NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

MYKEL LEE MCMILLION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the possession of a firearm in an open-carry state, combined with other wholly innocent factors, is sufficient to justify a warrantless seizure under the Fourth Amendment?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa and the United States Court of Appeals for the Eighth Circuit:

United States v. McMillion, 4:22-cr-00174-001, (S.D. Iowa) (criminal proceedings) Order on Motion to Suppress entered June 30, 2023.

United States v. McMillion, 23-2720 (8th Cir.) (interlocutory criminal appeal), judgment entered May 13, 2024.

United States v. McMillion, 23-2720 (8th Cir.) (interlocutory criminal appeal), Order denying petition for rehearing en banc and rehearing by the panel entered June 14, 2024.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Federal Statutes

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Mykel Lee McMillion respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's published opinion in Mr. McMillion's case is available at 101 F.4th 573 and is reproduced in the appendix to this petition at Pet. App. p. 13.

JURISDICTION

The Eighth Circuit entered judgment in Mr. McMillion's case on May 13, 2024. Pet. App. p. 12. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. II

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. CONST. AMEND. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

STATEMENT OF THE CASE

A. Introduction

Iowa recently joined a growing number of states and became an "open carry" state. 2021 Iowa Acts HF756. Now, in Iowa, one can openly carry a firearm in public, without needing any kind of permit. *Id.* The possession of a firearm in Iowa is presumptively lawful. And this Court recently confirmed that the Second Amendment protects the right to carry a handgun for self-defense in public. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Therefore, Iowans *should* feel protected by these constitutional and statutory protections safeguarding the right to carry a firearm.

In spite of these protections, the Eighth Circuit held that law enforcement may conduct a *Terry*[1] seizure in an open-carry jurisdiction based upon possession of a firearm, if law enforcement can point to other wholly innocent factors like being in a high-crime area late at night. In doing so, the Eighth Circuit joined the minority position in a circuit split. Most courts, both state and federal, have rejected the Eighth Circuit's position and hold that warrantless seizures of individuals who possess firearms in open-carry jurisdictions, without any evidence that the possession is unlawful, violate the Fourth Amendment.[2] These courts have explicitly rejected that innocent factors like being in a high-crime area can somehow tip the scales to

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

[2] This issue is distinct from other legal issues such as—whether such stops are lawful in jurisdictions that require a permit to carry, when the circumstances indicate an individual is committing a crime with a firearm, or when law enforcement has information to support that the individual is prohibited from possessing firearms.

establish reasonable suspicion of criminal activity. *See, e.g., United States v. Daniels*, 101 F.4th 770 (10th Cir. 2024) (finding that possessing a firearm in a high-crime area and driving away upon police arrival did not provide reasonable suspicion); *see also United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) ("To conclude that mere presence in a high-crime area at night is sufficient justification for detention by law enforcement is to accept carte blanche the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.").

This Court should grant the petition for certiorari to address this split and ensure individuals who exercise their Second Amendment rights to possess firearms in public for self-defense are not thereby waiving their Fourth Amendment rights.

B. Proceedings below

Mr. McMillion was charged in an indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). The charge was based upon the recovery of a firearm found on Mr. McMillion's person after a *Terry* stop and frisk.

i. Mr. McMillion files a motion to suppress, arguing that possession of a firearm does not support a warrantless seizure in an open-carry jurisdiction.

Mr. McMillion moved to suppress the firearm, arguing that officers lacked reasonable suspicion to seize him. R. Doc. 26, 26-1, 32[3]. The district court held a

[3] In this petition, the following abbreviations will be used:

suppression hearing, during which it heard testimony and admitted exhibits. R. Doc. 33, 33-1, 34, 34-1, 34-2. The evidence established is summarized below.

In the early morning hours on September 25, 2022, a security officer at the Oakridge apartment complex called the Des Moines Police Department ("DMPD"). R. Doc. 37, at p. 1; Pet. App. p. 1. The apartment complex is in a high-crime area. R. Doc. 37, at p. 2; Pet. App. p. 2.

