No. 16-1532

IN THE
Supreme Court of the United States

SHAQUILLE MONTEL 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 *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Conservative Legal Defense and Education Fund, Citizens United, Citizens United Foundation, Downsize DC Foundation, DownsizeDC.org, United States Justice Foundation, The Heller Foundation, and Policy Analysis Center in Support of Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Citizens United, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, Conservative Legal Defense and Education Fund, Citizens United Foundation, Downsize DC Foundation, United States Justice Foundation, The Heller Foundation, and Policy Analysis Center, and are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, for purposes related to participation 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.

SUMMARY OF ARGUMENT

Judge Niemeyer's opinion for the *en banc* Fourth Circuit cannot be allowed to stand. This case demonstrates that, in the area of Second Amendment and Fourth Amendment law, the U.S. Supreme Court increasingly is losing control over the decisions of the

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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 the filing of it; 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.

lower federal courts. Circuit court judges, in particular, seem to feel free to disregard binding Supreme Court constitutional decisions by devising clever interpretations which allow them to substitute their judgment for the judgment of this Court. The circuit court below so badly misread this Court's decision in, Terry v. Ohio, 392 U.S. 1 (1968)— to the point that one could conclude that it simply refused to follow Terry. That case requires that a search during a stop must be based on two separate factors: that an individual is both "armed" and "dangerous." By conflating these two tests, the court not only sanctioned police violation of the Fourth Amendment, it revealed its hostility to this Court's decision in District of Columbia v. Heller, 554 U.S. 570 (2008) recognizing an individual right to keep and bear arms.

Additionally, the circuit court violated every principle of federalism and state police power, in that it attempted to define a rule for police which would penalize those who choose to lawfully bear arms. In its hostility to the Second Amendment, the court of appeals undermines the collective decisions of state legislatures, such as West Virginia, which have recognized lawful public carry of arms as part of the Second Amendment's protection of "bear[ing]" arms.

Even more importantly, the lower circuit's opinion shows a disrespect for the Second Amendment and the law-abiding American gun owner who exercises his rights under that Amendment. And, it conditions the exercise of an individual Second Amendment right on the implicit waiver of a Fourth Amendment right to be free from unlawful searches and seizures. The federal

judges joining in that opinion, and the judge who concurred in the result only, all showed disrespect for "the People" by falsely assuming that they are a threat to law enforcement when, in fact, persons engaged in lawful concealed carry are the least likely persons to be such a threat. The court below interprets the United States Constitution not in accordance with the authorial will of the Framers who drafted the Second and Fourth Amendments, but to satisfy the demands of federal law enforcement. Impugning law-abiding citizens causes the People to lose respect for the federal courts. And, this decision moves the nation one giant step closer toward a police state, in which judges allow the felt needs of law enforcement to trump the express protections of the Bill of Rights.

This Court should grant the petition in order to enforce both the Second and Fourth Amendments from lower court judges who would enforce neither.

ARGUMENT

I. THE FOURTH CIRCUIT'S OPINION IS FRAUGHT WITH FACTUAL AND LEGAL ERRORS.

A. The Implications of the Fourth Circuit's Opinion Are Expansive.

The court of appeals *en banc* decision allows the police to "**frisk**" anyone they stop who may be armed, based on nothing more than the possible presence of a firearm. United States v. Robinson, 846 F.3d 694, 696 (4th Cir. 2017). Although the opinion does not

expressly say so, implicitly it opens the door for the police to **disarm** any American on whom a weapon is found, even if lawfully carried. *See* Robinson at 709 (Harris, J., dissenting).

