No._____

In The

Supreme Court of the United States

Jacob Matthew Johnson

Petitioner,

v.

The State of Texas

Respondent.

On Petition for Writ of Certiorari
to the
Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

JONATHAN D. LANDERS
917 Franklin St., Ste. 300
Houston, TX 77002
(713) 685-5000
Jlanders.law@gmail.com

WILLIAM P. DEMOND
DEMOND LAW, PLLC
1520 Rutland St.
Houston, TX 77008
(713) 701-5240
william@demondlaw.com
Counsel of Record
for Petitioner

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QUESTION PRESENTED

Can three or four unadorned "calls for service" to an area (1) constitute a specific and articulable fact significantly associating said area with criminal activity, (2) support an officer's reasonable suspicion of those found therein, and (3) justify a warrantless search and seizure despite the plain text of the Fourth Amendment and "no indication that the person was engaged in criminal activity other than sitting there in the dark"?

LIST OF PARTIES

The caption of the case contains the names of all the parties. *See* Sup. Ct. R. 14(1)(b)(i).

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

- On August 2, 2017, in cause number 224018 pending in County Court at Law no. 1 of Brazoria County, Texas, the trial court denied Mr. Johnson's motion to suppress evidence after signing the State's proposed findings of facts and conclusions of law. On May, 8, 2018, Mr. Johnson was found guilty of possessing marijuana and sentenced to three days in jail and a fine of $500.

- Texas' Fourteenth Court of Appeals reversed the trial court's ruling on Mr. Johnson's motion to suppress evidence on May 28, 2020. *Johnson v. State*, 602 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2020), *rev'd*, 622 S.W.3d 378 (Tex. Crim. App. 2021).

- The Texas Court of Criminal Appeals reversed the opinion of the court of appeals and affirmed the judgment of the trial court, over dissent, on May 12, 2021. *Johnson v. State*, 622 S.W.3d 378 (Tex. Crim. App. 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jacob Matthew Johnson respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (App., *infra*, 1a-19a) is reported at 622 S.W.3d 378; there was one concurrence without opinion, one dissent without opinion, and one dissenting opinion (App., *infra*, 20a-30a). Texas' Fourteenth Court of Appeals' opinion (App., *infra*, 31a-49a) is reported at 602 S.W.3d 50; there was one concurring opinion (App., *infra*, 50a-66a).

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was filed on May 12, 2021. This Court's jurisdiction rests on 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fourth Amendment to the United States Constitution provides:

> 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.

U.S. CONST. amend. IV.

STATEMENT

The Court should clarify the contours of constitutionally permissible warrantless arrests in areas with allegedly high levels of crime. The Chief Justice of this Court has acknowledged a split among the states concerning "high crime area" analyses, lower courts and scholars acknowledge there is neither a definition of such areas nor an accepted test to identify them, and an area's "significant association with criminal activity" is even more nebulous than "high crime". This case presents a compelling opportunity for the Court to identify how such areas are identified under the Fourth Amendment and to establish whether a nexus must exist between such designations and the specific facts articulated to justify *Terry* stops.

A. Factual Background

Sergeant Robert Cox of the Brazoria County (Texas) Sheriff's Office was patrolling a 24-hour park-and-ride in the early morning hours of August 28, 2016 when he saw Johnson's parked vehicle with its lights off. Sergeant Cox parked his car 10-15 yards away from Johnson's vehicle, turned on his overhead lights,[1] approached the vehicle, and identified himself. As Mr. Johnson lowered his car window, Sergeant Cox detected the odor of marijuana, saw Johnson's pants were unbuttoned, and arrested him.

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[1] App., *infra*, 76a ("Q: . . . [S]o if you turned on your overhead lights, it would be like a normal police car pulling somebody over if you got a traffic ticket. Right? I mean, that's what your vehicle looked like? A [Sergeant Cox]: Yes, sir.").

At the suppression hearing, the State stipulated that "it was a warrantless arrest."[2] Sergeant Cox (the State's sole witness) then testified: (1) while working the night of August 28, 2016, he noticed "a suspicious vehicle in a park-and-ride, FM 2004 and FM 523";[3] (2) he patrolled that area "every night" that he works[4] and had done so for ten years;[5] (3) the park-and-ride had "a variety of criminal activities" (including "burglaries of motor vehicles, public lewdness, [and] illicit drugs");[6] (4) he responded to calls there on "several occasions"[7] (but could not say how many times "without pulling up our call history on it");[8] (5) he personally responded to "maybe three or four" calls for service to the park-and-ride "in the months around August 28th of 2016";[9] (6) the park-and-ride was open twenty-four hours a day;[10] (7) patrons of a nearby bar also utilized the park-and-

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[2] App., *infra*, 67a. The State therefore had the burden to prove that the search or seizure was reasonable under the totality of the circumstances. *Amador v. State*, 221 S.W.3d 666, 672–73 (Tex. Crim. App. 2007).

[3] App., *infra*, 68a.

[4] App., *infra*, 69a-70a.

[5] App., *infra*, 70a.

[6] App., *infra*, 70a-71a.

[7] App., *infra*, 71a. Upon questioning from the trial court, Sergeant Cox stated that in the ten years he had been going to the park-and-ride, he had been out there "a lot". *Ibid.*; *see also* App., *infra*, 70a (Sergeant Cox went to the park-and-ride every night he was on duty for approximately ten years).

[8] App., *infra*, 71a-72a; *see also* App., *infra*, 44a ("Officer Cox has had to make some calls for service to the Parking Lot for criminal activity.").

[9] App., *infra*, 72a.

[10] App., *infra*, 78a.

ride;[11] (8) during his routine patrols of the park-and-ride, he would drive around and shine a spotlight on the vehicles;[12] (9) the interior and exterior lights of Johnson's vehicle were off;[13] (9) he shined his spotlight on Johnson's vehicle;[14] (10) he saw two individuals inside and detected movement;[15] and (11) based on his experience, he thought that it was out of the ordinary for someone to be inside a vehicle at the park-and-ride after midnight with no one there to give them a ride.[16] Sergeant Cox did not testify that the parking lot was a "high crime area". *Johnson*, 602 S.W.3d at 60.

