No. 14-1045

IN THE

Supreme Court of the United States

SHAUN J. MATZ,

Petitioner,

v.

RODNEY KLOTKA, ET AL.,

Respondents.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In their opposition brief, Respondents do not squarely address the question presented in Matz's petition: whether the use of a firearm and handcuffs during an investigative stop of an individual *not suspected of any crime* exceeds the bounds of a permissible *Terry* stop where their use is justified only by officers' suspicions about a different individual. Instead, Respondents cite only cases holding that a *Terry* stop is not transformed into an arrest where officers reasonably believe that *the subject of the stop* is involved in criminal activity or directly poses a danger to the officer. *See, e.g.*, Opp. at 13-18.

Terry requires officers "to point to specific and articulable facts" that "justify[] the *particular intrusion*" in question. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (emphasis added). So while it may be within the bounds of a lawful *Terry* stop to order an attempted bank robber out of a vehicle at gunpoint and handcuff him, that same intrusion is an arrest where the individual stopped is not suspected of a crime. Respondents argue that this Court's review is unwarranted, and they cite cases upholding forcible stops with facts that mimic the bank robber scenario. *See, e.g.*, Opp. at 13 (citing *United States v. Buffington*, 815 F.2d 1292 (9th Cir. 1987)). But Matz's petition presents the second situation because he was not suspected of any crime, yet he was stopped at gunpoint and handcuffed.

Failing to distill the question presented, Respondents do not address the split of authority between courts of appeals over whether an unknown individual's proximity to suspected criminal activity

(or a suspected criminal) alone permits officers to brandish a firearm or use handcuffs during a *Terry* stop. Indeed, Respondents do not dispute that the opinion below directly contradicts the Second Circuit's decision in *United States v. Ceballos*. 654 F.2d 177 (2d Cir. 1981). In that case, though officers observed the Hispanic defendant enter a building inhabited by a known drug-dealer, the court held that officers exceeded the scope of a *Terry* stop when they ordered him out of his car at gunpoint because he was "completely unknown to the officers" and "was not known to be armed or reasonably suspected of being armed." *Id.* at 184.

In a similar case, the Second Circuit held that plaintiffs were arrested in an action brought under 42 U.S.C. § 1983. *Oliveira v. Mayer*, 23 F.3d 642 (2d Cir. 1994). Addressing the very issue presented here, the court noted that "whenever this [c]ourt and other circuits have found an intrusive detention to be only a *Terry* stop, the police have always had a reasonable basis to believe *the suspect* was armed or otherwise dangerous." *Id.* at 646 (emphasis added).

Likewise, the decision below conflicts with the Ninth Circuit's decision in *United States v. Strickler*. 490 F.2d 378 (9th Cir. 1974). There, the court held that the officers exceeded the bounds of *Terry* where they surrounded an unknown person's car with weapons drawn based solely on his proximity to a residence where cocaine was being delivered. *Id.*

For the reasons stated here and in the petition, this Court's review is essential to ensure that the trend allowing the use of intrusive measures during *Terry* stops does not further expand and abolish the "probable cause" requirement altogether.

ARGUMENT

I. THE SEVENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENT

Respondents spend several pages of their opposition brief attempting to explain why the lower court's decision is consistent with this Court's precedent. Respondents fail, however, because they gloss over critical differences between this Court's authority on the scope of a lawful *Terry* stop and the decision below.

Respondents admit that "[a] *Terry* stop may be transformed into a formal arrest requiring probable cause if an officer's use of force is sufficiently disproportionate to the purpose of the stop[.]" Opp. at 7. Respondents then argue, however, that the court below correctly held that pointing a gun at and handcuffing Matz did not exceed the bounds of *Terry* given purported concerns for officer safety. Opp. at 7-9. In support of that claim, Respondents cite to *United States v. Hensley*, 469 U.S. 221 (1985), and *Adams v. Williams*, 407 U.S. 143 (1972). *See* Opp. at 8-9.