Although Judge Neimeyer's opinion failed to address the issue, forcible police disarmament of citizens in these situations is entirely predictable. It is what happened in Terry v. Ohio, 392 U.S. 1, 30 (1968), in Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977) (*per curiam*), and is what happened here. Indeed, it would be counter intuitive to expect the police to frisk someone, find a firearm, and say "ah, I see you have a gun, please keep it while I go write you a ticket." But, very much **unlike** the facts in Terry and Mimms — where the police reasonably suspected that there was actual criminal activity afoot — the only infraction that gave rise to the (pretextual) traffic stop in this case was failure to wear a seat belt. Robinson at 697. Although a police force may be committed to the enforcement of "Click it or Ticket," there certainly was no special danger posed to the police by a citizen with an unlatched buckle. The Fourth Circuit's ruling that the police may disarm any law-abiding gun owner with a firearm, for no reason but that he is armed, stands in stark contrast to the Second Amendment which states that the right to "bear arms shall not be infringed."

If the Fourth Circuit's reasoning — that the mere potential presence of a firearm creates an imminent danger to police and the public — is allowed to stand, then police conducting a traffic stop would be permitted not only to frisk a person for weapons, but also to **search his car for weapons** in the event they

did not find a firearm on his person (or, even if they did, because he might have another stashed under the seat). *See* Robinson at 713 (Harris, J., dissenting); United States v. Holmes, 376 F.3d 270 (4th Cir. 2004) (upholding the "protective search" of a vehicle for weapons when occupants believed to be armed and dangerous).

The majority claims that "[t]o be clear, the general risk that is inherent during a traffic stop does not, without more, justify a frisk of the automobile's occupants" (*id.* at 699) but the court's opinion belies that statement. As Judge Wynn points out, the presence of **any** "weapon" could give rise to a search (*i.e.*, a frisk). *Id.* at 703 (Wynn, J., concurring). This is no rule at all. If all that is required to frisk and disarm a person is the presence of anything that could be used as a weapon, then the police would be justified in frisking every single motorist they stop, due to nothing more than the pointed, steel car keys in the ignition (or even the car itself). In other words, if you drive a car, then you — by definition — have a weapon.[2]

These predictable consequences[3] of the circuit court's opinion eliminate any pretense that its holding is limited to a "protective frisk" of a person's clothing.

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[2] *See* https://www.youtube.com/watch?v= DuEVfMxs684.

[3] The dissent below warned that the Court's sweeping new rule creates for gun owners a "wide range of 'special burdens,' the full extent of which we only can begin to discern." *Id.* at 711 (Harris, J., dissenting).

Rather, the Fourth Circuit's opinion means that a gun owner who goes into public while lawfully armed has virtually no Fourth Amendment protection against police searches and seizures of his weapon or whatever else they may find.

B. Contrary to the Lower Court's Assertions, Those Who Lawfully Bear Arms Pose Virtually No Danger to Police.

According to the *en banc* court, a "protective frisk" (and disarmament) by police is permissible simply based on "a forced police encounter and the presence of a weapon,[4] not from any illegality of the weapon's possession" — or even the presence of any actual criminal activity. Robinson at 696. That is a remarkable proposition. Typically, society considers some persons to be criminals and to be dangerous, while all other persons are presumed to be responsible and law-abiding. The Fourth Circuit, however, detaches dangerousness from any criminal activity, and instead links it to the lawful and constitutionally protected activity of bearing arms — the very fact that

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[4] In his concurring opinion, Judge Wynn would narrow the majority's focus on "weapons" in general to "firearms" in specific, since "numerous everyday objects" can be "weapons," including a "'sharpened pencil.'" *Id.* at 703 (Wynn, J., concurring). Judge Wynn was not shy to express his distaste for an armed citizenry. While he cautions against assuming anyone with a "weapon" is categorically dangerous, he has no problem assuming anyone with a "firearm" is dangerous. *Id.* at 705. In other words, Judge Wynn calls out the majority for going too far, but then he explains that he is willing to go even further than the majority, singling out firearm owners for disparate treatment.

a person owns and carries a firearm is what makes him dangerous.