B. Proceedings Below

At the motion to suppress hearing, the State's counsel argued:

> Sergeant Cox had reasonable suspicion because there were prior incidences of burglaries, public lewdness, and drug use in this park-and-ride and we believe that the case law shows that people that are parked in high crime areas at odd times of night, that – those facts *alone* would provide reasonable suspicion for an investigative detention.[17]

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11 *Ibid.*
12 App., *infra*, 73a.
13 *Ibid.*
14 *Ibid.*
15 *Ibid.*
16 App., *infra*, 79a.
17 App., *infra*, 80a (emphasis added).

The State's counsel also judicially admitted,

> So, basically, Judge . . . in this case [Sergeant Cox] was simply stopping by a vehicle that was parked in a suspicious location to find out what was going on.[18]

After hearing the arguments of counsel, the trial court denied Johnson's motion to suppress.

The trial court entered findings of fact, including:

> 4. The park and ride at the intersection of FM 2004 and FM 523 is a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness. Sergeant Cox testified that he had personally made several arrests in the months prior to this offense for such offenses in that park and ride.
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> *Johnson*, 602 S.W.3d at 55.

The trial court also entered conclusions of law:

> 1. Officers do not need reasonable suspicion to initiate a consensual encounter with a citizen. Sergeant Cox's initial encounter with the defendant was a proper consensual encounter that later evolved into an investigative detention.

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18 *Ibid.*

> 2. The sole fact that Sergeant Cox activat[ed] his overhead lights alone did not elevate the consensual encounter into an investigative detention.
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> 3. If the initial encounter was a detention, it was properly supported by reasonable suspicion of criminal activity as necessary to detain the defendant based on specific, articulable facts, namely: his presence in the park and ride, a high crime area, after the park and ride's normal operating hours.
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> *Id.* at 55-56.

According to the Texas Court of Criminal Appeals, "[t]he [intermediate] court of appeals concluded that [1] a seizure had occurred before Appellant rolled down his car window . . . . [2] Sergeant Cox lacked reasonable suspicion to initiate the seizure . . . . [3] the record does not support the trial court's finding that the park-and-ride 'is a high crime area[']"[19] . . . . [and 4] even in the light most favorable to the trial court's ruling, the record in this case did not reasonably support the trial court's determination that Sergeant Cox had the requisite reasonable suspicion."[20] The concurring opinion from the intermediate court concluded that the time of day was not suspicious

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[19] *See* TEX. CONST. art. V, § 6(a) (decisions from intermediate courts of appeals "shall be conclusive on all questions of fact brought before them on appeal or error").

[20] App., *infra*, 7a-9a.

because the park-and-ride was open twenty-four hours a day.[21]

The concurrence also rejected the trial court's "high crime area" analysis on additional grounds:

> First, there is no evidence that anyone committed a crime during those [Sergeant Cox's] service calls; instead, the reasonable inference is only that someone called the police for some unidentified form of assistance.[22] Second, there is no evidence anyone was arrested during those service calls. Third, if it was a high crime area, Officer Cox's ten years patrolling it should have yielded additional testimony establishing that fact. Fourth, three to four service calls over the course of several months to an establishment that is perpetually open does not constitute a "high crime area"; concluding otherwise would obliterate the significance of the Supreme Court's test, effectively convert every neighborhood in every sizable Texas city to a high crime area, and undermine the reasonableness component of Fourth Amendment jurisprudence.

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[21] *Johnson*, 602 S.W.3d at 65-66 (Hassan, J., concurring) (citing *Klare v. State*, 76 S.W.3d 68, 75 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (citing *U.S. v. Nicholas*, 104 F.3d 368 (10th Cir. 1996))).

[22] *But see Johnson*, 622 S.W.3d at 385 (suggesting the trial court should have inferred there were crimes).

Id. at 67-68 (Hassan, J., concurring) (citations omitted).

The Texas Court of Criminal Appeals reversed, assumed Johnson was seized when Sergeant Cox activated his overhead lights,[23] and accepted the trial court's finding that the arresting officer had reasonable suspicion to seize Johnson based on the area's "significant association with criminal activity and because the occupants of the vehicle engaged in activity that appeared secretive and was unusual for the time and place."[24] Only six of nine judges joined the opinion.

Judge Walker dissented and found (1) the presence of Johnson's vehicle "was neither odd nor out-of-the-ordinary";[25] (2) his vehicle was parked "during normal operating hours";[26] (3) Johnson's "relative seclusion was never testified to";[27] (4) "[f]rom the vehicle being dark and not parked adjacent to the other vehicles, the Court sees unusual and secretive behavior";[28] and (5) "Based upon the totality of the circumstances, there could not be a reasonable suspicion that criminal activity was imminent."[29] Judge Walker also opined that, "[i]n essence, [Johnson] was suspicious because he was not doing what 'one might expect' of an innocent person" and asked: "Should every place where people are engaged in hidden—and therefore private—business be

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23 *Johnson*, 622 S.W.3d at 383.

24 *Id.* at 381.

25 *Id.* at 389 (Walker, J., dissenting).

26 *Ibid.*

27 *Ibid.*

28 *Id.* at 390 (Walker, J., dissenting).

29 *Id.* at 392 (Walker, J., dissenting).

reasonably suspected of containing criminal activity such that the State has license to poke its nose inside?"[30] Finally, Judge Walker concluded:

> Whether [this] detention was premature or whether it represented a disregard for the Constitution, the nearly-immediate decision to detain a person sitting in a car, with no indication that the person was engaged in criminal activity other than sitting there in the dark, undermines the public trust in law enforcement and the entire justice system.[31]

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30 *Id.* at 390 (Walker, J., dissenting).

