No. 16-1532

IN THE

Supreme Court of the United States

SHAQUILLE M. ROBINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and impartial administration of justice.

NACDL has an interest in ensuring the fair and just development of basic criminal-law principles, especially those related to the scope of the Fourth Amendment's protections. NACDL believes that this case presents an appropriate vehicle for the Court to clarify the test for conducting a *Terry* stop-and-frisk. Such clarification would ensure fair and uniform application of the Fourth Amendment across jurisdictions while also providing needed guidance to criminal-defense lawyers and their clients, prosecutors, and lower courts.

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[1] In accordance with Supreme Court Rule 37.2(a), counsel of record received timely notice of the intention to file this brief, and all parties have consented in writing to the filing of this brief. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, their members, and its counsel made any monetary contribution intended to fund this brief.

SUMMARY OF ARGUMENT

The Fourth Circuit, joining a split among the circuit courts and state supreme courts, has concluded that the phrase "armed and presently dangerous" in *Terry v. Ohio* now just means "armed," because an armed person may be presumed dangerous. This collapses a two-part inquiry—one that properly balanced the need for police safety against key Fourth Amendment protections—into a single question: Did the officer reasonably believe the person he frisked was armed? Once this reasonable belief is established, an officer who properly stops an individual now has broad discretion to subject him to a *Terry* frisk. This assumption of dangerousness warrants review for two reasons.

First, the belief that any particular individual is armed has only become *more* reasonable as state legislatures pass laws expanding the ability to carry openly while also increasing the availability of non-discretionary concealed carry permits. This has already resulted in dramatically increased numbers of citizens lawfully carrying firearms, including a more than proportional increase in the number of minorities lawfully carrying firearms.

Accordingly, police officers now have the discretion to frisk almost *anyone* whom they have lawfully stopped. This broad authority to subject individuals to potentially demeaning, intrusive, and time-consuming frisks upsets careful checks created by our legal system and unnecessarily increases the risk of discriminatory policing. When an officer is freed of any obligation to articulate why he believes a particular individual is presently dangerous, he is

given the discretion to make stop-and-frisk decisions unmoored from the strictures of the Fourth Amendment. This exposes all individuals, indeed even those who choose not to exercise gun rights, to diminished Fourth Amendment protections.

Second, this approach undermines the independent policy-making authority of state legislatures. Dozens of States have made the decision to trust their citizens with the right to carry guns in public. Regardless of the merits of this decision, it is not for the courts to undermine it, including by freeing local officials to defy statewide judgments, by holding that citizens who exercise this right have unknowingly relinquished key Fourth Amendment protections.

This affront to federalism is particularly remarkable given that the policy judgment of the state legislatures is consistent with constitutional tradition whereas, the rule that the Fourth Circuit endorsed lacks support in either the common law or this Court's precedent. In fact, the Fourth Circuit's approach contradicts the long-standing common-law principle that a citizen armed in public is not, without more, doing anything to justify "terror to the people" and thus is not dangerous. And, in the course of rewriting history, the Fourth Circuit misreads several of this Court's precedents by taking their facts and analysis out of context. This doubly ahistorical move compounds the Fourth Circuit's undermining of States' legislative authority.

For these reasons, as well as those raised by Petitioner, this Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE DECISION BELOW MERITS REVIEW BECAUSE, GIVEN THE EXPANSION OF LAWFUL PUBLIC CARRYING, IT OPENS THE DOOR TO UNCHECKED RACIAL PROFILING.

States across the Country are increasing non-discriminatory access to concealed-carry permits while also liberalizing open-carry laws. Yet, under the per se approach adopted by the Fourth Circuit, once an officer reasonably believes an individual is armed, that officer can perform an "annoying, frightening, and perhaps humiliating" frisk without assessing whether the individual was "presently dangerous." *Terry v. Ohio*, 392 U.S. 1, 25 (1968). Given the growth of public firearm possession, this assumption makes it all too easy for police officers to engage in illegal and injurious racial profiling during otherwise lawful *Terry* stops. Such a potentially dangerous abuse of power warrants this Court's attention.

A. Over the past two decades, and especially in recent years, States have been expanding the rights of their citizens to carry firearms in public.