No doubt, tens of millions of law-abiding Americans would disagree. While in 2007, there were approximately 4.6 million Americans with concealed carry permits, that number skyrocketed to 12.8 million in 2015,[5] to 14.5 million in 2016,[6] and to 15.7 million as of just two months ago.[7] *See* Petition for Certiorari ("Pet.") at 15. Additionally, there are millions more Americans who "bear arms" in the dozen or more states that now permit "constitutional carry," where any law abiding person with a gun may carry it concealed without the need to obtain a permit.[8] Finally, it is impossible to know how many more Americans "open carry" their firearms which, in most states, does not require a permit.[9]

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[5] *See* J. Lott, Jr., J. Whitley, and R. Riley, "Concealed Carry Permit Holders Across the United States" (July 20, 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629704.

[6] *See* J. Lott, Jr., "Concealed Carry Permit Holders Across the United States: 2016" (July 27, 2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814691.

[7] *See* Fox News, "Demand Soars for Concealed Carry Permits, Data Shows" (May 22, 2017) http://www.foxnews.com/us/ 2017/5/22/demand-soars-for-concealed-carry-permits- data-shows.html.

[8] C. Cooke, "Constitutional Carry Marches On," National Review (Jan. 25, 2017) http://www.nationalreview.com/article/444212/constitutional-carry-states-adopting-it-droves.

[9] *See* http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/open- carrying/.

Needless to say, there is an ever-increasing number of millions of law-abiding Americans who carry firearms on a daily basis throughout this country. These armed Americans drive countless cars, and are stopped by countless police officers at countless traffic stops and given countless tickets — almost always without incident. Yet the Fourth Circuit's opinion treats them all of them as potentially dangerous criminals.

Today, many states link their registries of concealed carry permit holders to their DMV registration databases.[10] This means that, when the police stop a vehicle and run its tags before exiting their cruiser, they can be informed immediately if the car's owner (most likely its driver) may be legally carrying a firearm. Many Americans have had the police react negatively after finding out they possessed a concealed carry permit. *Id.* But now, according to the Fourth Circuit, the police can act on that hostility, and approach any driver they suspect of being armed "with ... weapon[s] drawn," order him from the car, frisk him, and disarm him. Robinson at 697. Under this decision, every law-abiding, gun-toting person in the Fourth Circuit is now in danger of having the police "draw down" on him any time he goes out in public.[11]

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[10] *See, e.g.,* M. Leahy, "The Police's License Plate Loophole," Laissez Faire (May 19, 2014) https://lfb.org/the-polices-license-late-loophole/.

[11] Under the Fourth Circuit's decision, could an anti-gun police department set up a "seatbelt checkpoint" just outside the local

Next, the Fourth Circuit assumes that anyone who has a firearm is potentially dangerous — and, since the court says the legality or illegality of the act of carrying the firearm does not matter, its rule applies even if the police **know for a fact** that a driver is a law-abiding concealed carry permit holder.[12] *See* Robinson at 698. The circuit court below asserted that Robinson had argued "illogically that the legal possession of a firearm cannot pose a danger to police officers....." *Id.* Instead, the court asserted — citing absolutely no statistical authority whatsoever — that "persons who are armed, whether **legally or illegally**, pose yet a **greater safety risk** to police officers." *Id.* (emphasis added). The court claimed that it is "illogical[] that when a person forcefully stopped may be legally permitted to possess a firearm, any risk of danger to police officers posed by the firearm is eliminated." *Id.* In another part of its opinion, the court again rejected this argument, claiming that it "fails as a matter of logic." *Id.* at 700-01. However, what may appear "logical" to judges is not borne out by the "realities" of American life. As then-Justice Oliver

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shooting range, and stop every car with an unbuckled driver or front seat passenger entering or exiting the premises, ordering them from the car at gunpoint?

[12] Contrast Robinson with the Fourth Circuit's previous decision that police must assume a person with a gun is a law abiding citizen until proven otherwise: "[b]eing a felon in possession of a firearm is not the default status." United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013). In this case, the Fourth Circuit evades its own ruling in Black by holding that the police may treat anyone with a gun the same way as they would a felon in possession.