But Respondents' reliance on those cases is misplaced for two reasons. *First*, in both cases the officers had reasonable suspicion that *the subject of the stop* was himself involved in criminal activity. *Second*, in both cases the officers reasonably feared for their safety given the nature of the suspected criminal activity. Indeed, in *Hensley*, the St. Bernard, Ohio police department issued a flyer indicating that the suspect was wanted for armed robbery. 469 U.S. at 233. When the officer approached the suspect's car, the officer drew his weapon and pointed it into the air. *Id.* at 224. This

Court determined that because the suspect was wanted for armed robbery, the officers who stopped Hensley "were authorized to take such steps as were reasonably necessary to protect their personal safety." *Id.* at 235. Thus, their conduct was "well within the permissible range in the context of suspects who are *reported to be armed and dangerous*." *Id.* (emphasis added).

Adams is inapposite for similar reasons. There, a reliable informant approached a police officer and told him that the suspect sitting alone in a car in a high crime neighborhood at 2:15 a.m. was transporting heroin and carrying a concealed weapon in his waistband. 407 U.S. at 147-48. The officer approached the suspect's car and knocked on the window. *Id.* When the suspect rolled down the window, the officer reached into the car and "removed a fully loaded revolver from [his] waistband," the location of the gun precisely indicated by the informant. *Id.* at 145. This Court concluded that "[w]hile properly 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, [the officer] had ample reason to fear for his safety," and thus the "forcible stop" was warranted. *Id.* at 147-48.

These holdings make sense because *Terry* requires that officers "point to specific and articulable facts" that "justify[] the particular intrusion." 392 U.S. at 21. Likewise, *Ybarra v. Illinois* demands "reasonable belief or suspicion *directed at the person to be frisked*." 444 U.S. 85, 94 (1979) (emphasis added). In both *Hensley* and *Adams*, officers could point to reliable facts about the *specific individual stopped*

warranting the particular intrusion because both individuals were suspected of crimes and posed real threats to the officers' safety.

Not so here. Notably, Respondents never claim that the officers had any suspicion that *Matz himself* (or his passenger) was involved in criminal activity, let alone criminal activity that threatened the officers' safety. Instead, Respondents attempt to justify the officers' extreme actions by citing Matz's presence in a vehicle near a house where police spotted Salazar with other individuals. Indeed, Respondents' defend the intrusive measures used because:

- officers were on foot while "pursuing an individual [Salazar] suspected of having committed armed robbery and possibly murder who was a member of the Latin Kings gang" (Opp. at 9);
- officers approached individuals in a vehicle "who had been with Salazar" (*Id.*);
- officers were "concerned that Salazar might be hiding in the vehicle" (*Id.*) (though Respondents admit that officers did not see Salazar in the vehicle when they initiated the stop at gunpoint, nor did they see anyone get into the trunk of the car (*Id.* at 12)); and
- officers were "possibly confronting 'individuals in the car who may have been armed,' given the nature of Salazar's crimes" (*Id.* at 9-10).

Respondents offer no facts supporting the officers' conclusion that it was necessary to point weapons at, threaten to kill, and handcuff *Matz and his passenger*

other than the officers' assumption that they were "likely gang confederates or associates as Salazar would not likely have let anyone other than Latin Kings gang members or associates to be close to him." Opp. at 10. But unsubstantiated conjecture about the criminality of an individual based on his proximity to another person does not fulfill *Terry*'s requirement that officers "point to specific and articulable facts" that "justify[] the particular intrusion" in question. 392 U.S. at 21.

Respondents' explanations offer no justification independent of Matz's proximity to Salazar for pointing a weapon at Matz and threatening to kill him, or for handcuffing him after he obeyed officers and exited the car. Thus, the decision below clearly violates *Ybarra* because stopping an individual based on his mere propinquity to a suspected criminal does not survive the "'narrow scope' of the *Terry* exception," let alone justify the use of a firearm and handcuffs during a *Terry* stop. 444 U.S. at 94.