31 *Id.* at 392 (Walker, J., dissenting).

REASONS FOR GRANTING THE PETITION

The Court should grant review. The Texas Court of Criminal Appeals has decided an important question of federal law concerning warrantless arrests of people who are present in areas associated with criminal activity that (1) is contrary to this Court's decisions;[32] (2) conflicts with decisions from state courts of last resort[33] and United States courts of appeals; and (3) has not been, but should be, settled by this Court, *i.e.,* how should courts determine whether areas are sufficiently associated with criminal activity to suspend Fourth Amendment protections therein and must the facts upon which a stop is based share some nexus with said association? Finally, the Court should grant review because this case implicates significant privacy interests for those living in, working in, traveling through, parking in, or conducting commerce in areas deemed sufficiently associated with criminal activity for law enforcement to suspend Fourth Amendment protections and warrantlessly seize those found therein.

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[32] *See, e.g., Brown v. Texas,* 443 U.S. 47, 52 (1979), *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citing *Brown*, 443 U.S. 47), and *Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990) ("Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion.").

[33] *See Pennsylvania v. Dunlap*, 128 S. Ct. 448, 449 (2008) (ROBERTS, C.J., dissenting from denial of cert.) ("Aside from its importance for law enforcement, this question [involving probable cause analyses in high crime areas] has divided state courts, a traditional ground warranting review on certiorari.").

I. Granting certiorari is necessary to address an important constitutional question that other courts would have resolved differently

a. CONTRARY DECISIONS FROM UNITED STATES COURTS OF APPEALS

i. The First Circuit has held illumination in a vehicle in a "high crime area" at night creates reasonable suspicion

In *U.S. v. Stanley*, 915 F.2d 54 (1st Cir. 1990), the First Circuit held the defendant's conduct in a "slightly illuminated" vehicle after midnight in an area with a reputation for narcotics transactions created reasonable suspicion. *Id.* at 56.[34] Here, the court held there was reasonable suspicion because no light emanated from the interior of Johnson's vehicle. *Johnson*, 622 S.W.3d at 387 ("One might expect to see some sort of light in the occupied vehicle, such as from a cell phone calling the ride or monitoring its progress, a CD player playing a song while the person waits, an internal light on to read a book, or the light of a smartphone occupying one's time.").[35] According to

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[34] "The officers noticed defendant alone in his car, just after midnight, leaning over the center console which was slightly illuminated. He was apparently engaged in some purposeful activity which, under the circumstances, and given their experience, the officers suspected was drug-related."

[35] *But see U.S. v. See*, 574 F.3d 309 (6th Cir. 2009) (finding no reasonable suspicion where, "[a]part from the contextual factors of time and the high-crime status of the area, all that Williams knew at the time he parked his car

the Texas Court of Criminal Appeals, the absence of light "would easily facilitate [drug] crimes" or create "a waiting spot for the commission of some other crime." *Johnson*, 622 S.W.3d at 387-88; *see also Johnson*, 622 S.W.3d at 391 (Walker, J., dissenting) ("It seems to me that . . . the Court has to resort to stereotypes about light and dark, day and night, good and evil.").

These decisions reveal that despite this Court's holdings in *Brown, Wardlow*, and *Buie*, courts are utilizing trivial facts to uphold officers' unconstitutional searches and seizures based on the People's presence in certain areas alone. Here, Texas' highest criminal court did so by (1) adopting the trial court's unsubstantiated finding that the park-and-ride had a "significant association with criminal activity" and (2) reverse engineering a new test for reasonable suspicion based thereon. Without clarification from this Court, people in such areas will continue to have diminished rights under the Fourth

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was that there were three men in an unlit car in the parking lot of a housing complex and that they had not chosen to park in one of the spots closer to the building."); *Commw. v. Helme*, 503 N.E.2d 1287, 1289-90 (Mass. 1987) ("The use of interior lights in an automobile raises no reasonable suspicion of criminal activity nor indicates potentially hazardous conditions confronting the occupants of the vehicle."); *cf. People v. Freeman*, 320 N.W.2d 878, 880 (Mich. 1982) (illegal stop because "(1) an idling, occupied vehicle with its parking lights on, parked in an otherwise darkened, deserted parking lot, (2) near a darkened house, (3) at 12:30 a.m." did not provide a sufficient basis for the officer's suspicion that criminal activity might be afoot).

Amendment despite the absence of any constitutional text authorizing such diminution.

ii. The First Circuit's framework concerning the designation of "high crime areas"

The First Circuit appears to be a minority jurisdiction because it has formulated a three-part framework to determine whether an area is "high crime". *See U.S. v. Wright*, 485 F.3d 45, 53-54 (1st Cir. 2007).

> In most cases, the relevant evidence for this factual finding will include some combination of the following: (1) the nexus between the type of crime most prevalent or common in the area and the type of crime suspected in the instant case, . . . (2) limited geographic boundaries of the "area" or "neighborhood" being evaluated, and (3) temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue . . . . Evidence on these issues could include a mix of objective data and the testimony of police officers, describing their experiences in the area.

Id. (internal citations omitted); *see also U.S. v. Alvin*, 701 F. App'x 151, 154 (3d Cir. 2017) (unpub.) ("Ultimately, it was not just the high-crime area or the hour, but also the relationship between what the officers observed and the informant's knowledge—i.e.,

the temporal and geographical proximity—as well as the number of persons in the area that 'place[d] th[at] case squarely on the constitutional side of the divide [between reasonable and unreasonable suspicion].'") (citation omitted).[36]

Here, there is no nexus available because the officer's "maybe three or four" service calls over several months reveal no evidence of any crime, much less "the type of crime most prevalent or common in the area." *See Johnson*, 602 S.W.3d at 60.[37] No evidence tends to show that an occupied car (with or without lights) was related to *any* type of crime in the area, much less the type that was allegedly prevalent at any relevant time. Similarly, there is no "temporal

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[36] *Cf. U.S. v. Juvenile TK*, 134 F.3d 899, 903 (8th Cir. 1998) (focusing in part on "temporal and geographic proximity of the car to the scene of the crime"); *State v. Chisum*, 200 A.3d 1279, 1289 (N.J. 2019) (no reasonable suspicion where reputation for previous criminal activity "is unconnected to the circumstances surrounding" the complaint at issue).