In the phone call to the DMPD, the security officer informed a DMPD dispatch operator: "An individual is in a white Buick by our maintenance shop. He had a gun on him, a handgun." R. Doc. 37, at p. 1 (citing R. Doc. 26-2; Def. Ex. A); Pet. App. p. 1. Later in the call, the DMPD operator asked the security officer, "What building are they by?"; the security officer responded: "405." R. Doc. 26-2, Def. Ex. A at 0:40–1:03. The security officer—despite being specifically asked by the DMPD operator—did not indicate that the individual was threatening to use the handgun. R. Doc. 26-2, Def. Ex. A at 0:26–0:40. The security officer said that the individual was "black with a white shirt," said he "was still in the vehicle," and described the vehicle as a "white Buick." R. Doc. 26-2, Def. Ex. A at 1:03–1:40. The security officer said the gun was a "handgun" and the individual had it "out." R. Doc. 26-2, Def. Ex. A 1:40–1:55.

DMPD Officer Ernesto Escobar arrived on the scene in the parking lot. Testimony indicated that the vehicle was seen near the complex's maintenance building, toward the intersection of 15th Street and Crocker Street, near the entrance

"R. Doc." -- district court clerk's record, followed by docket entry and page number, where noted; and "Supp. Tr." – Suppression hearing transcript, followed by page number.

to the parking lot from 15th Street. Supp. Tr. pp. 9–10; R. Doc. 37, at p. 2; Pet. App. p. 2. But, by the time law enforcement arrived, the Buick had moved to a different parking space in the parking lot on the south side of the residential parking lot. R. Doc. 37, at p. 2; Pet. App. p. 2.

As a residential parking lot, "[e]very tenant that lives on the property" is issued a permit for a parking space. Supp. Tr. p. 8. Multiple signs were posted "related to the parking in that area." Supp. Tr. p. 10. These signs "posted that it is maintenance parking only and that nonpermitted vehicles will be towed at owner's expense." Supp. Tr. p. 10–11; R. Doc. 37, at p. 2; Pet. App. p. 2. The parking area where the Buick was located was not gate restricted. Supp. Tr. p. 17; R. Doc. 37, at p. 2; Pet. App. p. 2. No testimony or evidence indicated that the vehicle was in an area where permitted tenant vehicles could not park. R. Doc. 37, at p. 2; Pet. App. p. 2. There was no evidence that anyone "expressed concerns to police that the Buick was illegally parked," and no evidence that the security officers mentioned anything about loitering or trespass to the DMPD officers. R. Doc. 37, at pp. 2, 8 n.2; Pet. App. p. 2, 8. As the prosecution conceded below, at the time of the stop, the officers had no reason to believe that the individuals in the vehicle were not residents or not connected to the apartment complex. Supp. Tr. p. 3. Nor was there "any sort of commotion or disturbance" observed. R. Doc. 37, at p. 2, Pet. App. p. 2.

When Officer Escobar arrived at the scene, he spoke briefly with an apartment security officer. That security officer told Officer Escobar that the people in a white

Buick (which had just turned its lights on) were near apartment 405, and that, while they were at apartment 405, one of the individuals had a gun in his hand and was swinging it around. R. Doc. 37, at p. 2; Pet. App. p. 2; R. Doc. 26-2; Def. Ex. C at 1:08–:35 ("They were over here by 405, and one of the male individuals had a gun in his hand and was swinging it around; we saw him on camera.").