State legislatures are continuing to make it easier for citizens legally to carry firearms in public. *E.g.*, Jeffrey Bellin, *The Right to Remain Armed*, 93 Wash. U. L. Rev. 1, 17 (2015) ("In June 2002, seven States and the District of Columbia prohibited the concealed carrying of handguns. Today, no such bans remain."). Over the past two decades, this national trend has introduced firearms to a growing number of public spaces in which they had been banned, including

several major cities. *See id*. at 4. Thirty States now permit citizens to openly carry firearms without a license; fifteen States require either a license or permit; and only five States and the District of Columbia prohibit citizens from openly carrying firearms in public. *See* U.S. Gov't Accountability Office, GAO-12-717, *Gun Control: States' Laws and Requirements for Concealed Carry Permits Vary Across the Nation* 1 (2012).

What is more, every State in the Country now permits concealed carrying of firearms under certain conditions. *See id*. at 17. States are also steadily updating their licensing regimes for concealed-carry permits, shifting from "may issue" regimes (in which permits are issued at the discretion of state officials) to "shall issue" regimes (in which permits must be issued to all qualified applicants). *See id*. Over the past two decades, ten States have migrated from "may issue" to "shall issue," raising the total number of "shall issue" States to thirty-nine. *Id*. And by the end of 2016, "the number of concealed handgun permits soared to over 16.36 million—a 256% increase since 2007." John R. Lott, Jr., Crime Prevention Research Center, *Concealed Carry Permit Holders Across the United States: 2017* 28 (2017), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004915. At the same time, the number of States that had abolished permitting for concealed carry quadrupled from one to four. *Id*.

This change has helped to eliminate licensing discretion previously exercised to favor "[o]nly the political elite"—a practice that at times led to discriminatory firearm permitting. John Lott, *Women and Minorities Bear Arms*, Wall St. J., July

19, 2017; John Eligon & Frances Robes, *Police Shootings Highlight Unease Among Black Gun Owners*, N.Y. Times, July 8, 2016 (describing the racially discriminatory history of administering gun permits). Indeed, it was found that in Los Angeles—a "may issue" city—the Sheriff only issued permits to two groups of people: "judges and reserve deputies" and "friends of [the sheriff]." Gene Madaus, *Sheriff Lee Baca and the Gun-Gift Connection*, L.A. Weekly, Feb. 14, 2013. In part to avoid these concerns, several States have limited municipalities' ability to restrict the public carrying of firearms. *See, e.g.*, W. Va. Code § 8-12-5a(a) (effective Mar. 8, 2014); Ky. Rev. Stat. § 65.870 (effective July 12, 2012).

This trend toward equal access to permits also means that minorities now make up an increasing portion of firearm owners in the United States.[2] Among African Americans in particular, gun ownership has grown dramatically in recent years. *See* Rich Morin, *The Demographics and Politics of Gun-owning Households,* Pew Research Center (2014), http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/ (showing a 4% increase in gun ownership in 2014 compared to the same study a year earlier). This growth is, of course, most dramatic in States that have passed laws easing firearm restrictions. For example, in Texas (where the state legislature eased permitting requirements

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[2] Women also now make up a larger percentage of gun owners. In Connecticut, for example, female gun permit holders as a percentage of all permit holders rose from 24% in 2012 to 33% in 2016. Lott, Concealed Carry: 2017, *supra*, at 13.

in 2013) the number of African American concealed-carry permit holders increased from 10,389 in 2012 to 17,594 in 2014. John R. Lott, Jr., Crime Prevention Research Center, *Concealed Carry Permit Holders Across the United States: 2016* 13 (2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814691. What is more, from 1996 to 2014, the number of African American permit holders in Texas grew more than twice as quickly as the number of new Caucasian permit holders. *Id*.

As States continue to ease public-carrying restrictions, and as usage grows, it is also becoming increasingly common for individuals to lawfully carry firearms in urban areas. Eligon, *supra*. In fact, even as some cities have attempted to enact more onerous restrictions on public carrying, a growing number of state legislatures have passed laws preempting these very restrictions. *Id*. Between 2008 and 2013, state lawmakers overrode restrictive firearm ordinances in Philadelphia, Atlanta, Cleveland, Phoenix, and San Francisco, dramatically expanding the public square in which citizens can lawfully carry a firearm. *See, e.g.*, *City of Cleveland v. State*, 942 N.E.2d 370, 373 (Ohio 2010) (upholding the constitutionality of the state legislature's preemption of a city gun ordinance against a challenge by Cleveland).