[37] "Officer Cox testified that in the months around the time of the charged offense, he had gone to that Parking Lot three of four times '[f]or calls of service.' He did not identify the nature of the service calls, nor did he say whether he made an arrest during any of these calls." *See also Johnson*, 622 S.W.3d at 385 ("[A]s the court of appeals pointed out, Sergeant Cox did not explicitly testify that his calls to the park-and-ride were for those crimes or that he made arrests during those calls."); *Johnson*, 602 S.W.3d at 67-68 (Hassan, J., concurring) ("[T]here is no evidence that anyone committed a crime during [Sergeant Cox's] service calls; instead, the reasonable inference is only that someone called the police for some unidentified form of assistance.").

proximity" possible because there is no evidence of criminal activity at any specific time, much less evidence of "heightened criminal activity" at any time. *See Wright*, 485 F.3d at 54.

Johnson respectfully asks this Court to either adopt the First Circuit's *Wright* framework or to provide additional guidance that identifies the necessary nexus(es) between areas with allegedly sufficient levels of crime and the conduct of those therein before *Terry* stops are constitutionally permissible.

iii. The Second Circuit's opinion that a "high crime area" designation is not a substitute for analyzing underlying testimony

The Second Circuit recognizes the danger at issue. After acknowledging, "the fact that the encounter occurred late at night is a relatively weak and generic factor," it specifically warned that "the general label 'high crime area' is not a substitute for analysis of the underlying testimony." *U.S. v. Freeman*, 735 F.3d 92, 101 (2d Cir. 2013) (no reasonable suspicion where officer "gave no sense of the length of time over which those incidents occurred or whether the number of incidents was atypical . . . little elaboration on the basis" for police treatment of the area as "high crime" was provided); *accord U.S. v. Montero-Camargo*, 208 F.3d 1122, 1138-39 & n.32 (9th Cir. 2000) (en banc) ("[C]ourts should examine with care the specific data underlying" the assertion that an area is one in which "particular crimes occur with unusual regularity."), *cert. denied*, 531 U.S. 889 (2000); *State v. Pineiro*, 853 A.2d 887, 898 (N.J. 2004)

("The words 'high crime area' should not be invoked talismanically by police officers to justify a *Terry* stop that would not pass constitutional muster in any other location.") (citations omitted).

Here, the Texas Court of Criminal Appeals accepted the trial court's characterization of the area as "significantly associated with criminal activity" without recognizing that "*maybe* three or four"[38] service calls over several months to a 24-hour business do not tend to prove any fact relevant to a reasonable suspicion analysis; in fact, it fails to even imply officers had any suspicion anyone was engaged in any type of crime at any specific or relevant time. *See Johnson*, 622 S.W.3d at 385; *Johnson*, 602 S.W.3d at 59; *id.* at 67-68 (Hassan, J., concurring). The Texas Court of Criminal Appeals therefore substituted an unsubstantiated characterization of the area for the requisite analysis of specific and articulable facts justifying a warrantless seizure. *Compare Terry v. Ohio*, 392 U.S. 1, 21 n. 18 (1968) ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.") (citations omitted) *with Johnson*, 622 S.W.3d at 382 (trial court concluded the specific and articulable fact at issue was Johnson's "presence in the park and ride, a high crime area, after the park and ride's normal operating hours."). This Court should grant review to determine whether such substitution is reasonable and authorized under the Fourth Amendment.

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[38] Emphasis added.

iv. Circuits relying upon sufficient quanta of alleged crime

Several United States courts of appeals have designated areas to be sufficiently associated with criminal activity to justify *Terry* stops of those therein based upon a sufficiently alleged quantum of crime. *See, e.g.*, *Wright*, 485 F.3d at 49 (where the "high crime area" finding was supported by weekly and biweekly reports, biweekly meetings analyzing statistics, and where the defendant was provided detailed discovery supporting the finding); *U.S. v. Evans*, 994 F.2d 317, 321 (7th Cir. 1993) (high crime area finding supported by daily reports of gunfire, auto theft, and other crimes proven by entries from a police logbook detailing citizen complaints at a particular residential duplex); *U.S. v. Thornton*, 197 F.3d 241, 248 (7th Cir. 1999) ("In less than one year there had been some 2,500 drug arrests in the five-block- by-five-block area where the incident occurred.");[39] *contra U.S. v. Bonner*, 363 F.3d 213, 216 (3d Cir. 2004) (district court did not err when it found an area was not "high crime" based on an examination of logbooks over a three-year period yielding an average of 1.3 arrests per week).

