No. 18-9399

IN THE
Supreme Court of the United States

PAUL JOHNSON, JR., *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

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

**Brief *Amicus Curiae* of
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INTEREST OF THE *AMICI CURIAE*[1]

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Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

The police subjected Petitioner to a stop and frisk outside his home, based on what the district court concluded was "reasonable suspicion." Petition for Certiorari ("Pet. Cert.") at 6. The frisk of Petitioner, conducted while he was lying on his stomach on the ground with his hands handcuffed behind him, confirmed not only that he had no firearm on his person, but also that he carried no weapon of any kind. *Id*. at 4-5. The frisk did, however, reveal one hard, round, oval-shaped object in a pocket. Rather than ending the search when police found Petitioner to be unarmed, the police continued the search and removed that small item from his pocket, which was found to be a single .380 caliber bullet. *Id.* at 5. That discovery began a chain of events that resulted in Petitioner being charged as a felon-in-possession, although the police did not know he was a felon (or in possession) at the time of the stop and frisk. *Id.* at 15, n.1.

At trial, Petitioner moved to suppress the fruits of the search, which was denied by the district court. United States v. Johnson, 2016 U.S. Dist. LEXIS 193567 (S.D. Fla. May 19, 2016). On appeal, a unanimous panel reversed. United States v. Johnson, 885 F.3d 1313 (11th Cir. 2018). However, the Eleventh Circuit then granted *en banc* review, vacating the panel decision and ordering rehearing. United States v. Johnson, 892 F.3d 1155 (11th Cir. 2018).

By a 7-5 vote, the Eleventh Circuit upheld the validity of the search, agreeing with the district court

that a Terry search properly continued even after the police confirmed that the Petitioner was unarmed. The majority opinion then proceeded to detail the circumstances surrounding the stop and frisk. United States v. Johnson, 921 F.3d 991 (11th Cir. 2019). These factors included, *inter alia*, that the search occurred at night, in a high-crime area, based on a call from an unknown neighbor. *Id*. at 995. The *en banc* court ostensibly concluded that, based on the totality of the circumstances, the search was "reasonable" and thus "constitutional," However, two dissenting opinions detailed reasons why the sole factor undergirding the majority opinion was the police officer's discovery of ammunition — a single bullet — rather than any of the other circumstances of the search.

SUMMARY OF ARGUMENT

This case provides the Court with an excellent vehicle to re-examine the deeply flawed Terry stop-and-frisk line of cases, in view of this Court's recent return to the property principles undergirding the Fourth Amendment.

For the first 176 years of our nation, the first clause of the Fourth Amendment — "[t]he right of the people to be secure in their persons, houses, papers. and effects, against unreasonable searches and seizures, shall not be violated" — protected the specified common law property rights from government searches and seizures **unless** the government could demonstrate a property right superior to the individual right. Only if the property

at issue was contraband, the fruit of a crime, the instrumentality of a crime, or suffered some defect of title, would it then be subject to the second clause of the Amendment: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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

Departures from the Fourth Amendment's history and text caught the attention of the late Justice Scalia

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

and Justice Thomas. Justice Scalia, writing the majority opinion in both United States v. Jones (2012) and Florida v. Jardines (2013), re-established the Fourth Amendment property "baseline," below which the stop-and-frisk privacy-based doctrine may not go. The totality-of-the-circumstances test for "unreasonableness" is totally incompatible with a properly stated and applied 18th century standard of "unreasonableness," as stated by Justice Thomas in dissent in Carpenter v. United States, just this last October term.

The majority opinion by Judge William Pryor also raises important Second Amendment concerns. His opinion purports to uphold the search based on the totality of the circumstances, but instead Judge William Pryor adopted what five dissenting judges correctly understood to be a *per se* rule which always allows seizure of any ammunition found during a Terry search. Such a rule cannot be justified by the Terry decision, as it is not based on a concern for officer safety. Rather, the majority opinion's rule treats with special disfavor the private possession of ammunition — the possession of which is constitutionally protected under the Second Amendment.