B. The per se rule endorsed below allows for unchecked racial profiling, as officers encounter more citizens who are—or may be—legally armed.

As it becomes increasingly common to carry a firearm in public, a per se assumption of dangerousness makes less and less sense and is more

and more hazardous to law-abiding citizens, especially minorities. And there are collateral consequences to such a per se rule: It would apply not only to lawful stops of those carrying a firearm, but also to those carrying anything that appears to be one, including, say, a 5.5-inch iPhone strapped to the waist. Officers also do not have the time or capacity to frisk everyone they lawfully stop who has a potentially "suspicious" bulge on their hip. This means that officers will have to exercise added discretion when deciding whom to frisk. This opens the door to increased racial profiling.

Police officers already have broad discretion to stop an individual for any one of dozens of minor infractions that ordinarily go unenforced. An officer may stop an individual who commits a slight traffic offense even when it is clear that the officer would not have conducted the stop "absent some additional law enforcement objective." *Whren v. United States*, 517 U.S. 806, 806 (1996). Moreover, modern traffic codes cover almost every aspect of motor vehicle operations, making it "almost impossible for drivers to comply fully" with the law. Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2009 Cato Sup. Ct. Rev. 133, 166.

Add to this already broad authority a per se assumption of dangerousness, and police officers will have essentially unreviewable discretion to *Terry* frisk almost anyone. This per se assumption thus removes a key check on their conduct. Until now, an officer had to justify his decision to make potentially invasive physical contact with an individual during a *Terry* stop by pointing to objective indicia of dangerousness. Now, however, the mere belief the

individual is armed—a belief that is becoming more and more reasonable—allows an officer to frisk any lawfully stopped individual. This per se assumption of dangerousness thus increases both the breadth of discretion given to police officers when performing a stop and the depth of the potential intrusion into one's privacy and personal autonomy when this discretion is exercised.

While most officers will use this newfound power appropriately, it is too easily abused. Empirical evidence suggests that "individuals of color are more likely than white Americans to be stopped, questioned, searched, and arrested by police." Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 Fordham Urb. L. J. 457, 458 (2000). And this pattern appears to be persistent. *See* Renée McDonald Hutchins, *Stop* Terry: *Reasonable Suspicion, Race, and a Proposal to Limit* Terry *Stops*, 16 N.Y.U. J. Legis. & Pub. Pol'y 883, 917 (2013) ("Since *Terry*, data is increasingly proving that the loosening of constitutional standards is causing substantial harms to people of color nationwide."). The danger of discrimination under a per se assumption is plain: By eliminating the need to put forward evidence of an individual's dangerousness, courts remove an important check for ensuring that stop-and-frisk decisions are made based on actual assessments of dangerousness.

Indeed—and as a result—this per se assumption disproportionately discourages racial minorities from exercising their rights to bear arms. Unfortunately, this form of discrimination has deep roots in our Country. Starting in the late 1700s, most slave

States prohibited gun ownership by free African Americans. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 335-38 (1991). This trend persisted well beyond the Civil War, as state and local officials often denied African Americans equal access to gun licenses and permits. *See* Eligon, *supra*. The historical effects of this discrimination have taken decades to unravel and are still evident when one looks at gun ownership and carry rates nationwide, as discussed above.

Many States have attempted to undo this harmful discrimination by passing "shall issue" permitting laws, but fear of the police and the potential for an unwelcome—and possibly dangerous—encounter with an officer still looms large. Recent tragedies, such as the fatal shooting of Philando Castile,[3] have deterred many African Americans who wish to legally carry firearms. As one woman explained, "I really don't even want to carry my gun because I'm afraid that they'll shoot me first and then ask questions later." Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. Times, June 20, 2017. A per se assumption of dangerousness only fuels these fears by perpetuating a cycle of police distrust and deterring the lawful carrying of firearms by historically oppressed minorities.

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[3] *See generally* Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. Times, June 20, 2017.

The Fourth Circuit's decision below thus introduces hazards of national scope and importance, ones that call for this Court's attention.

II. THE DECISION BELOW MERITS REVIEW BECAUSE ITS RULE SETS THE FOURTH AMENDMENT AGAINST STATE POLICY JUDGMENTS, THE COMMON LAW, AND THIS COURT'S PRECEDENT.