This lack of clarity concerning constitutional standards for identifying such areas is further evidenced via holdings based on generalized quanta of alleged crime. *See U.S. v. Flowers*, 6 F.4th 651, 654, 657 (5th Cir. July 30, 2021) (examining a warrantless arrest in "an area of Jackson, around Capitol Street

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[39] *Cf. U.S. v. Rickus*, 737 F.2d 360, 362 (3d Cir. 1984) (where officers were aware that the area had recently been victimized by as many as twelve unsolved nighttime burglaries).

and Road of Remembrance, where 'recent violent crime and burglaries' had occurred" and utilizing said fact to conclude said area had a "pervasive and continuous criminal pattern"); *see also U.S. v. Trullo*, 809 F.2d 108, 111 (1st Cir. 1987) (stop performed in Boston's "Combat Zone" was "unquestionably" in "a high crime area and had "been the scene of many stabbings and shootings, often fatal."); *U.S. v. Gomez*, 633 F.2d 999, 1005 (2d Cir. 1980) ("The car was halted in an area of high narcotics activity—a factor appropriate in considering whether an investigatory stop was proper."), *cert. denied*, 450 U.S. 994 (1981).[40]

The Texas Court of Criminal Appeals' opinion that "maybe three or four" generalized "service calls" to an area can justify warrantless seizures and searches diminishes the Fourth Amendment rights of those therein. *See Flowers*, 6 F.4th at 662 (5th Cir. July 30, 2021) (Elrod, J., dissenting) ("For citizens to become suspects, they must do more than merely exist in an 'unsavory' neighborhood."). This holding from Texas' highest criminal court is contrary to United States courts of appeals' opinions that have explicitly

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[40] *See also U.S. v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 904 (11th Cir. 1985) (court could observe as a "common experience consideration" that Miami had become a center for drug smuggling and money laundering), *cert. denied*, 474 U.S. 1056 (1985); *U.S. v. Goodrich*, 450 F.3d 552, 553 (3d Cir. 2006) (concluding an area was "high crime" where police "had responded to ten to fifteen reported thefts of anhydrous ammonia" from the tanks at issue preceding defendant's arrest); *contra Freeman*, 735 F.3d at 101 (officer "recited some of the crimes that took place in the area, but gave no sense of the length of time over which those incidents occurred or whether the number of incidents was atypical.").

depended upon substantially higher (or generalized) numbers of alleged crimes, neither of which is present herein. *See Johnson*, 602 S.W.3d at 60 ("Officer Cox also testified that he has had to make some calls for service to the Parking Lot for criminal activity. He did not state how many times he made these calls or for what criminal activity.").

v. Circuits relying upon sufficient nexuses

United States courts of appeals have also found areas are sufficiently associated with criminal activity to justify *Terry* stops when there was a sufficient nexus between previous criminal acts and the circumstances creating reasonable suspicion. *See Wright*, 485 F.3d at 53-54 (discussing the nexus requirement); *U.S. v. Rickus*, 737 F.2d 360, 365 (3d Cir. 1984) (reasonable suspicion to stop vehicle aimlessly and slowly driving through area with multiple recent burglaries); *U.S. v. Ogden*, 703 F.2d 629, 633 (1st Cir. 1983) (four out-of-state tractor trailer trucks at deep-water docking facility at night in area of Maine coast where authorities knew that drug smuggling was going on and "there was no legitimate reason for the trucks being there"). Sergeant Cox's testimony revealed that in his ten years of nightly patrols, he was aware of burglaries, lewdness, and illicit drugs at the park-and-ride. App., *infra*, 70a-71a. However, Sergeant Cox failed to explain how sitting in a car with the lights off was related to any criminal activity. *See, e.g.*, *U.S. v. Williams*, 808 F.3d 238, 249 (4th Cir. 2015) ("This record does not make an evidentiary connection between nocturnal travel and drug trafficking . . . .

Absent such a connection, that the traffic stop of [the defendant] occurred at about 12:37 a.m. does not contribute to a reasonable, articulable suspicion . . .”). Therefore, the Texas Court of Criminal Appeals’ holding is also contrary to United States courts of appeals that require a nexus between previous criminal acts and the suspected criminal act at issue.

b. STATE COURTS OF LAST RESORT

i. Random stops are unconstitutional

In *State v. Legg*, the Supreme Court of Appeals of West Virginia held that there was no reasonable suspicion where conservation officers “patrolled what they believed to be a ‘high crime’ area, and randomly stopped vehicles to determine if the occupants of the vehicles were committing any crimes.” 536 S.E.2d 110, 117 (W. Va. 2000). *Compare ibid. with* App., *infra*, 80a (counsel for the State: “So, basically, Judge . . . in this case [Sergeant Cox] was simply stopping by a vehicle that was parked in a suspicious location to find out what was going on.”). The court concluded, “[s]uch unbridled use of authority by a law enforcement officer is precisely what the State and Federal Constitutions intended to prohibit.” *Legg*, 536 S.E.2d at 117; *see also State v. Anderson*, 783 S.E.2d 51, 55 (S.C. 2016) (“Certainly being in a high crime area does not provide police officers carte blanche to stop any person they meet on the street.”); *State v. Weyand*, 399 P.3d 530, 536 (Wash. 2017) (“Police cannot justify a suspicion of criminal conduct based only on a person’s location in a high crime area.”). The Texas Court of Criminal Appeals’ holding that Johnson could be seized because he was sitting and moving in an

unilluminated parked car in an area with an unquantified "association with criminal activity" conflicts with numerous other state courts of last resort concerning an important federal question arising under the Fourth Amendment.

ii. Courts relying upon sufficient quanta of alleged crime

Some state courts of last resort that conclude an area is sufficiently associated with criminal activity to justify *Terry* stops appear to do so based on officers' representations concerning the number of crimes that allegedly occurred therein. *See, e.g.*, *State v. Hamdan*, 665 N.W.2d 785, 791 (Wis. 2003) (finding a "high crime neighborhood" based upon a specific number of crimes, during a limited time period, in a specific area). Other states rely on an officer's personal arrests. *See, e.g.*, *Commw. v. Santaliz*, 596 N.E.2d 337, 338 (Mass. 1992) (officer involved in 50 drug-related arrests in the neighborhood over an undisclosed period of time); *People v. Aldridge*, 674 P.2d 240, 241 (Cal. 1984) (officer "made more than two hundred arrests in the area"). Similar to the federal courts, some state courts of last resort also allow generalizations concerning the quantum of alleged crime when they are sufficiently connected to other relevant facts. *See*, *e.g.*, *Woody v. State*, 765 A.2d 1257, 1259-60 (Del. 2001) (area linked with drug dealing and officers noticed bulge in clothing of man who fled upon seeing them); *State v. Richardson*, 501 N.W.2d 495, 496 (Iowa 1993) (officer had reasonable suspicion to stop automobile parked in the middle of night near chain link fence in a nonresidential neighborhood that had been frequently burglarized);

but see State v. Dean, 645 A.2d 634, 636 (Me. 1994) (reasonable suspicion based upon vague "high crime" finding and defendant's presence in the area).