Wendell Holmes noted, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

In fact, it is fairly common knowledge that concealed carry permit holders are among the most law-abiding Americans — and **least dangerous** to police. One study has found that those who possess a concealed carry permit are **259 times less likely** to "violate the law" than members of the general public — and they are even **7 times less likely** to commit a crime **than police themselves**![13]

Similarly, the State of Texas tracks crimes committed by concealed carry permit holders, and compares it to that of the general population. For 2015 (the most recent year reported), Texans were convicted of a total of 43,924 crimes, while concealed carry holders made up **only 108** of that total.[14] That means that a concealed carry holder in Texas is nearly **407 times less likely** to commit a crime than a member of the general public.

What the Texas and other studies show is the opposite of what the court assumes: the presence of a legally armed person at a traffic stop presents

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[13] *See* J. Haggerty, "Report: Concealed Carry Permit Holders Are Most Law Abiding Demographic," The Daily Caller (Aug. 10, 2016) http://dailycaller.com/2016/08/10/report-concealed-arry-permit-holders-are-more-law-abiding-than-police/.

[14] *See* "Conviction Rates for Handgun License Holders," Texas Department of Public Safety (May 13, 2016) http://www.dps.texas.gov/rsd/ltc/reports/convrates.htm.

virtually no danger to the police whatsoever. Indeed, the dissenters below agreed that "there is no reason to think" that such a person "is anything but a law-abiding citizen who poses no threat to the authorities." Robinson at 707 (Harris, J., dissenting). While the circuit court would treat concealed carry permit holders as being among the most dangerous people in society, in fact they are perhaps the **least dangerous of all**. This turns the Fourth Circuit's conclusion on its head. Rather than assuming that a person with a legally carried firearm is dangerous, the police should assume just the opposite.

If it is simply the mere presence of a firearm at a forced traffic stop that gives rise to danger (Robinson at 700), perhaps the Fourth Circuit should have been concerned with threats to public safety posed by the firearms carried by Officers Tharp, Hudson, and Roberts. What separates police from other law-abiding gun carriers? A better safety record? That cannot be shown.[15] Better training? Not according to even some police, who believe it is likely that:

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[15] *See*, *e.g.*, J. McKinley Jr., "Unarmed Man Is Charged With Wounding Bystanders Shot by Police Near Times Square," New York Times (Dec. 4, 2013) http://goo.gl/wU1jAe (unarmed man charged for the wounding of two bystanders that the **police** accidentally shot); R. Esposito, "NYPD Gunfire Wounded All 9 People Injured In Empire State Building Shootout," ABC News (Aug. 25, 2012), http://goo.gl/5u6rBP (9 bystanders "injured by a combination of richochets and bullet fragments" during police confrontation with suspect who did not fire a single round). These examples are not meant to disparage police officers, but simply to demonstrate that firearms being lawfully carried have never been shown to be unsafe, even relative to those carried by police.

> the people that are out there who do carry concealed right now are at least as proficient with their weapons as police officers are. Actually, my deputies have to qualify with their pistols twice a year and for many of them that's all the shooting they do; whereas, people who chose to carry are typically into guns, so they shoot more and are probably even better with their weapons than most cops are.[16]

There is simply no rational reason for completely trusting armed police officers, while simultaneously completely distrusting law-abiding gun owners.

The Fourth Circuit, in all its wisdom, has asserted that legally armed citizens pose an exponential increase in risk to the safety of police.[17] *Id.* at 699. One might suspect that the police — the ones directly affected by that increased risk of violence — must agree with this analysis. Not so! In fact, more than 91 percent of police surveyed in one study **support concealed carry** by law-abiding Americans,[18] and

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[16] F. Miniter, "On the Front Lines," National Rifle Association (Feb. 22, 2016) https://www.americas1stfreedom.org/articles/2016/2/22/on-the-front-lines/.