Moreover, the Court should reconsider the premise of a Terry stop and frisk in the light of District of Columbia v. Heller. At the time that Terry was decided, it was thought by many that almost every citizen carrying a gun did so for a nefarious reason, which would pose a threat to officer safety. Today, however, millions of Americans routinely carry

firearms for purposes of self-defense or other valid reasons, in no way related to criminal activity. In 2017, 17.25 million Americans had concealed carry permits, and millions more live in states which acknowledge constitutional carry and do not require permits. In 1968, a police encounter with an armed citizen might have given rise to a concern for officer safety, but in 2019, no such assumption to support a "frisk" of an American citizen can be made.

ARGUMENT

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

A. The Genesis of the Stop and Frisk Rule.

Fifty-one years ago, this Court sanctioned what has become one of the most contentious yet common police practices — stopping and searching persons on the nation's sidewalks and streets, on suspicion that the person is up to no good. *See* Terry v. Ohio, 392 U.S. 1 (1968). Shackled by the then-prevailing constitutional assumption that no such intrusion was permissible (*id.* at 35 (Douglas, J., dissenting)), a nearly unanimous Court invented the rule of "stop-and-frisk," enabling the police, with only reasonable suspicion, to interfere with a person's freedom of movement and at the same time, pat down the suspect for weapons in the name of protecting public safety. *Id.* at 22-27. *See* Minnesota v. Dickerson, 508 U.S. 366, 379-83 (1993) (Scalia, J., concurring).

In support of its brand new doctrine, this Court quoted the first phrase of the Fourth Amendment which states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." *See* Terry at 8. Completely missing at the outset of the genesis of this new doctrine was that Amendment's second phrase stating that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendment IV. This omission was caught by the lone dissenting voice, Justice William O. Douglas, who pointed out that it was agreed by all, that the "stop" in Terry was a Fourth Amendment "seizure" and that the "frisk" was a Fourth Amendment "search," and neither would have been permissible under the Warrant Clause unless based upon "probable cause." Terry at 35-36 (Douglas, J., dissenting). How, Justice Douglas asked, under the new Terry rule, could it be "that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action." *Id.* at 36.

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

> But we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could

> not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures. [*Id.* at 9.]

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

One might first inquire, what "general proscription against unreasonable searches and seizures" did Chief Justice Warren have in mind? He asserted that "the **central** inquiry under the Fourth Amendment [is] — the **reasonableness** in all the circumstances of the particular governmental invasion of a citizen's **personal security**." *Id.* at 18 (emphasis added). But the Fourth Amendment text is both more specific, and at the same time more comprehensive, than that. As Justice Scalia observed in United States v. Jones:

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

Thus, the Amendment "secures" the People in four categories of fixed common law property rights — their "persons, houses, papers, and effects" — not just their

personal private interests, as determined by a judicially contrived and administered standard of reasonableness. As Justice Scalia put it in Jones:

> What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a *minimum* the degree of protection it afforded when it was adopted. [*Id.* at 411.[3]]

In contrast, the Terry ruling laid down by Chief Justice Warren is not fixed, but fluctuating, the outcome dependent upon a judicial assessment of reasonableness in light of all the relevant circumstances, as the *en banc* court below noted. Johnson, 921 F.3d at 997-1000. ("[W]e assess only whether an officer acted reasonably in his circumstances."). In short, the job of the judge in a Fourth Amendment stop-and-frisk case is like that of a jury in an automobile accident case, applying a standard of reasonable care under the "totality-of-the-circumstances test" in order to ascertain fault.

B. Privacy versus Property.

It has become commonplace in modern American practice to address constitutional issues with only passing reference to the text, history, and purpose of the relevant constitutional text. This has been

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

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

As Justice Scalia recently reminded us: "[W]hen it comes to the Fourth Amendment, the home is first among equals [because] [a]t [its] 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" Florida v. Jardines, 569 U.S. 1, 6 (2013). In other words, the Fourth Amendment establishes a property rights baseline that when the government physically intrudes "in a constitutionally protected area," a Fourth Amendment "search" has occurred. *Id.* at 7.

To be sure, in his 1993 concurring opinion in Dickerson, Justice Scalia expressed his opinion that "[t]here is good evidence ... that the 'stop' portion of the Terry 'stop-and-frisk' holding accords with the common law[,] [but] no clear support at common law for physically searching the suspect." *Id.* at 380-81. Drawing on this statement and other references to Justice Scalia's Dickerson opinion, Petitioner urges

this Court to grant his petition to determine if this Court's stop-and-frisk jurisprudence conforms to the "original" meaning of the Fourth Amendment text. *See* Pet. Cert. at 10-13. But Justice Scalia's initial probe into the validity of stop-and-frisk under the Fourth Amendment is not the only reason to grant this petition.