This Court stated in *Florida v. Royer* that "[i]n the name of investigating a person who is no more than suspected of criminal activity, the police may not . . . . seek to verify their suspicions by means that approach the conditions of arrest." 460 U.S. 491, 499 (1983) (plurality). Here, where Matz was not even "suspected of criminal activity," "any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway v. New York*, 442 U.S. 200, 213 (1979). Thus, this Court's review is warranted.

II. RESPONDENTS DO NOT DISPUTE THAT CIRCUIT COURTS ARE SPLIT ON THE ACTUAL QUESTION PRESENTED

A. The Decision Below Conflicts With Decisions of the Second and Ninth Circuits.

Respondents do not dispute that the decision below conflicts with decisions of other circuit courts on the scope of a lawful *Terry* stop where officers used intrusive measures on an individual *not personally suspected of criminal activity* based only on his proximity to criminal activity or a suspected criminal.

For example, the decision below conflicts with the Second Circuit's decision in *United States v. Ceballos*. 654 F.2d 177. There, the Second Circuit held that officers' use of a firearm during a stop based only on the defendant's proximity to a known criminal's residence transformed the encounter into an arrest. In that case, officers stopped a Hispanic individual driving a car at gunpoint because he entered a building where a known drug dealer lived, and exited with a paper bag. *Id.* at 179-80. The Second Circuit determined that the encounter exceeded the "narrow" scope of a *Terry* stop because the defendant "was completely unknown to the officers, was not reputed to be a major narcotics violator . . . was not known to be armed or reasonably suspected of being armed" and "did not engage in erratic driving designed to avoid surveillance[.]" *Id.* at 184 (internal citations omitted). The court held that the defendant's presence in an automobile did "not justify the intrusiveness of the tactics utilized[.]" *Id.* It further cautioned that the "generalization" that "narcotics traffickers are often armed and violent" "is insufficient to justify the extensive intrusion which

occurred," because "[i]f it were, any narcotics suspect, *even if unknown to the agents and giving no indication that force is necessary*, could be faced with a 'maximal intrusion' based on mere reasonable suspicion." *Id.* (emphasis added).

The Second Circuit likewise held in *Oliveira*—contrary to the decision below—that the use of a firearm exceeded the narrow scope of a *Terry* stop given officers' unsupported generalizations about individuals not suspected of any crime. In that case, officers responded to a report of three "darked-skinned males, handling an expensive video camera while driving in a dilapidated station wagon through an affluent area." 23 F.3d at 644. Officers used police cruisers to form a "wedge around the plaintiffs' vehicle," and ordered plaintiffs to exit the vehicle at gunpoint, before handcuffing and searching them. *Id.* The court explained that it had "not discovered a single case in which a court found a detention that involved numerous intrusive elements, with little or no reasonable justification, to be a *Terry* stop." *Id.* at 646. Instead, the court clarified that "whenever [courts] have found an intrusive detention to be only a *Terry* stop, the police have always had a reasonable basis to believe *the suspect* was armed or otherwise dangerous." *Id.* (emphasis added). Lacking any concrete facts justifying the "oppressive elements of the encounter," the court held that the encounter transformed into an unlawful arrest. *Id.* at 647.

The decision below also conflicts with the Ninth Circuit's decision in *Strickler*. 490 F.2d 378. There, officers saw a car driving near a house under surveillance for cocaine activity, and the occupants of the car "turned their heads" towards the house. *Id.*

After the car parked nearby, officers blocked the car, pointed a gun at the occupants, and inspected the interior of the car. *Id.* One officer, "with gun drawn, had approached [the defendant] and ordered him to raise his hands[.]" *Id.* at 379. The court noted that before the encounter, "the police had no information which implicated [the defendant] in any way in the cocaine negotiations," and "[t]he arrest was based solely upon [the defendant's] proximity to a residence where cocaine was being delivered and his participation in some ambiguous driving and observing activity." *Id.* at 380. Lacking articulable facts to support the intrusive measures used, the court held that the encounter was an arrest requiring probable cause.