The Texas Court of Criminal Appeals' opinion conflicts with the foregoing authorities because Sergeant Cox's "maybe three or four" service calls reveal no quantum of crime at any specific or relevant time. *Compare Johnson*, 602 S.W.3d at 60 ("Officer Cox never specified how many of these criminal offenses had occurred there.") *with* TEX. CONST. art. V, § 6(a) (factual conclusivity clause); *see also Johnson*, 602 S.W.2d at 67-68 (Hassan, J., concurring).[41]

iii. Courts relying upon temporal proximity

Some state courts of last resort further analyze the amount of alleged crime within a relevant time period. S*ee, e.g.*, *Woody*, 765 A.2d at 1260 (arrest made just two weeks earlier); *State v. Donnell*, 239 N.W.2d 575, 577 (Iowa 1976) (hundreds of break-ins during the past year). The Texas Court of Criminal

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[41] *Cf. N. Mariana Islands v. Crisostomo*, No. 2013-SCC-0008-CRM, 2014 MP 18, 2014 WL 7072149, at *3 (N. Mar. I. Dec. 12, 2014) ("In each instance, the testimony relied on the area's reputation. The officers never said how many arrests took place at the beach, how many of those arrests led to convictions, or how those rates differed from other areas. In other words, they never provided the court the data necessary to independently review whether the beach was, in fact, a high-crime area. In sum, it was an error to label the beach as a high-crime area solely on generalized assertions that an area was well-known for certain illegal activities.").

Appeals' opinion is also contrary to these states because there is no evidence of the last time any crime occurred at the park-and-ride. *See Johnson*, 602 S.W.3d at 67-68 (Hassan, J., concurring); *see also Bailey v. State*, 987 A.2d 72, 93 (Md. 2010) ("[T]he testimony about the high drug crime area did not provide any specific information . . . Rather, the testimony indicated that there were general complaints about criminal or drug activity in the area, of unknown frequency, made at unknown points in time.").

iv. Courts relying upon facts known to the officer

Other state courts of last resort have concluded there was an absence of reasonable suspicion in "high crime areas" even when the officers had personal knowledge of specific facts that substantially exceeded those herein. *See id.* at 77–78 (no reasonable suspicion where defendant was standing in a "high crime drug area" despite the odor of ether emanating from his person and his failure to respond to police questions); *State v. Larson*, 611 P.2d 771, 775 (Wash. 1980) (no reasonable suspicion where a car was parked contrary to local ordinance in a "high crime area" at 3 a.m. and officers knew about recent burglaries; "it appears that she was detained because of her presence in a particular location, even though she had a lawful right to be there, rather than because of any suspicious conduct."); *see also Johnson*, 602 S.W.3d at 59 (quoting *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011)).

The Texas Court of Criminal Appeals approved Sergeant Cox's *Terry* stop despite the generalized

information presented via (1) "maybe three or four" service calls to a 24-hour park-and-ride "in the months around August 28th of 2016", (2) nightly patrols revealing three forms of crime over 10 years, and (3) Johnson's presence and movement in a vehicle with its lights off. "In essence, [Johnson] was suspicious because he was not doing what 'one might expect' of an innocent person." *Johnson*, 622 S.W.3d at 390 (Walker, J., dissenting); *see also Moberly v. Commw.*, 551 S.W.3d 26, 32 (Ky. 2018) ("The fact is that many honest, decent, law-abiding citizens live in high-crime areas under similar circumstances and would behave the same way . . . . [The arresting officer] articulated nothing about Appellant's behaviors, individually or collectively, to connect him to criminal behavior beyond what may be ordinarily expected of a driver stopped for a traffic violation."); *People v. Freeman*, 320 N.W.2d 878, 881 (Mich. 1982) ("[T]he record in this case is devoid of any reference to other specific facts which would cast a suspicious light upon the presence of Freeman's vehicle in the parking lot.").[42] The Texas Court of Criminal Appeals' new

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[42] *Cf. Flowers*, 6 F.4th at 662 (Elrod, J., dissenting) ("As my able colleague once put it, 'it defies reason to base a justification for a search upon actions that any similarly-situated person would have taken.'") (quoting *U.S. v. Rideau*, 969 F.2d 1572, 1581 (5th Cir. 1992) (en banc) (Smith, J., dissenting)); *People v. Thomas*, 660 P.2d 1272, 1276 n.2 (Colo. 1983) ("Considering the universal character of the suspected activity . . . any conclusion to be drawn from that activity alone would not be the type of *reasonable inference* from specific and articulable facts that *Terry* and its progeny require, regardless of the officer's opinion of the area as a 'high crime area.'") (emphasis in the original); *People v. Bower*, 597 P.2d 115, 119 (Cal. 1979) (rejecting

threshold for *Terry* stops will be mercilessly replicated, thereby exposing countless people to diminished constitutional protections based on subjective expectations of specific environments that are derived from subjective experiences and prejudices. *See, e.g., Hill v. State*, 2021 WL 3411864, at *3 (Tex. App.—Austin Aug. 5, 2021, no pet.) ("A setting that 'ha[s] a significant association with criminal activity' can support reasonable suspicion[.]") (quoting *Johnson*, 622 S.W.3d at 387).

The Texas Court of Criminal Appeals' holding that the stop at issue was supported by reasonable suspicion despite the absence of any specific or articulable facts linking Johnson (or anyone) to any type of crime committed at any specific or relevant time appears contrary to every state court of last resort that has addressed this issue. This material divergence warrants review and presents an opportunity to identify a uniform set of guiding principles with respect to *Terry* stops in areas with constitutionally significant levels of crime.