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

Just this last October term, this Court wrestled with yet another Fourth Amendment challenge to a widely used high-tech investigative practice, in which the meaning and application of the Katz two-pronged privacy test was hotly contested. *See* Carpenter v. United States, 138 S.Ct. 2206 (2018). In his dissenting opinion, Justice Thomas reminded us that the adoption of that test of reasonableness "profoundly changed our Fourth Amendment jurisprudence[,] [taking] only one year for the [Terry] Court to adopt [the Katz] test" (*id.* at 2237), which soon thereafter became the "lodestar" for determining whether a particular "search" or "seizure" was "unreasonable." *Id.* at 2243. But Justice Thomas observed that:

> the Katz test invokes the concept of reasonableness in a way that would be foreign to the ratifiers of the Fourth Amendment. Originally, the word "unreasonable" in the Fourth Amendment likely meant "against reason" — as in "against the reason of the common law...." [*Id.* at 2243.]

Emphasizing this point, Justice Thomas recounted that:

> Locke, Blackstone, Adams, and other influential figures shortened the phrase "against reason" to "unreasonable." Thus, by prohibiting "unreasonable" searches and seizures in the Fourth Amendment, the Founders ensured that the newly created Congress could not use legislation to abolish the established common-law rules of search and seizure. [*Id.* (citation omitted).]

This understanding of the meaning of "unreasonable" in the Fourth Amendment in this Court prevailed until Warden v. Hayden, 387 U.S. 294 (1967), decided just seven months before Katz, which was the vehicle chosen by Justice Brennan to elevate privacy over property "as the organizing constitutional idea of the 1960s and 1970s" in contrast to "[t]he organizing constitutional idea of the founding era ... property." *See* Carpenter at 2240 (Thomas, J., dissenting).

Although the Fourth Amendment prohibition is directed at "unreasonable" searches and seizures, the meaning of "unreasonable" is contextual and unique — different from the meaning of that word as applied by juries in tort cases, or by judges in suits for an injunction, where competing interests may be properly balanced *ad hoc*. Rather, the Fourth Amendment's meaning of "unreasonable" was designed as an objective, fixed rule to govern the relationship between the government and its citizens — a direct product of

specific historic events involving the abusive exercise of government power against the liberty and property of individual citizens. *See, e.g.,* Hayden at 313-21 (Douglas, J., dissenting). As the Court in Heller has reminded us, "[t]he very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." District of Columbia v. Heller, 554 U.S. 570, 634 (2008). In short, there is no judicial balancing to be done — as the Fourth Amendment, like the Second and the First, "is the very *product* of an interest balancing by the people." *Id.* at 635.

D. The Property Principle Explained and Applied.

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

> The search for and seizure of **stolen or forfeited goods,** or goods liable to duties and concealed to avoid the payment thereof, are **totally different** things from a search for and seizure of a man's **private books and papers** for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. **In the one case, the government is entitled to the possession of the property; in the other it is not.** [*Id.* at 623 (emphasis added.]

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

> The principles laid down in this opinion affect the very essence of constitutional liberty and security.... [T]hey apply to all invasions on the part of the Government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the

> rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his **indefeasible right of personal security, personal liberty and private property**, where that right has never been forfeited by his conviction of some public offence. [Boyd at 630 (emphasis added).]

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

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

Thus, Gouled, in turn, brought the Boyd "doctrine" into its "full flowering ... where an opinion was written by ... Justice Clarke for a unanimous Court that included both ... Justice Holmes and ... Justice Brandeis"[4] stating that:

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

> The prosecution was for defrauding the Government under procurement contracts. Documents were taken from defendant's business office under a search warrant and used at the trial as evidence against him. **Stolen or forged papers could be so seized**....; so could lottery tickets; **so could contraband;** so could property in which the public had an interest.... **But** the papers or documents fell in none of those categories and the Court therefore held that even though they had been taken under a warrant, they were inadmissible at the trial as **not even a warrant, though otherwise proper and regular, could be used 'for the purpose of making search to secure evidence'** of a crime. [Hayden at 319 (Douglas, J., dissenting) (emphasis added).]

