No. 21-532

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

BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND RESTORING JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The National Association for Public Defense (NAPD) is an association of over 15,000 practitioners who provide the constitutional right to counsel throughout the United States. NAPD's membership includes lawyers, social workers, investigators, experts, education and legislative advocates, and others dedicated to delivering effective assistance of counsel to indigent criminal defendants. NAPD pools its theoretical and practical public defense expertise to increase access to justice for poor people. Its collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms; dedicated juvenile, capital, and appellate offices; and through a diversity of practice models.

NAPD strives to protect the Fourth Amendment's guarantee against unreasonable searches and seizures. It trains its members on the subject by promoting Fourth Amendment advocacy at its annual conference and through webinars on various Fourth Amendment topics. NAPD therefore has the expertise necessary to demonstrate to this Court the importance of issuing a writ of certiorari in this case.

Moreover, as one of its foundational principles, NAPD seeks to address the disparate treatment of racial and ethnic minorities in the criminal justice

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[1] All parties have consented to the filing of this brief. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amici* and their counsel, make a monetary contribution to fund its preparation or submission.

system. NAPD recognizes that racial and ethnic bias, including implicit bias, undermines fairness within the system and prevents equal justice under the law. NAPD therefore has a strong interest in the public policy implications of this case.

Restoring Justice is a faith-based non-profit in Houston, Texas that provides holistic representation to indigent defendants, including legal representation, social services, counseling, and volunteer support. Its vision is that the criminal justice system acknowledges, respects, and upholds Constitutional rights and dignity for each and every human.

As Fourth Amendment litigators and advocates, it sees the harms to Americans most in need when the Fourth Amendment is not protected. Restoring Justice therefore has a strong interest in the public policy implications of this case.

SUMMARY OF ARGUMENT

In this case, an officer claimed to initiate a warrantless investigatory stop based almost entirely on the characterization of a 24-hour park-and-ride facility as a high-crime area. The trial court made this fact finding, not by using a specific objective standard, but by cobbling together the officer's observations that he had made several arrests for burglaries of motor vehicles, drug crimes, and public lewdness. But the officer never said the arrests occurred at the park-and-ride facility. And in testifying about "calls for service" to the facility during his ten years on the force, the officer never said when those calls occurred, what they were for, or if any resulted in an arrest.

The Texas Court of Criminal Appeals used the high-crime-area designation as a substitute for verifiable and quantifiable evidence in its Fourth Amendment reasonable suspicion analysis. The lack of an objective standard for determining a high-crime area has been a problem for decades: Chief Justice Roberts recognized 13 years ago that the issue of an officer's testimony regarding a "high-crime neighborhood" and its effect on Fourth Amendment analysis had "divided state courts." *Pennsylvania v. Dunlap*, 555 U.S. 964 (2008) (Roberts, C.J., dissenting from denial of cert.) (addressing high-crime-area designation on probable cause determination). Since then, the divide has grown.

This Court should grant review to define the standards for a high-crime-area designation and to clarify its role in a Fourth Amendment analysis.

ARGUMENT

In *Illinois v. Wardlow*, this Court made clear that courts may consider if an area is a high-crime area in a Fourth Amendment reasonable suspicion analysis. 528 U.S. 119, 124 (2000). But the label without a definition has created the very problem the Texas Court of Criminal Appeals' opinion illustrates: an officer or a reviewing court may invoke the designation without objective criteria that would allow the conclusion to be challenged. One's presence in a particular location cannot be per se evidence of criminality.

I. The failure to tether the high-crime-area designation to verifiable and quantifiable evidence diminishes the protection afforded by the Fourth Amendment's reasonable suspicion requirement.

The Texas Court of Criminal Appeals found unreasonable police action—a warrantless search and seizure with no indication that the person was engaged in criminal activity other than sitting in the dark—constitutional simply because it allegedly occurred in an area associated with significant criminal activity. The finding was based entirely on Officer Cox's testimony that:

- He patrolled the park-and-ride facility for more than ten years.

- There were burglaries of motor vehicles, drug crimes, and public lewdness in the park-and-ride facility (which was not

otherwise substantiated with dates, number of events, or even the name of the officer reporting the alleged crimes).

- He had "been out there . . . a lot."

- In the months around the time of the charged offense, Officer Cox had gone to the facility three or four times "[f]or calls of service."

- He had responded to calls to the facility on "[s]everal occasions."

- He has had to make some calls for service to the facility for "criminal activity."

- The facility was open and was a 24-hour park-and-ride parking lot.

- People mainly use the facility during the daytime, but some people park there and walk to a nearby bar that does not have a big parking lot.

- It is out of the ordinary for somebody to be in a parked car in the facility after midnight with no other vehicle there to pick them up.

- He was conducting a routine patrol around midnight when he checked this facility.

- He saw a vehicle parked at the facility.
- He shined his spotlight across the facility and twice across the vehicle.
- He saw movement in the vehicle and could tell two people were inside.
- The vehicle had no headlights or other lights turned on, and no other vehicles were near it.

Johnson v. State, 602 S.W.3d 50, 58 (Tex. App.—Houston [14th Dist.] 2020) *rev'd by* 622 S.W.3d 378 (Tex. Crim. App. 2021).