In this case, the Seventh Circuit split from the Second and Ninth Circuits by holding that officers' use of a firearm and handcuffs on Matz based only on their suspicions about a nearby criminal fell within the "outer edge of a permissible *Terry* stop." App. 16a. The court reasoned that officers "were pursuing an individual [Salazar] suspected of having committed armed robbery and possibly murder" and the individuals "had been with Salazar just moments beforehand." *Id.* at 17a. Yet officers did not know Matz or his passenger, and officers did not see any weapons or Salazar inside the car before or during the stop. Opp. at 12. Respondents even admit that the officers decided to use extreme force because of their unfounded inference—similar to the generalization about narcotics suspects rejected by the court in *Ceballos*—that the "individuals [in the car] were all likely gang confederates or associates as Salazar would not likely have let anyone other than

Latin Kings gang members or associates to be close to him." Opp. at 10.

Thus, the lower court's decision conflicts with decisions of the Second and Ninth Circuits on the scope of a lawful *Terry* stop where the subject of the stop is not suspected of any crime. The conflict warrants this Court's review.

B. The Cases Respondents Cite Do Not Address the Question Presented.

The cases Respondents cite in their opposition brief are irrelevant to the question presented because in those cases—unlike here—officers had articulable suspicion directed *at the subject(s) of the stop*. For example in *Buffington*, a confidential informant told police that Buffington planned to rob a bank, and an officer and a bank teller saw him casing the bank and wrapping a scarf over his face outside of the bank before the stop. 815 F.2d at 1300 (Opp. at 13). Similarly, in *United States v. Trullo*, officers witnessed the suspect participate in a likely drug deal in a high crime area of Boston before stopping him. 809 F.2d 108, 111-12 (1st Cir. 1987) (Opp. at 13). Likewise, in *United States v. Conyers*, an informant told officers that someone driving an Acura or Pontiac would arrive at a specific location around 8 p.m. and would be transporting cocaine—when the suspect arrived in a Pontiac at that time, officers stopped him. 118 F.3d 755, 757 (D.C. Cir. 1997) (Opp. at 14). In *Courson v. McMillian*, officers attempted to pull over a speeding car after seeing it near marijuana fields, but the occupants ignored sirens and would not pull over. 939 F.2d 1479, 1492 (11th Cir. 1991) (Opp. at 14). After the car finally stopped, the passengers would not exit the car, it was

obvious that they were intoxicated, and one passenger became verbally abusive. *Id.*

The list of inapposite cases cited in Respondents' opposition brief goes on, but these cases do not diminish the need for this Court's review of the decision below.[1] Instead, the split of authority on the scope of a lawful *Terry* stop when the subject of the stop is not suspected of any crime warrants this Court's review.

* * * *

The court below admitted that it was a "close" question whether it was reasonable for officers to pull a weapon on Matz, threaten to "blow his [expletive] head off," and handcuff him. App. 14a. In fact, the court admitted that "[w]ith the benefit of hindsight we may be able to think of less intrusive ways—from a Fourth Amendment perspective—the officers could have detained Matz and the others." *Id.* at 18a.

The court was right to hedge. If officers now may point a weapon at, threaten to kill, and handcuff an individual not suspected of any crime on the presumption that every person driving near a known gang member poses a threat to officer safety, then the "probable cause for arrest" standard has been

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[1] *See, e.g.*, *United States v. Campbell*, 178 F.3d 345 (5th Cir. 1999) (Opp. at 15) (subject of stop matched description of known bank robber); *United States v. Alvarez*, 899 F.2d 833 (9th Cir. 1990) (Opp. at 16) (officers received tip from informant and "had strong reason to believe" the subject of stop "was armed with explosives"); *United States v. Taylor*, 857 F.2d 210 (4th Cir. 1988) (Opp. at 16) (officers were aware that subject of stop had been convicted of assault with intent to murder, robbery, a narcotics violation, and escape).

abolished and *Terry* has expanded to permit arrests based on mere conjecture.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary reversal.

Respectfully submitted,

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