E. The Property Principle Abandoned.

Forty-six years after Gouled, however, this Court abandoned this well-established Fourth Amendment jurisprudence based upon "property rights" in favor of one rooted in an emerging right of "privacy." *See* Hayden at 301-304. Claiming dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts," Justice Brennan — writing for a bare majority of five justices — jettisoned the time-honored rule that a search for "mere evidence" was *per se* "unreasonable." *Id.* at 295-304. Justice Brennan claimed that the distinction between (i) "mere

evidence" and (ii) "instrumentalities [of crime], fruits [of crime], or contraband" was "**based on premises no longer accepted** as rules governing the application of the Fourth Amendment." *Id.* at 300-01 (emphasis added). Discarding the notion that the Fourth Amendment requires the government to demonstrate that it has a "superior property interest"[5] in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth Amendment from "irrational,"[6] "discredited,"[7] and "confus[ing]"[8] decisions of the past, and thereby would provide a more meaningful protection of "the principal object of the Fourth Amendment [—] the protection of privacy rather than property...." *Id.* at 304.

Concurring in the result, but not in the reasoning, Justice Fortas (joined by Chief Justice Warren) stated that he "cannot join in the majority's broad — and ... totally unnecessary — repudiation of the so-called 'mere evidence' rule." *Id.* at 310 (Fortas, J., concurring). Resting his concurrence on the time-honored "'hot pursuit' exception to the search-warrant requirement,"[9] Justice Fortas sought to avoid the

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[5] *Id.* at 303-04.

[6] *Id.* at 302.

[7] *Id.* at 306.

[8] *Id.* at 309.

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

creation of what he called "an **enormous and dangerous hole** in the Fourth Amendment"[10]:

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

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

> **[I]llegitimate and unconstitutional practices** get their first footing ... by **silent approaches and slight**

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

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

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

F. The Property Law Baseline Reestablished.

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

The *en banc* court below found the stop and frisk engaged in by the Miami police complied with the Terry "reasonableness" test. According to the majority opinion, that test required the court to ascertain whether, in the totality of the circumstances, the police had reasonable suspicion that Johnson was engaged in a burglary and, after a pat down search yielded ammunition, that it was reasonable for the police officer to seize the ammunition and take whatever further steps were warranted in a high crime district to protect themselves and the public. In short, the encounter presented for resolution is a classic stop-and-frisk case, in which the search and seizure "must

be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." Terry at 20.

Yet, the text and history of the term "unreasonable," as employed in the Fourth Amendment, does not sanction searches and seizures under general proscriptive terms subject to a tort-like standard of care on investigative police work, but rather requires a standard of "reason," imposing upon the government certain fixed rules of the common law of property governing the people's inalienable rights to their "persons, houses, papers, and effects." *See* Carpenter at 2244 (Thomas, J., dissenting). In short, frisking of Americans after stops, no matter how "reasonable" they may seem to modern judges, have no place in the pantheon of fixed common law limits protecting the people's property.

II. THE *PER SE* RULE AUTHORIZING THE SEIZURE OF AMMUNITION FOUND DURING A TERRY STOP, AS WELL AS THE TERRY DOCTRINE ITSELF, SHOULD BE RE-EXAMINED IN LIGHT OF THE SECOND AMENDMENT.

Writing for the *en banc* Court, Judge William Pryor claimed to find the seizure of the round of ammunition to be reasonable, based on "'the concrete factual circumstances of [the] individual case[],'' also called "'the totality of the circumstances — the whole picture....'" Johnson, 921 F.3d at 998; *see also id.* at 1003. However, two of the dissenting opinions, signed

by five judges,[11] explain in detail why the rule adopted in the majority opinion is, indeed, a *per se* rule that authorizes police to seize any ammunition in every Terry stop — without the need to consider the totality of circumstances. Although Judge William Pryor denied this characterization of his opinion (*id*. at 1002-03), the dissenters were correct, as this is exactly what the majority opinion does.

