms that a *Terry* frisk requires both suspicion of the presence of a weapon and dangerousness of the detained individual. To begin with, the Court stated that the frisk failed under *Terry* because it was "not supported by a reasonable belief that [Ybarra] was armed *and* presently dangerous[.]" *Id.* at 92–93 (emphasis added). Then, in finding *Terry* inapplicable, the Court specifically observed not only that Ybarra "gave no indication of possessing a weapon," but also that he did not appear to be dangerous. *Id.* at 93. Ybarra "made no gestures or other actions indicative of an intent to commit an assault" and "acted generally in a manner that was not threatening." *Ibid.*

A third case is *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, this Court upheld what amounted to a *Terry* frisk of the passenger compartment of an automobile. 463 U.S. at 1036–37, 1052. Police officers observed a vehicle driving erratically before it swerved off the road into a ditch. *Id.* at 1035–36. The officers stopped to investigate. When interacting with the driver outside the vehicle, both officers saw a large hunting knife on the floor of the car by an open door. *Id.* at 1035. After detaining the driver, one officer shined his flashlight into the car in order to "search for . . . weapons." *Ibid.*

Applying *Terry* to the officers' "protective search[]" of the vehicle, the *Long* Court again reaffirmed that a *Terry* frisk requires both the

possible presence of weapons and a separate suspicion of dangerousness. *Id.* at 1049. The Court held that a *Terry* search of an automobile is justified when an officer believes: (1) "that the suspect is dangerous"; and (2) that "the suspect may gain immediate control of weapons." *Ibid.* In other words, the *Terry* search may occur if there is reasonable suspicion that the suspect is both effectively armed and presently dangerous.

Finally, this Court discussed the standard for a *Terry* frisk in *Arizona v. Johnson*, 555 U.S. 323 (2009). Recounting *Terry* and several of its follow-on cases, including *Mimms*, this Court repeatedly described the test for a *Terry* frisk as requiring reasonable suspicion that a detained individual is both "armed *and* dangerous." *Id.* at 330 (emphasis added); see also *id.* at 327, 331–332. The Court summarized *Terry* as permitting a police officer "to act instantly on reasonable suspicion that the persons temporarily detained are armed and dangerous." *Id.* at 330. Nothing in *Arizona* supports the Fourth Circuit's conclusion that a *Terry* frisk is permissible based solely on reasonable suspicion that such individuals are armed.

C. The Fourth Circuit's unitary inquiry conflicts with precedents of this Court that reject categorical rules based on generalized perceptions of dangerousness.

The Fourth Circuit's approach is inconsistent, as well, with several of this Court's Fourth Amendment precedents that refused bright-line rules premised on generally perceived dangerousness. The decision below creates a categorical rule that, during a lawful *Terry* stop, a person reasonably suspected of possessing any weapon is so inherently dangerous as to always justify a protective frisk. As the court of appeals explained, "when the 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* frisk." *Robinson*, 846 F.3d at 699 (quoting *Terry*, 392 U.S. at 27) (internal citation omitted). But in at least two cases, this Court has refused to adopt similar categorical exceptions to the Fourth Amendment.

In *Florida v. J.L.*, 529 U.S. 266 (2000), this Court declined to categorically permit a *Terry* stop any time an officer receives "a tip alleging an illegal gun," no matter the reliability of that tip. *Id.* at 272. "Firearms are dangerous," this Court acknowledged. *Ibid.* And armed criminals pose a "serious threat . . . to public safety." *Ibid.* But even so, an "automatic firearm exception" premised on that generally perceived danger "would rove too far." *Ibid.* The Court held that "an anonymous tip" that a person is carrying an illegal gun must "bear standard indicia of reliability in order to justify a [*Terry*] stop." *Id.* at 274.

Similarly, in *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court refused to ratify a blanket exception to the Fourth Amendment's "knock-and-announce" rule in cases involving felonious drug delivery because of the likelihood for violence. *Id.* at 387–88. The lower court had reasoned that, in light of the propensity for drug dealers to be armed and their common willingness to resort to violence, the danger posed to officers serving drug-related warrants justified a categorical exception. *Id.* at 392–93. This Court disagreed, refusing to create a blanket expection based on a generalized perception of danger. While "drug investigation[s] frequently . . . pose special risks to officer safety," the Court noted, "not every [such] investigation will pose th[is] risk[] to a substantial degree." *Id.* at 393. Thus, the Court held that officers who wished to engage in a "no-knock" entry needed to demonstrate that they had "reasonable suspicion. . . under the particular circumstances" that announcing their presence "would be dangerous or futile." *Id.* at 394.

Neither *J.L.* nor *Richards* can be squared with the Fourth Circuit's bright-line rule that merely being suspected of possessing a weapon during a lawful *Terry* stop makes a person sufficiently dangerous to justify a *Terry* frisk. Both cases reject that sort of generalization, and the Fourth Circuit should have, as well. Though any armed individual detained by police is potentially dangerous, many lawfully-armed individuals pose very little or no threat at all. Given the intrusion a frisk represents to an individual's Fourth Amendment rights, such a frisk must be

justified by an individualized determination that the subject of the frisk is *both* armed *and* dangerous.

CONCLUSION

The petition for a writ of certiorari should be granted.

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