[17] Even the dissenters were wrong here, believing that "no[] doubt that recent legal developments regarding gun possession have made the work of the police more dangerous as well as more difficult." *Id.* at 713.

[18] *See* R. Avery, "Police Gun Control Survey: Are legally-armed citizens the best solution to gun violence?" PoliceOne.com (Apr. 8, 2013) https://www.policeone.com/Gun-

over 90 percent believed that concealed carry is instrumental in **reducing crime** — not causing it.[19] A more recent survey produced similar findings.[20]

At the end of the day, the Fourth Circuit's opinion rejects the views of the Framers of the Bill of Rights, law-abiding gun owners everywhere, and even the police the Fourth Circuit purports to protect — all of whom believe that a legally armed citizenry poses little danger to the police or the public, while providing enormous benefit not only to public safety, but also to the security of our free state against tyranny.[21] Regrettably, it is only an unelected judicial elite which

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Legislation-Law-Enforcement/articles/6186552-Police-Gun-Control-Survey-Are-legally-armed-citizens-the-best-solution-to-gun-violence/.

[19] "PoliceOne's 2013 Gun Policy & Law Enforcement Survey Results: Executive Summary" (Apr. 8, 2013) https://www.policeone.com/police-products/firearms/articles/6188462-PoliceOnes- 2013-Gun-Policy-Law-Enforcement-Survey-Results-Executive-Summary/.

[20] *See* J. Lott, Jr., "Gun Control Is Not the Answer to Shootings that Kill Police Officers," The National Review (July 26, 2016) http://www.nationalreview.com/article/438327/gun-control-police-officers-overwhelmingly-support-second-amendment-rights.

[21] In fact, every year the lives of officers are saved by concealed carry permit holders, such as recently by this "black man with a gun" in Florida: J. Jacobo & W. Gretsky, "Video shows passer-by shooting Florida deputy's attacker," ABC News (Mar. 15, 2017) http://abcnews.go.com/US/video-shows-passerby-shooting-florida-deputys-attacker/story?id=46143376.

continues to believe that gun owners are dangerous people.[22]

C. Firearms Are Not "Inherently Dangerous."

Next, the Fourth Circuit claims that it is "the [mere] presence of a weapon during a forced police encounter" that gives rise to the danger. Robinson at 700. Again, it is Judge Wynn in concurrence who has no qualms about stating expressly that which the majority assumes implicitly — that firearms are "inherently dangerous," and thus so is anyone who chooses to carry one. *Id.* at 704-705 (Wynn, J., concurring). This "guilt by association" is a common but erroneous assumption made by those who hold anti-gun views.

In reality, modern firearms are incredibly safe — indeed, manufacturers go to extraordinary lengths to make sure that their firearms will not fire unless the trigger is consciously depressed, and that a deliberate motion by a human being is required to depress the trigger.[23] The chance that a firearm stored in a safe,

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[22] Officer Hudson is apparently one of the 10 percent of police officers who unreasonably believe that a lawfully armed citizenry presents a threat. As Petitioner notes, he testified that "he believed if he found an individual with a gun, he should 'treat them as [if] they could be a criminal.'" Pet. at 24.

[23] *See, e.g.*, the triply redundant "Safe Action" System found on Glock pistols (https://us.glock.com/technology/safe-action), including a serrated trigger which requires a finger be placed precisely in the center of the trigger in order to engage it.

transported in a container, or carried in a holster will discharge unintentionally is about as close to zero as is possible with a mechanical object. It is only the human element (firearm handling and shooting) that can be dangerous. Contrast this with, say, keeping a pet tiger, or storing an explosive device, either of which potentially can pose a danger to the public even in the complete absence of human involvement. The Fourth Circuit would create a theory of enterprise liability — that those who bear arms must pay for that privilege by giving up other constitutional rights — moving the Second Amendment from constitutional right to constitutional liability.