"that a location's crime rate transforms otherwise innocent-appearing circumstances into circumstances justifying the seizure of an individual") (citations omitted); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 Ohio St. L.J. 99, 143 (1999) (arguing that "the character of the neighborhood for criminality should be considered only where the behavior that is relied upon to establish reasonable suspicion is behavior not commonly observed among law-abiding persons at the time and place observed.").

II. Unanswered important federal question: how should courts determine whether areas are sufficiently associated with criminal activity to warrant the suspension of Fourth Amendment protections therein?

"The concept of a high-crime area is easy enough to imagine, but lacks a generally accepted definition." *N. Mariana Islands v. Crisostomo*, No. 2013-SCC-0008-CRM, 2014 WL 7072149, at *2 (N. Mar. I. Dec. 12, 2014);[43] *see also People v. Bower*, 597 P.2d 115, 120 n.8 (Cal. 1979) ("[T]here is as yet no consistent or predictable agreement as to what 'rate' of crime is a 'high' one for this purpose."); *State v. Genous*, 961 N.W.2d 41, 47 (Wis. June 4, 2021) (Dallet, J., dissenting) ("Without a generally accepted understanding of what 'high-crime area' means, its definition (and its boundaries) will shift from court to court.") (citing Andrew G. Ferguson, *Crime Mapping and the Fourth Amendment*, 63 Hastings L.J. 179, 203-05 (2011)); *ibid.* ("[I]t is unclear what the term 'high-crime area' actually means, making it difficult for circuit courts to know how much weight to give a location's characteristics in any particular analysis. We should therefore adopt objective criteria for evaluating an assertion that an area is high in

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[43] Citing Andrew Guthrie Ferguson & Damien Bernache, *The "High–Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 Am. U. L. Rev. 1587, 1590 (2008) ("The Supreme Court has never provided a definition. Lower courts are equally imprecise.").

crime.").[44] The complications arising from this absence of a uniform definition are compounded by the absence of guidance as to whether lower courts should consider (1) the number of arrests performed by officers in a particular area, (2) the relative number of convictions based on those arrests, (3) the number of criminal complaints in an area, (4) indictments, (5) 911 calls, or (6) some other metric (or combinations thereof).

Worse still, relying upon arrests alone (without evidence of relevant convictions) to impose such designations improperly presumes that those who were arrested are guilty contrary to a long-treasured *presumptio juris*.[45] Further, "giving substantial weight to the perceived crime rate of an area [based on arrests alone] may constitute a self-fulfilling prophecy." *Bower*, 597 P.2d at 120 n.8 (citation omitted); *see also Remers v. Superior Court*, 470 P.2d

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[44] *Cf. State v. Morgan*, 539 N.W.2d 887, 891 (Wis. 1995) (quoting the trial court judge: "[I]f the state wants the Court to rely on a high-crime area theory in justifying a *Terry* pat down, there has to be a clear and specific record made."); *Bonner*, 363 F.3d at 218 (Smith, J., concurring) ("I write separately only to highlight an issue implicated in the District Court's fact-finding which we have not been required to address: whether under the flight 'plus' analysis of *Wardlow* . . . the government is required to prove the existence of objective criteria for what constitutes a high crime area and that the stop occurred in such an area, or rather that the government is required to prove that officers effecting the stop had a reasonable articulable basis to believe that they were in a 'high-crime area'.").

[45] *See Coffin v. U.S.*, 156 U.S. 432, 460 (1895); *see also Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017) ("Absent conviction of a crime, one is presumed innocent.").

11, 16 (Cal. 1970) ("[P]olice officers cannot utilize invalid arrests as a basis for estimating a particular location's crime rate and then utilize the resulting estimate in determining the reasonableness of an arrest and search in that location.") (citation omitted).

Relatedly, labeling an area as "high crime" "raises special concerns of racial, ethnic, and socioeconomic profiling." *U.S. v. Caruthers*, 458 F.3d 459, 467-68 (6th Cir. 2006) (citing *Montero-Camargo*, 208 F.3d at 1138); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659 (1994)); *Montero-Camargo*, 208 F.3d at 1138 ("We must be particularly careful to ensure that a 'high crime' area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business[.]"); *see also State v. Johnson*, 861 S.E.2d 474, 489-90 (N.C. Aug. 13, 2021) (Earls, J., dissenting).[46] This "high crime

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[46] "I share the concern expressed by many courts that encouraging reliance on undefined, amorphous signifiers like 'high crime area' as a proxy for suspected criminal activity risks subjecting identifiable racial minority communities to disproportionate, invasive, and unlawful searches . . . There is research demonstrating that the reported rate of crime in a particular geographic area is driven not only by the actual incidence of criminal conduct in that area, but also by law enforcement's choices regarding where and how to conduct enforcement activities. *See* Sandra G. Mayson, *Bias in, Bias Out*, 128 Yale L.J. 2218, 2253 (2019) ('Blacks

area" justification is frequently utilized to judicially rubber stamp warrantless (and therefore presumptively unreasonable) searches and seizures. *Compare Flowers*, 6 F.4th at 658 ("If this course of conduct is constitutionally impermissible, then it is difficult to see how any active policing can take place in communities endangered and impoverished by high crime rates.") *with id.* at 662 (Elrod, J., dissenting) ("[W]e must ensure that Americans living in disadvantaged or high crime communities still have Fourth Amendment protections."); *see also* L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 Ariz. St. L.J. 267, 279 (2012) ("The conclusion in legal opinions, among scholars,