In addition to the immediate harm that minority groups face in light of this per se assumption of dangerousness, the Fourth Circuit's opinion is also hostile to federalism and constitutional tradition. It blurs the respective roles of federal courts and state legislatures, and erodes foundational common-law principles that have for centuries allowed individuals to freely enter the public square unmolested by intrusive and potentially discriminatory police conduct. The decision below warrants review for this reason as well.

A. The per se assumption endorsed by the Fourth Circuit undermines the considered policy judgments of state legislatures.

The Fourth Circuit joined other federal circuit and state supreme courts in embracing a per se assumption that citizens lawfully carrying guns are "dangerous." This assumption undermines the considered policy judgments of dozens of state legislatures.

As described above, many States have made it easier in recent years for their citizens to carry firearms in public. *See supra* pp. 4-6. Such policies reflect the settled belief of States' elected representatives that lawfully armed citizens pose

little danger.[4] *See Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (acknowledging that public-carry States have struck what they consider "a proper balance" between public safety and individual gun rights). In an *amicus* brief filed with this Court just this year, twenty-six States—including West Virginia—expressed their belief that "shall issue" concealed-carry regimes "protect public safety." Brief of Alabama and 25 Other States as Amici Curiae in Support of Petitioners at 15, *Peruta v. California*, *cert. denied*, 137 S. Ct. 1995 (2017), www.scotusblog.com/wp-content/uploads/2017/03/16-894-cert-amicus-alabama.pdf.

The Fourth Circuit's decision undermines these considered judgments by categorically declaring lawfully armed citizens "dangerous" in the eyes of the Constitution. This per se assumption exposes all individuals to "annoying, frightening, and perhaps

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[4] This belief has an empirical basis and is supported by a "general consensus" of researchers. Bellin, *supra*, Wash. U. L. Rev. at 32. For example, Florida and Texas data show that "permit holders are convicted of felonies and misdemeanors at less than a sixth of the rate for police officers." John R. Lott, Jr., Crime Prevention Research Center, *Concealed Carry Permit Holders Across the United States: 2017* 21 (2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004915#. This remarkably low crime rate holds even for the crimes most closely linked with firearms use, such as aggravated assault with a deadly weapon (permit holders were eight out of 2,025 defendants convicted in 2016 in Texas) and aggravated robbery (zero out of 1,615 defendants convicted in 2016 in Texas). *See* Regulatory Serv. Div., Tex. Dep't of Pub. Safety, *Conviction Rates for Handgun License Holders* 1 (2017), http://www.dps.texas.gov/RSD/LTC/Reports/ConvictionRatesReport2016.pdf.

humiliating" frisks if officers suspect that they may be armed. *Terry*, 392 U.S. at 25.

Perversely, this exposure will be greatest in those States that have given their citizens the broadest firearms rights, because those are the States where police will most often have reason to suspect that residents are armed. The Fourth Circuit's rule thus permits police officers to assume the worst of legally armed citizens, directly contradicting the States' considered judgments. That result is irrational. When a "legislature has decided its citizens may be entrusted with firearms on public streets," local police departments "ha[ve] no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every 'gunman' who lawfully possesses a firearm." *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1133 (6th Cir. 2015).

Indeed, a per se assumption of dangerousness allows local governments and police departments, in collusion with courts, to undermine state policy in a peculiarly insidious way. As local-preemption laws testify, state and local governments sometimes disagree over the appropriate limits on the right to carry guns in public. Some States respond to this tension by giving local governments wide latitude to regulate firearms within their municipal limits; others have exercised their sovereign right to enact uniform state policies. In the latter group, a rogue municipality determined to resist its State's relatively permissive gun laws could—under the per se rule—encourage its police officers to seize on minor infractions as opportunities to stop and frisk armed (or suspected-to-be-armed) citizens. This is another

way in which the decision below would discourage residents from exercising their state-law rights, effectively flouting the legislature's choice of a uniform state policy.