D. The Fourth Circuit's Opinion Will Create a Host of Real World Problems.

Finally, the Fourth Circuit's opinion does not solve a problem — but it will create many problems between the police and gun owners. First, the court **tells the police that they should fear gun owners** — that they are endangered by the mere presence of a civilian with a firearm — and that it's appropriate to conduct traffic stops of these innocent people with "weapon[s] drawn." *Id.* at 697. Any time police weapons are drawn, it is reasonable to expect that more innocent civilians will be accidentally shot.

Second, the court **tells law-abiding gun owners that they should fear the police** — that the police will believe they are potentially violent and dangerous,

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http://goo.gl/3zEzGs.

and are authorized to treat gun owners as such, causing a surge in fear and apprehension among gun owners when they are stopped by the police.[24]

Third, allowing the police to frisk and disarm anyone carrying a firearm means that there will be many legally carried firearms being pulled from concealed carry holsters by police who often have little training in how to perform that task safely. Concealed carry holsters are designed to be used by the person carrying — not by the police. Is it not reasonable to predict that such disarming also will cause an increase in the number of accidental shootings of citizens?

It simply would be a mistake to assume that police officers are all experts in firearms handling.[25] Often enough, their only familiarity with firearms is having been trained on their own duty weapon, and their only

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[24] No doubt, many police officers who respect the Second Amendment, especially in areas of the country with high rates of gun ownership, will simply ignore the lower court's ruling. However, in other areas of the country, the lower court's opinion will create an atmosphere which will have tragic consequences like that of Philando Castile, another law-abiding "black man with a gun," mistaken for an armed robbery suspect, and gunned down as he attempted to inform police that he was lawfully carrying a concealed firearm. M. Smith, "Minnesota Officer Acquitted in Killing of Philando Castile," *New York Times* (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html.

[25] *See* R. Farago, "Study: Why Police Firearms Training Sucks," The Truth About Guns (Apr. 26, 2015) http://www.thetruthaboutguns.com/2015/04/robert-farago/study-why-police-firearms-training-sucks/.

range time is a couple of annual qualifications on a static range.[26] The New York Police Department infamously was forced to require all firearms issued to officers to have a trigger with an absurdly heavy 12-pound pull installed, after a rash of negligent discharges by officers unfamiliar with their weapons' operation.[27] There have even been stories of gun owners who have had to instruct police officers on how to safely unload their firearm after they have been disarmed.[28] Increasing the number of legally carried firearms that are being handled by officers unfamiliar with their operation is only asking for trouble.

Finally, the court's opinion no doubt will lead to an increased hostility between police and armed citizens. Even the nicest and most law-abiding gun owner will not be too happy about being pulled out of his car at gunpoint in the middle of the night, away from his wife and small children — for no reason other than because he carries a gun to keep his family safe.

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[26] *See* M. McDaniel, "Harsh Reality: Police Are Not Highly Trained Firearms Experts," Bearing Arms (June 2, 2016) https://bearingarms.com/mike-m/2016/06/02/individual-safety-whos-responsible/.

[27] *See* C. Graff, "Range Report: Glock New York Trigger," Gun Digest (Apr. 13, 2012) https://gundigest.com/reviews/range-report-glock-new-york-trigger.

[28] *See, e.g.*, "Frostburg State University Cop Asks Woman how to unload weapon," https://www.youtube.com/watch?v=e5qIDb8rG2M; A. Walden, "Police Confiscate Handgun From Flight Attendant, Then Accidentally Fire It," KFYO 790 (Sep. 25, 2012) http://kfyo.com/tsa-accidentally-fires-off-handgun-confiscated-from-flight-attendant/.

II. REMAINING SILENT IN THE FACE OF POLICE INTERROGATION DOES NOT MEAN A PERSON IS DANGEROUS.

After concluding that all gun owners can be considered dangerous *per se*, the lower court came to an alternate conclusion that Robinson was sufficiently suspicious based on the facts of this case. *Id.* at 702. The Fourth Circuit found suspicious Robinson's "'**failure to verbally respond** to the inquiry whether he was armed,'" and claimed that this failure in part "**gave rise to a reasonable suspicion** that Robinson was armed and dangerous." *Id.* at 697 (emphasis added). This is an incredible finding.