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> are more likely than others to be arrested in almost every city for almost every type of crime. Nationwide, black people are arrested at higher rates for crimes as serious as murder and assault, and as minor as loitering and marijuana possession.'); *see also* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Legal Ethics 285, 298 (2014) ('It is the police who choose what areas to target, who respond to calls, and who make the initial decision whether to make an arrest or issue an informal warning when minor misconduct occurs.'). My concern is especially acute in this case because Officer Whitley 'did not observe [defendant] engage in any type of behavior that is consistent with [the criminal] activity' thought to occur with greater frequency in the area where he was apprehended."

and on the street is the same: a high-crime area designation almost always shifts the analytical balance toward a finding of reasonable suspicion."); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 Ohio St. L.J. 99, 99 (1999) (high crime area designations have "become a significant and frequently invoked basis on which to argue that highly ambiguous conduct is sufficiently suspicious to justify a stop.").[47]

As summarized by one court:

> Allowing such a finding [of a "high crime area"] solely through unsubstantiated testimony (no matter how confidently stated) would give police the power to transform "any area into a high crime area based on their unadorned personal experiences." . . . Yet those experiences can exaggerate the criminality of an area because "[j]ust as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area." . . . This is natural—even expected—because police "are trained to detect criminal activity"; they view "the world with suspicious eyes."

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[47] *Cf. N. Mariana Islands*, 2014 WL 7072149, at *2 ("[I]ndeed, the mere mention that a place is a high-crime area 'almost always shifts the analytical balance toward a finding of reasonable suspicion.'") (quoting Ferguson, 57 Am. U. L. Rev. at 1590).

N. Mariana Islands, 2014 WL 7072149, at *2 (quoting *Montero–Camargo*, 208 F.3d at 1143 (Kozinski, J., concurring)); *see also Montero–Camargo*, 208 F.3d at 1143 (Kozinski, J., concurring) ("But to rely on every cop's repertoire of war stories to determine what is a 'high-crime area'—and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion—strikes me as an invitation to trouble.").

These are important federal questions because many people live, work in, visit, travel through, park in, or conduct commerce in areas that are foreseeably designated as sufficiently "associated with criminal activity" to suspend full Fourth Amendment protections. *See Larson*, 611 P.2d at 775 ("It is beyond dispute that many members of our society live, work, and spend their waking hours in high crime areas, a description that can be applied to parts of many of our cities. That does not automatically make those individuals proper subjects for criminal investigation."); *In re Tony C.*, 582 P.2d 957, 959 (Cal. 1978) ("Yet the interest at stake is far from insignificant: it is the right of every person to enjoy the use of public streets, buildings, parks, and other conveniences without unwarranted interference or harassment by agents of the law."). This two-tiered system of constitutional rights has "no place in a constitutional democracy." *State v. Edmonds*, 145 A.3d 861, 888-89 (Conn. 2016) (Robinson, J., concurring) (citation omitted); *see also Johnson*, 622 S.W.3d at 391 (Walker, J., dissenting) ("If such a suspicion were a reasonable inference from standing on a street corner in this neighborhood, all citizens passing through victimized neighborhoods would be suspects, and pedestrian checkpoints could be set up to monitor their comings and goings. Practices of this

kind are repugnant to a free society.") (quoting *Johnson*, 602 S.W.3d at 68 (Hassan, J., concurring) (quoting *Ceniceros v. State,* 551 S.W.2d 50, 55 (Tex. Crim. App. 1977))).

This also constitutes an important federal question because (1) "[g]enerally speaking, arguments in the Fourth Amendment context predicated upon allegations that conduct was observed in a 'high-crime area' should be received with 'circumspection'";[48] (2) "in relying on the testifying officer for the opinion about an area[,] courts are shifting the responsibility to police to make what is a legal conclusion";[49] and (3) this shift materially diminishes government burdens concerning presumptively unreasonable warrantless searches and seizures despite the absence of any language in the Fourth Amendment authorizing same. *See generally Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("[A] search conducted without a warrant issued upon probable cause is 'per se unreasonable' . . ."); *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) ("[P]olice bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."). "High crime area" justifications for warrantless seizures are "far from insignificant" and "easily subject to abuse." *In re Tony C.*, 582 P.2d at 959. Characterizing an area as sufficiently associated with criminal activity to suspend Fourth Amendment protections after "maybe three or four" generalized service calls over several

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[48] *State v. Martinez*, 457 P.3d 254, 261-62 (N.M. 2020) (citing 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.5(g) at 644-45 (5th ed. 2012) (citing Ferguson, 57 Am. U. L. Rev. at 1593)).

[49] Ferguson, 57 Am. U. L. Rev. at 1624.

months would erase any meaningful distinction between such areas and any other area. *See State v. Fisher*, 714 N.W.2d 495, 504 (Wis. 2006).[50]

"The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 273 (1973). "How far we have come." *Flowers*, 6 F.4th at 658 (Elrod, J., dissenting).

CONCLUSION

The Court should grant the Petition.

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[50] *See also Johnson*, 602 S.W.2d at 68 (Hassan, J., concurring) ("[T]hree to four service calls over the course of several months to an establishment that is perpetually open does not constitute a 'high crime area'; concluding otherwise would obliterate the significant of the Supreme Court's test, effectively convert every neighborhood in every sizable Texas city to a high crime area, and undermine the reasonableness component of Fourth Amendment jurisprudence.") (citing *Klare*, 76 S.W.3d at 75 (citing *Brown*, 443 U.S. at 99)); *Bower*, 597 P.2d at 120 n.8 ("While it may be valid to say that one burglary a year in a neighborhood is too many, as a practical matter attaching a high crime label under such circumstances would do little to differentiate one location from another in any meaningful way.").

Respectfully submitted,

WILLIAM PIERATT DEMOND
DEMOND LAW, PLLC
1520 Rutland St.
Houston, TX 77008
(713) 701-5240
william@demondlaw.com
Counsel of Record for Petitioner
Jacob Matthew Johnson

JONATHAN D. LANDERS
917 Franklin St., Suite 300
Houston, TX 77002
(713) 685-5000
Jlanders.law@gmail.com