As Officer Escobar spoke with the security officer, the Buick began backing out of its parking spot. R. Doc. 37, at p. 2; Pet. App. p. 2. Officer Escobar responded by driving his vehicle further into the lot to intercept the Buick before it could exit, thereby seizing the vehicle's occupants.[4] *Id.* Officer Escobar exited his vehicle and approached the Buick's passenger's side on foot. R. Doc. 37, at p. 3; Pet. App. p. 3. DMPD Officer Grant Purcell then approached on foot and walked around to the driver's side of the Buick. *Id.* Recognizing Mr. McMillion, Officer Purcell removed Mr. McMillion from the vehicle, searched Mr. McMillion's person, and found a firearm. *Id.* at pp. 3–4; Pet. App. p. 3-4.

ii. The district court grants the motion to suppress.

The district court granted the motion to suppress by written order. R. Doc. 37; Pet. App. p. 1. First, the court acknowledged the changing legal landscape in Iowa regarding firearm possession, as well as Supreme Court decisions on the Second Amendment right to carry firearms for protection and determined that possession of a firearm alone could no longer justify a warrantless seizure. R. Doc. 37, p. 8; Pet.

[4] On appeal, the prosecution did not dispute that Mr. McMillion was seized by Officer Escobar when he turned on his bright or "takedown" lights. Gov't's Br. p. 9.

App. p. 8. The court next looked to potential additional factors as part of the reasonable suspicion analysis. The district court noted that the prosecution "focus[ed] primarily on three facts: (i) the Oakridge Apartments are a high-crime area; (2) the time of night; and (3) the report that McMillion was 'swinging [the gun] around.'" R. Doc. 37, p. 8; Pet. App. p. 8.

The district court determined that the first two factors—high-crime area and time of night—provided little to nothing to the reasonable-suspicion analysis. R. Doc. 37, p. 8; Pet. App. p. 8. The court stated: "The Iowa Legislature did not exclude 'high-crime neighborhoods' from the new gun laws or restrict open-carry rights to particular times of day; instead, the right to carry applies across the board." R. Doc. 37, p. 8; Pet. App. p. 8.

As to the report of possession itself, the court noted that no one reported that Mr. McMillion "pointed the gun at anyone or otherwise threatened anyone when he was 'swinging it around.'" R. Doc. 37, p. 10; Pet. App. p. 10. The district court found that, "as a matter of fact, the law enforcement officers merely had reason to believe that McMillion *displayed* the firearm in the parking lot." R. Doc. 37, p. 10; Pet. App. p. 10.

In its ruling, the district court specifically noted the facts not established at the suppression hearing. The district court found that "[t]he evidence failed to establish . . . that the security guards or police officers discussed . . . so-called 'loitering'" as a basis for the seizure. R. Doc. 37, p. 8, n.2; Pet. App. p. 8. Also, the

district court found that the security guards "did not mention trespass to the responding officers as a basis for concern." R. Doc. 37, at p. 8, n.2; Pet. App. p. 8. At the time, the area was "serene," with no "sort of commotion or disturbance." R. Doc. 37, at pp. 2, 10; Pet. App. p. 2, 10.

Overall, because Iowa law does not prohibit the open possession or non-threatening display of firearms, the district court found that the stop was not supported by reasonable suspicion. R. Doc. 37, pp. 10–11; Pet. App. p. 10-11. The court granted the motion to suppress.

iii. The prosecution files an interlocutory appeal and the Eighth Circuit reverses the grant of the motion to suppress.

The prosecution filed an interlocutory appeal to the Eighth Circuit Court of Appeals, challenging the district court's grant of the motion to suppress. The Eighth Circuit reversed the district court. *United States v. McMillion*, 101 F.4th 573 (8th Cir. 2024); Pet. App. p. 13. The circuit found reasonable suspicion of criminal activity. The circuit reasoned:

> Here, Officers Escobar and Purcell responded to a 4:40 a.m. call from the security guards at a notoriously high-crime apartment complex. They learned that an unknown car was moving about the complex, including in areas where personal cars were not allowed, and that one of the occupants of the car had a gun and was swinging it around. When the officers got close to the car, it attempted to leave the area. McMillion argues that this was merely the behavior of an individual exercising his right to openly carry a gun in a dangerous neighborhood. Perhaps. But while the mere presence of a firearm in an open carry jurisdiction does not itself create reasonable suspicion of criminal activity, the presence of a firearm taken together with the "high-crime area," the "time . . . of night," the report that Oakridge security had "previously observed a

> pistol in [McMillion's] hand," the "location of the suspect parties," and their "behavior when they [became] aware of the officer[s'] presence" may be indicative of criminal activity such as trespass, assault, or burglary. … Officers Escobar and Purcell were allowed to "detain [McMillion] to resolve the ambiguity.".