As if to highlight these concerns, the en banc Fourth Circuit showed its disregard for West Virginia's policy judgment when it reasoned that "[t]he presumptive lawfulness of an individual's gun possession in a particular State does next to nothing" to dispel the assumption of dangerousness. *United States v. Robinson*, 846 F.3d 694, 701 (4th Cir. 2017) (en banc) (emphasis added) (citing *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013)). Like the Tenth Circuit in the case it cited, the Fourth Circuit succumbed to an all-too-common fallacy. It conflated the question of whether guns are dangerous—which this Court has answered in the affirmative, *see McLaughlin v. United States*, 476 U.S. 16, 17 (1986)—with the question of whether a *person* with a gun is always dangerous. *See Rodriguez*, 739 F.3d at 491 (conflating the two and treating *McLaughlin* as controlling the latter). It is the latter question, not the former, that matters for *Terry* and its progeny. *See Terry*, 392 U.S. at 24 (permitting a stop when the officer reasonably suspects "*the individual*" is "presently dangerous") (emphasis added); *see also Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (*Terry* permits a stop upon "reasonable suspicion that *the persons* temporarily detained are armed and dangerous") (emphasis added). And it is precisely this latter question that States answer in the negative when they decide to trust their citizens to carry firearms legally. That

considered legislative decision is entitled to respect—not summary override.[5]

B. A per se assumption is inconsistent with the common law and rests on a faulty reading of precedent.

In addition to undermining state policy judgments, a per se assumption of dangerousness flies in the face of the common law's historical attitude toward the carrying of firearms. The decision below also misread the precedents on which it relied, which are consistent with common-law history. The novelty of the Fourth Circuit's distrust of lawfully armed citizens, in the face of States' historically based contrary law, compounds the reasons for review. If the Fourth Amendment permits an ahistorical assumption that legally armed citizens are always dangerous, this Court should be the one to say so. If not, this Court should reaffirm our law's traditional tenet that citizens do not become dangerous in the eyes of the law simply because they exercise their right to carry firearms.

This Court has frequently interpreted the Fourth Amendment against the backdrop of pre-Founding Anglo-American common law. *See Kyllo v. United States*, 533 U.S. 27, 34 (2001) (reading the Amendment to secure "that degree of privacy against government that existed when [it] was adopted"); *Carroll v. United States*, 267 U.S. 132, 149 (1925)

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[5] It is no answer to say that state legislatures could reject the per se assumption by statute or that state courts could interpret their own constitutions' Fourth Amendment analogues more protectively. Courts should not gratuitously burden state legislators and judges with unnecessary problems to solve.

(similar). Likewise, the Court has looked to history to interpret the Constitution's meaning for firearms regulation. *See District of Columbia v. Heller*, 554 U.S. 570, 582-86, 592-95 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 768-77 (2010).

1. The voice of history is clear. At common law, and particularly by the time of the Founding, no stigma of dangerousness attached to an individual's mere lawful public carrying of a firearm.

English law regulated such behavior only when it was accompanied by indicia of dangerousness, from carrying "in such a Manner as will naturally cause a Terror to the People." William Hawkins, 1 *A Treatise of the Pleas of the Crown*, ch. 63, § 4 (Thomas Leach ed., 6th ed. 1787) (1716). This limited proscription—causing "a terror to the people"—was held "to have always been an offence at common law." *Id.*

Common-law courts resisted the imposition of broader restraints, tending to reduce them to this traditional offense. Take the medieval Statute of Northampton, which decreed, "[n]o man [may] . . . go nor ride armed by Night nor by Day, in Fairs, Markets, . . . nor in no part elsewhere." 2 Edw. III, c.3 (1328), *quoted in* Hawkins, *supra*, ch. 63, § 4. Facially, this sweeping language enacted a blanket restraint on the public carrying of weaponry. Yet in *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686), the King's Bench held that its meaning "was to punish people who go armed *to terrify the King's subjects*." *Id.* at 76 (emphasis added). In other words, the common law understanding regarding dangerousness was such that the court simply assimilated the statute to the narrower common-law offense, confirming that merely "go[ing] armed" was

no basis for a belief of dangerousness. *Id.* As a leading treatise confirmed several decades later, "no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people." Hawkins, *supra*, ch. 63, § 9.