In fact, only a small minority of states (12, by *amici's* count[29]) require citizens proactively to tell the police that they are armed, while the majority of states do not require people to admit that they are carrying a firearm — even if asked.[30] Only a few require admission upon request. *See, e.g.*, 430 ILCS 66/10. Since concealed carry laws are now mainstream, and so-called "duty-to-inform" laws are well known (*see* Pet. at 17), it should be seen as a deliberate policy choice by a state legislature **not** to require a citizen to tell the

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[29] Arizona does not require a person to notify the police that he is armed, but does appear to require an affirmative response if asked. http://www.handgunlaw.us/states/arizona.pdf.

[30] Many states, like Virginia, do require a person to produce his concealed carry permit (but not verbally answer) when asked by the police, but in Virginia failure to produce one's permit is punishable with at most a $25 civil penalty. Code of Virginia § 18.2-308.01(B).

police that he is armed — even if asked.[31] *See* Robinson at 716 (Harris, J. dissenting) ("West Virginia does not require that people carrying firearms inform the police of their guns during traffic or other stops, even if asked."). Indeed, informing the police that one is lawfully carrying a firearm can have deadly consequences. *(See* discussion of Philando Castile case, Section I.D., *supra.*)

Regardless of state law, the court below would impose a notification requirement by judicial fiat, finding any person to be criminally suspicious if he does not answer police questions.[32] According to Officer Hudson, Robinson's "oh crap look" at the traffic stop meant "I don't want to lie to you, but I'm not going to tell you anything." United States v. Robinson, 2014 U.S. Dist. LEXIS 112382, *28. Most lawyers would advise a client like Mr. Robinson (i) that it generally does no good to answer questions asked by the police,

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[31] As Petitioner notes, the Fourth Circuit's ruling would create the absurd state of affairs where a person in a "duty to inform" state would be legally required to tell a police officer that he has a firearm, which would then provide the officer with reasonable suspicion to frisk and disarm him. Pet. at 25.

[32] The dissent asserts that a law-abiding gun owner should be treated as safe and responsible, but that all changes if he forgets to inform the police he is carrying a firearm, if required by law, as "that failure itself may give rise to a reasonable suspicion of dangerousness, justifying a protective frisk." *Id.* at 713 (Harris, J., dissenting). The dissent fails to recognize that, in at least some states, failure to abide by a duty-to-inform law is considered civil offenses about as serious as the seatbelt infraction that led the officers to frisk Petitioner in this case. *See, e.g.,* Az. Revised Statute §13-3112; *see also* 21 OK Stat § 21-1290.8(B) (2014).

but (ii) that he should not lie to the police. The Fourth Circuit would make following that advice a badge of suspicion.[33]

Moreover, this Court has made clear that simply refusing to answer police questions at a traffic stop cannot give rise to reasonable suspicion or probable cause, and cannot be used to justify further police intrusions:

> Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly ... Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. **But the detainee is not obliged to respond**. And, unless the detainee's answers provide the officer with

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[33] The court's holding reflects how far courts are willing to stretch their credibility, finding a person's actions to be "suspicious" literally no matter what he says, how he acts, or what facial expressions he makes. Contrast Heien v. North Carolina, 574 U.S. ___,135 S.Ct. 530 (2014) (stopped for appearing too nervous while driving past the police) with De La Rosa v. White, 852 F.3d 740 (8th Cir. 2017) (suspicious for appearing too calm during a traffic stop). *See also* Heien, Petition for Certiorari, p. 2 (Police believed the motorist was suspicious "insofar as he was [following every state's driver's education instruction and] 'gripping the steering wheel at a 10 and 2 position, looking straight ahead.'").