Id. at 577; Pet. App. p. 17. The circuit did not address why it determined that law enforcement had reason to believe that Mr. McMillion's vehicle was "in areas where personal cars were not allowed," even though this directly contradicted the factual findings of the district court.

REASONS FOR GRANTING THE WRIT

I. Federal and state courts are split on whether the possession of a firearm, without any basis to believe that the individual's possession is unlawful, justifies a warrantless seizure in an open-carry jurisdiction.

The Eighth Circuit has entered a lopsided split on whether firearm possession in an open-carry jurisdiction, combined with other innocent factors, can justify a *Terry* seizure. The split is well established and longstanding, as detailed below.

A. The majority of courts do not allow warrantless seizures based upon firearm possession in open-carry jurisdictions.

The vast majority of courts, both state and federal, have found *Terry* seizures invalid in circumstances similar to Mr. McMillion's. *United States v. Daniels*, 101 F.4th 770 (10th Cir. 2024); *Northrup v. City of Toledo Police Dep't.*, 785 F.3d 1128 (6th Cir. 2015); *United States v. Black,* 707 F.3d 531, 540 (4th Cir. 2013); *Carter v. State*, 389 So. 3d 759 (Fla. Dist. Ct. App. 2024); *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019); *Pulley v. Commonwealth*, 481 S.W.3d 520 (Ky. Ct. App. 2016); *State v. Williamson*, 368 S.W.3d 468, 480 (Tenn. 2012); *Commonwealth v. Couture*, 552

N.E.2d 538, 540 (Mass. 1990). These courts generally reject arguments that presumptively legal firearm possession, combined with other innocent factors, can create reasonable suspicion of criminal activity. Instead, these courts are critical of attempts to "patch[] together a set of innocent, suspicion-free facts" to justify assuming firearm possession is unlawful or that a person with a firearm is committing a crime. *Black*, 707 F.3d at 539.

For example, the Tenth Circuit recently disagreed with the Eighth Circuit's rationale on materially indistinguishable facts. *United States v. Daniels*, 101 F.4th 770 (10th Cir. 2024). In *Daniels*, law enforcement received a tip that three black men had firearms and were taking the firearms in and out of their pockets.[5] The caller indicated the men looked like they were about to "do something." When analyzing the relevance of firearm possession, the Tenth Circuit noted that based upon *Bruen*, the court could not "look with suspicion" at an individual presumably exercising their Second Amendment rights. *Id*. at 778. Still, even when combined with other factors—that the defendant was in a high-crime area, in the middle of the night, and attempted to drive away once law enforcement arrived—the Tenth Circuit found no reasonable suspicion of criminal activity. *Id*. at 782-83.

The Pennsylvania Supreme Court has also rejected the legality of *Terry* stops under similar circumstances. *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019). In

[5] The circuit also noted issues with the tip itself, including reliability and insufficient evidence that the defendant matched the description in the tip. *Id*. at 778. The court assumed the tip was reliable, but afforded it little weight. *Id*.

Hicks, the Court found no reasonable suspicion based upon evidence that the defendant put a firearm in his waistband (a legal act), in a high-crime area, late at night. *Id*. at 404-10. The Court believed these innocent factors did not provide a "particularized basis upon which to suspect that [the defendants'] mere possession of a concealed firearm was unlawful." *Id*. at 410.