Judge William Pryor based his decision on the supposed danger posed by the single bullet found on Petitioner, and nothing more. From the first sentence of his opinion, it was all about the bullet: "This appeal requires us to decide whether a police officer violated the Fourth Amendment when he removed a round of live ammunition and a holster from the pocket of a suspect during a protective frisk." *Id*. at 995. To be sure, the majority opinion initially purports to rely on the totality of circumstances of the incident, as where it states: "As an essential part of a lethal weapon, Johnson's ammunition threatened the safety of Officer Williams and others **in this circumstance**." *Id*. at 998 (emphasis added). But Judge William Pryor goes on to make clear that the seizure was justified not by the totality of the circumstances of the Johnson case, but because of the presence of the bullet. His analysis melds together the bullet with a gun: "the round of ammunition is designed to become a deadly projectile. Ammunition is not a gun, but it is an integral part of what makes a gun lethal." *Id*.

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[11] *See id*. at 1012-25 (Rosenbaum, J., dissenting) and *id*. at 1030-31 (Jill Pryor, J., Wilson, J., Martin, J., and Jordan, J., dissenting).

In short, as Judge Rosenbaum correctly points out, the majority adopts a *per se* rule authorizing the seizure of ammunition:

> [T]he reasoning in question dictates today's holding that Johnson's bullet was properly seized — without reference to any actual circumstances existing at the time officers seized Johnson's bullet. So that same reasoning that made Johnson's bullet seizable here necessarily requires the conclusion that **ammunition is always seizable** during a proper Terry frisk. [*Id*. at 1014 (Rosenbaum, J., dissenting) (emphasis added).]

With the court below adopting a *per se* rule which singles out ammunition for special and negative treatment, it becomes necessary to review the *en banc* decision to determine not only if it infringes rights protected by the Fourth Amendment, but also by the Second Amendment. Thus, even assuming, *arguendo*, that the majority below was correctly decided under Terry, that would not entirely resolve the issue presented for review. When Terry was decided, the Second Amendment was generally thought to protect only the right of state governments to assemble militias. Since Heller in 2008, it has been clear that the Second Amendment protects an individual right. Although the right to keep and bear ammunition would seem to flow logically from the right to keep and bear a firearm, that issue has actually been litigated. *See* Jackson v. City & County of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) ("The Second Amendment protects 'arms,' 'weapons,' and 'firearms';

it does not explicitly protect ammunition. Nevertheless, without bullets, the right to bear arms would be meaningless.").[12] The Eleventh Circuit's *per se* rule concerning ammunition violates the Second Amendment.

Lastly, this case is a ready vehicle to reexamine the assumption that an armed citizen is a dangerous citizen. When Terry was decided in 1967, it was rare for Americans to be engaged in the concealed carry of firearms. A person who was carrying a firearm on his person was thought to pose a danger to the police, as few had permits to carry firearms. Today, 17.25 million Americans have permits to carry, and more live in states that do not require permits. Consider the following highlights contained in a 2018 study:

- Outside the restrictive states of California and New York, about 8.63% of the adult population has a permit.
- In fifteen states, more than 10% of adults have permits....
- Four states now have over 1 million permit holders: Florida, Georgia, Pennsylvania, and Texas.

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[12] The District of Columbia Court of Appeals has also concluded that the Second Amendment protects at least handgun ammunition in the home "for if such possession could be banned (and not simply regulated), that would make it 'impossible for citizens to use [their handguns] for the core lawful purpose of self-defense.'" Herrington v. United States, 6 A.3d 1237, 1243 (D.C. 2010) (citing Heller).

- Another 14 states have adopted constitutional carry in all or almost all of their state, meaning that a permit is no longer required.....
- Permits continued to grow much faster for women and minorities. Between 2012 and 2018, the percent of women with permits grew 111% faster for women and the percent of blacks with permits grew 20% faster than for whites. Permits for Asians grew 29% faster than for whites.
- Concealed handgun permit holders are extremely law-abiding. In Florida and Texas, permit holders are convicted of misdemeanors and felonies at one-sixth of the rate at which police officers are convicted. [John R. Lott, Concealed Carry Permit Holders Across the United States: 2018 (Crime Prevention Research Center: Aug. 14, 2018).]

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

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted to make clear that the Terry v. Ohio decision should not be broadened to authorize the police to have seized the bullet from Petitioner. Additionally, these *amici* urge the Court to use the opportunity presented by this case to reconsider its deeply flawed decision in Terry v. Ohio in light of the property principles undergirding the text and history of the Fourth Amendment (as

recognized in United States v. Jones), and in light of the individual right to keep and bear arms under the Second Amendment (as recognized in District of Columbia v. Heller).

Respectfully submitted,

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