What conditions transformed innocent public carrying into punishable "terror"? Commentators recognized an exception for "dangerous and unusual weapons," though they did not define the term. *See* Hawkins, *supra*, ch. 63, § 4; 4 William Blackstone, *Commentaries on the Laws of England* *149 (1768). The fullest treatment of "terror," however, came from the Recorder of London, in a 1780 opinion evaluating the lawfulness of a private self-defense association.[6] The Recorder's "best consideration" was not only that individuals could bear arms in public, but that they could even assemble in a group to do so, provided that (1) their "professed purpose and object" was "lawful," (2) they comported themselves "in a peaceable and orderly manner," (3) their numbers did not "manifestly and greatly exceed" their stated purpose, and (4) they did not commit spontaneous breaches of the peace. Recorder of London, "Legality of the London Military Foot-Association" (1780), *reprinted in* William Blizard, *Desultory Reflections on Police*,

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[6] The Recorder was the city's chief legal advisor and judge, and was typically "a grave and learned lawyer, skilful in the customs of the city." Thomas Allen, 2 *The History and Antiquities of London, Westminster, Southwark, and Parts Adjacent* 281 (1839). His 1780 opinion on public gun rights was "of wide interest" in the aftermath of the tumultuous anti-Catholic Gordon Riots. Leon Radzinowicz, 4 *A History of English Criminal Law* 107 (1968).

59, 62 (1785) (emphases omitted). The Recorder reached this conclusion by applying and expanding the traditional understanding that public carrying by an individual became a matter of legal concern only when accompanied by objective indicia of dangerousness. *See id.* at 59-61 (explaining the background individual right). Similarly, the court in *King v. Dewhurst*, 1 St. Tr. 529 (Lancaster Assize 1820), had "no difficulty in saying" that a person "has a clear right to protect himself when he is going singly or in a small party upon the road" but not to "carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm." *Id.* at 601-02.

Early American law drew the same line between mere lawful public carrying and prohibited "terror," which required something more than mere carrying. *See, e.g.*, *State v. Huntly*, 25 N.C. (1 Ired.) 418, 418 (1843) ("A man may carry a gun for any lawful purpose . . . but he cannot go about . . . to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people."); Charles Humphreys, *A Compendium of the Common Law in Force in Kentucky* 482 (1822) (given the constitutional right to bear arms, "it can only be a crime to exercise this right in such a manner, as to terrify the people unreasonably"). Like other tenets of our law, the traditional common-law attitude toward firearms crossed the Atlantic before the Founding and remained in force after it.

2. In spite of this history, the Fourth Circuit thought that two precedents of this Court—*Adams v. Williams*, 407 U.S. 143 (1972), and *Michigan v. Long*, 463 U.S. 1032 (1983)—abrogated the trust the

common law placed in lawfully armed citizens. *See Robinson*, 846 F.3d at 700-01. That conclusion is wrong. Both *Williams* and *Long* are consistent with our law's history—unlike an assumption that lawfully armed citizens are dangerous per se.

This is because the police officers in both *Williams* and *Long* faced other objective indicia of criminality and dangerousness beyond the mere fact of carrying. In *Williams*, the officer had received a tip about 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." 407 U.S. at 147. And when the officer asked the driver to step out of the car, he did not comply but instead simply rolled down his window. *Id.* at 148. "Under these circumstances"—not independent of them—the Court held that the officer had "reason to fear for his safety," justifying a protective frisk. *Id.*

Likewise, the officers in *Long* were on patrol late at night when "they observed a car travelling erratically and at excessive speed" before "swerv[ing] off into a shallow ditch." 463 U.S. at 1035. On being approached, the driver did not respond to requests and gave the officers the impression of being intoxicated. *Id.* at 1036. The Court's holding that a frisk for weapons was justified in these suspicious circumstances lends no support to the Fourth Circuit's blanket rule that an officer who suspects the presence of a weapon can *always* conduct a frisk. Indeed, *Long*'s language implies the opposite. The Court said that a *Terry* search requires officers to reasonably suspect "that the suspect is dangerous *and* the suspect may gain immediate control of

weapons," implying two independent conditions. *See id.* at 1049 (emphasis added).

The *Long* Court (in a footnote) did read *Williams* to "reject[ ] the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law." 463 U.S. at 1053 n.16 (citing *Williams*, 407 U.S. at 146). But that is just to say that an armed and dangerous person does not *cease to be* dangerous merely because he lawfully possesses his weapon. That truism is not equivalent to the Fourth Circuit's far broader holding: That a law-abiding citizen *becomes* dangerous merely because he is lawfully carrying a weapon.

As explained in Part I, the latter claim—unlike the objective-indicia-of-danger requirement—allows for arbitrary policing and profiling. That it also undermines the authority and judgment of state legislatures and is repugnant to our legal traditions provides all the more reason for this Court to review the assumption that legally armed citizens are dangerous per se.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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