> probable cause to arrest him, he must then be released. [Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984) (emphasis added).]

Although the district judge later disagreed with his decision, Magistrate Judge Trumble initially correctly ruled that Robinson's "'weird look' may indicate Defendant's unwillingness to cooperate at this stage of the stop, exercising his Fifth Amendment right to remain silent...." 2014 U.S. Dist. LEXIS 112382, *39.

III. THE COURT'S BROAD, SWEEPING NEW RULE WAS ENTIRELY UNNECESSARY.

Not only was the Fourth Circuit's holding just plain wrong — but it was also completely unnecessary to the resolution of this case. The court's primary holding was that any armed person — whether legally or not — constitutes a clear and present danger to the police, justifying a search for and seizure of his weapon. As the dissent notes, "[t]he majority goes on, however, to consider the particular facts surrounding Robinson's stop...." Robinson at 714 (Harris, J., dissenting). Indeed, after creating its sweeping new rule, the court gave another rationale for its holding — based on the specific facts of this case.

In Section III of its opinion, the court holds that, in addition to the alleged general danger accompanying the presence of a weapon, "the officers had knowledge of additional facts that ... justified the frisk in this case...." *Id.* at 701. The court claimed that this alternative holding (of dangerousness particular to

Robinson) was "not necessary to the conclusion in this case." *Id.* at 702.

Yet actually the opposite is true. If there were facts establishing that Robinson was dangerous, the court below should have relied on those facts[34] — the same factors that had persuaded the magistrate judge when he recommended granting the motion. 2014 U.S. Dist. LEXIS 112383, *1. Indeed, that is precisely what the district court did in denying Robinson's motion to suppress. What was "not necessary" was for the circuit court below to create a broad, *per se* Fourth Amendment rule that demonizes all gun owners.

For the court to base its opinion on facts specific to Robinson would have been the path of least constitutional resistance, and yet the Fourth Circuit claimed to do so was "unnecessary," opting instead to go out of its way and put itself on a "collision course"[35] with both the Second and Fourth Amendments. That in and of itself is reversible error.

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[34] Even this rationale by the Court falls apart. Not answering police questions is not suspicious. *See* Section II, *supra*. Carrying a gun in a so-called "high-crime area" should not be viewed as increasing the suspicion that a person is engaged in illegal activity, but rather should be viewed as good common sense. *See* Pet. at 26, dissent at 715; *see also, e.g.*, "Editorial: Detroit police chief wants citizens to arm themselves," *The Washington Times* (Jan. 6, 2014) http://www.washingtontimes.com/news/2014/jan/6/editorial-eliminating-gun-crime/.

[35] Robinson at 707 (Harris, J., dissenting).

CONCLUSION

John Adams famously wrote:

> Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other.[36]

Indeed, government is really only possible in a constitutional republic by the consent of the governed, where the government assumes it is governing an overwhelming moral and law-abiding people who do not need to be ruled over and controlled, but can be trusted. Critical elements of our constitutional republic are the Second and Fourth Amendments implicated in this case. The Second Amendment trusts that an armed citizenry is not something to be feared by government, but rather embraced as being what the Framers believed to be absolutely "necessary to the security of a free state." *See* District of Columbia v. Heller, *supra.* The Fourth Amendment, too, contributes to the people's security, by protecting them from arbitrary governmental invasions of their property — including their persons, houses, papers, and effects. *See* United States v. Jones, 132 S.Ct. 935 (2012). By treating law-abiding gun owners as potentially dangerous criminals to be confronted and disarmed, the circuit court undermines both Amendments, breaks faith with the People, and destroys the trust that must exist between the People

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[36] Letter "From John Adams to Massachusetts Militia," 11 October 1798, https://founders.archives.gov/documents/Adams/99-02-02-3102.

and their Federal Government. *See* Declaration of Independence.

The Court should grant the Petition for Certiorari to review the Fourth Circuit's *en banc* decision.

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