In characterizing the park-and-ride facility as a high-crime area, the Texas Court of Criminal Appeals did not apply any articulable standard. It simply said the record supported the trial court's bare fact finding that the 24-hour park-and-ride facility was a high-crime area and the resulting legal conclusion that reasonable suspicion existed because of the high-crime-area designation.

The sparse facts of this case do not support the fact finding or legal conclusion under a totality-of-the-circumstances test. More importantly, however, they highlight why a definitive standard is needed. So long as law enforcement officers are performing their job properly, they should be able to provide verifiable and quantifiable facts to justify why a particular location qualifies as a high-crime area.

A. The lack of a high-crime-area standard diminishes Fourth Amendment protection for residents or visitors of unsavory neighborhoods.

The Texas Court of Criminal Appeals created a high-crime-area exception to Fourth Amendment protection, suggesting that any person in a high-crime area may be searched without particularized facts or individualized suspicion. This holding is flawed in that it eliminates the requirement of individualized suspicion, which is fundamental to Fourth Amendment jurisprudence. As Judge Jennifer Elrod recently explained,

> "For citizens to become suspects, they must do more than merely exist in an 'unsavory' neighborhood . . . . Otherwise, our law comes dangerously close to declaring that persons in 'bad parts of town' enjoy second-class status in regard to the Fourth Amendment."

United States v. Flowers, 6 F.4th 651, 662 (5th Cir. 2021) (Elrod, J., concurring in part and dissenting in part) (quotations omitted).

That concern is real for all those living in or traveling through high-crime areas—wherever an officer or court later determines that may be. The lack of a particular legal standard to measure this factor in the reasonable suspicion analysis renders the Fourth Amendment guarantee meaningless.

If allowed to stand, the Texas Court of Criminal Appeals' opinion will let Texas law enforcement officers conduct criminal investigatory stops when

they encounter someone in a subjectively bad part of town. This effectively deems residents or visitors of such areas to be "less worthy of Fourth Amendment protection by making them more susceptible to search and seizure by virtue of where they live." *United States v. Curry*, 965 F.3d 313, 331 (4th Cir. 2020). The Fourth Amendment demands more.

B. The lack of a high-crime-area standard could lead to racial profiling.

The simple truth is that residents of areas designated as high-crime areas are predominantly "racial minorities and individuals disadvantaged by their social and economic circumstances." *Id.* (quoting *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013)). Allowing officers to conduct investigatory stops without any verifiable and quantifiable measure enables increased racial profiling.

Police officers already have broad discretion to stop someone for any number of minor infractions that ordinarily go unenforced. For example, an officer may stop a person who commits a small traffic offense even when it is clear that the officer would not have initiated the stop "absent some additional law enforcement objective." *Whren v. United States*, 517 U.S. 806, 806 (1996). Add to this already broad authority a presumption of criminality when in a high-crime area, and police officers will have essentially unfettered discretion to stop anyone they want.

This per se presumption removes a key check on their conduct. Until now, an officer had to justify his

or her decision to initiate potentially invasive searches during a *Terry* stop by pointing to objective indicia of criminality. Now, however, the mere belief the person is in a high-crime area—a belief that need not be tied to verifiable or quantifiable evidence—permits an officer to stop and search any individual without consequence. This presumption of criminality increases both the breadth of discretion given to police officers when performing a stop and the depth of the potential intrusion into one's privacy and personal autonomy when this discretion is exercised.

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

C. The lack of a high-crime-area standard opens the door to unsubstantiated inferences.

In practice, the high-crime-area designation has become the Fourth Amendment analog to the *ipse dixit* standard this Court rejected in *Kumho Tire Co., Ltd. v. Carmichael*—a conclusion cannot be a proper basis for expert testimony simply because the expert says so. 526 U.S. 137, 157 (1999). Such a standard undermines the protection the Fourth Amendment promises.

The Texas Court of Criminal Appeals held that Officer Cox's testimony supported an inference of a significant association with criminal activity. *Johnson v. State*, 622 S.W.3d 378, 386 (Tex. Crim. App. 2021). But that inference cannot be reasonable where:

- there is no evidence that anyone committed a crime during those service calls; instead, the reasonable inference is only that someone called the police for some unidentified form of assistance.

- there is no evidence anyone was arrested during those service calls.

- if it was a high-crime area, Officer Cox's ten years patrolling it should have generated more testimony establishing that fact.

- 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.

Johnson, 602 S.W.3d at 67 (Hassan, J., concurring). As Justice Meagan Hassan warned, if suspicion could be inferred from the locality alone, then:

> 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. If victimization by crime becomes the justification for indiscriminate intrusion by the state, then we forfeit the security of our persons and privacy from invasion by the police on a hope of future security from the criminal, and ultimately find ourselves the displaced refugees in a raging war on crime.

Id. at 68 (internal quotations and citations omitted).

The Texas Court of Criminal Appeals' standardless approach disregards this Court's admonition that a stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United*

States v. Cortez, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Without a verifiable and quantifiable measure to tether a high-crime-area designation to specific evidence, there is no way for a reviewing court to so evaluate the conclusion. Ultimately, then, the court is left with nothing but the *ipse dixit* assurances that the officer or reviewing court has considered the circumstances in a constitutionally appropriate manner.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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