Other state appellate courts have agreed with this logic. In *Pulley*, the Kentucky Court of Appeals reasoned that, "[a] firearm when combined with other innocent circumstances cannot generate reasonable suspicion because 'it [is] impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.'" *Pulley*, 481 S.W.3d at 527 (quoting *United States v. Smith,* 263 F.3d 571, 594 (6th Cir. 2001) (internal quotation marks omitted). Additionally, in *Carter*, Florida's District Court of Appeals rejected that the possession of a firearm, combined with being present in a high-crime area and walking away from an officer asking questions, did not provide reasonable suspicion of criminal activity. 389 So. 3d 759.

B. Other courts agree with the Eighth Circuit and allow warrantless seizures based upon firearm possession, combined with other wholly innocent factors.

Although the minority position, some courts have upheld warrantless seizures in open-carry jurisdictions. For example, the Third Circuit has upheld a warrantless seizure under similar facts. *United States v. Valentine*, 232 F.3d 350 (3d Cir. 2000). In *Valentine,* the defendant, in an open-carry jurisdiction, was seized based upon

information that he possessed a firearm. The Third Circuit upheld the seizure, noting that the additional innocent factors—that the defendant was in a high-crime area, at night, and walked away from law enforcement—established reasonable suspicion. *Id.* at 357.

The Second Circuit also upheld a *Terry* stop under similar circumstances. *United States v. Hagood*, 78 F.4th 570 (2d Cir. 2023). In *Hagood*, the defendant was seen with a fanny pack that appeared to contain a firearm, in a high-crime area, in the middle of the night. The Second Circuit found this sufficient for reasonable suspicion. However, district courts in the Second Circuit have questioned whether warrantless seizures based upon firearm possession are valid post-*Bruen*. *See United States v. Homer*, No. 23-CR-86 (NGG), 2024 WL 1533919 (E.D.N.Y. Apr. 8, 2024) (finding no reasonable suspicion to support seizure based upon information that defendant possessed a firearm in a car associated with known gang members, while showing a "lack of firearm discipline" by repeatedly removing the firearm from his pocket).[6]

As the above illustrates, courts across the country are divided on how to evaluate *Terry* stops based upon firearm possession in open-carry jurisdictions. This Court should grant certiorari to address this split.

[6] The U.S. Attorney's Office in *Homer* initially filed for interlocutory appeal, but later voluntarily dismissed the appeal.

II. The Eighth Circuit's decision is inconsistent with this Court's precedent.

The Eighth Circuit's decision is contradictory to this Court's Fourth and Second Amendment jurisprudence. This Court has stated that there is no "automatic firearm exception" to the Fourth Amendment. *Florida v. J.L.*, 529 U.S. 266, 273 (2000). Yet allowing warrantless seizures under these circumstances creates such exception. Under the Eighth Circuit's reasoning, a constitutionally protected activity is suspicious if law enforcement can point to innocent factors also present, even without connecting why these factors somehow makes the firearm possession more likely to be illegal. Piling on innocent factors results in a "check-the-box" exercise inconsistent with the reasonable suspicion analysis. *Daniels*, 101 F.4th at 782.

Further, allowing the Eighth Circuit's holding to stand "would effectively eliminate Fourth Amendment protections for lawfully armed persons." *United States v. King,* 990 F.2d 1552, 1559 (10th Cir. 1993). The Second Amendment right to carry firearms in public is eroded if the assertion of this right subjects an individual to warrantless seizures. "When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir. 1977); *see also Miller v. Smith*, 115 F.3d 1136, 1150-51 (4th Cir. 1997) ("Forcing an [individual] to choose between two rights guaranteed by the Constitution results in the denial of one right or the other . . . [and] affronts our notions of basic fairness.").

This Court should grant certiorari to ensure that *Terry* stops based upon firearm possession are consistent with this Court's precedent.

CONCLUSION

For the reasons stated herein, Mr. McMillion respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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