NO. 21-532

In the Supreme Court of the United States

JACOB MATTHEW JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

BRIEF OF AMICI CURIAE HARRIS COUNTY PUBLIC DEFENDERS AND DEFENSE ATTORNEYS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Amici in this case are the Harris County Public Defender's Office and the Harris County Criminal Lawyers' Association.[1] The Harris County Criminal Lawyer's Association ("HCCLA") is a nonprofit, voluntary membership organization and is the largest local criminal defense organization in the United States, with over 700 active members at any given time. HCCLA seeks to assist, support, and protect Harris County criminal defense practitioners in the zealous defense of individuals and their constitutional rights. HCCLA further seeks to educate the general public and, when appropriate, the judiciary, regarding the administration of criminal justice.

The Harris County Public Defender's Office ("HCPDO") is funded by Harris County. HCPDO currently employs over 100 attorneys charged with representing indigent defendants in Harris County from initial bail hearing through the appellate process. In addition to its services in a representative capacity, HCPDO also engages in appropriate efforts to develop ethical and progressive policy changes in the field of criminal justice.

Both amici advocate on behalf of individuals living in "high-crime" areas throughout the state of Texas.

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[1] Amici curiae state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. Amici curiae certify that counsel of record of all parties have consented in writing to the filing of this brief.

They are committed to ensuring that all people, no matter where they live or work, receive the same protections under the Fourth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

Chief Justice John Roberts recently instructed lower courts to follow two basic propositions in interpreting the Fourth Amendment: "First, that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power.' Second, and relatedly, that a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.' *Carpenter v. United States*, 138 S.Ct. 2206, 2214 (2018).

The Texas Court of Criminal Appeals' ruling in this case violates both of those instructions. It allows police officers to arbitrarily announce that an area is, in their opinion, "high crime" and then use that essentially meaningless incantation as the basis for building up "reasonable suspicion" to justify an investigative detention. It is unconstitutional, but unfortunately, not surprising. It is the culmination of an ongoing erosion of Fourth Amendment protections and the over-policing of neighborhoods deemed "high-crime."[2] That striking combination is felt most

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[2] *See* Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 61-71, 105-106, 120-124 (2010).

acutely by people of color, who are the predominate residents of "high-crime" areas. [3]

Whether an area is "high crime" is something capable of being determined by facts and data rather than untested opinion of police officers seeking to justify a seizure after the fact. The use of this term should not be permitted based on officer testimony of an officer's personal experience alone, but should be grounded in a measure of statistical or data-driven analysis.

Amici urge this Court to grant certiorari and provide a clear, empirical framework for the determination of what is a "high crime area", and to convey the deep concern that they share with other residents of Texas who value freedom from governmental intrusion. Labeling an area "high crime" without a framework to determine what that means functions only as a pejorative, an epithet hurled at people of color and people without resources. It should not have the force of law to deprive people of their rights.

This Court should grant Certiorari to establish meaningful, evidence-based rules about how courts should parse "high crime area" and how much weight it should be given in determinations of an officer's reasonable suspicion prior to performing a detention.

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[3] *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677-678 (1994).

ARGUMENT

In Colonial America, the government's practice of issuing "general warrants" and searching through residents' effects was rampant.[4] These warrants subjected citizens and their property to police scrutiny without any articulable suspicion of criminal conduct. General warrants gave the government blanket authority to search and seize where they pleased.[5] The frequent use of general warrants was one of the primary acts of the English government that ignited the colonial resistance in 1761. [6]

This discontent with the common law was fresh in the minds of the Framers as they began drafting the language of the Bill of Rights. The Framers recognized that the unrestricted power of search and seizure exercised by the British government could easily stifle liberty and impede citizens' rights to be secure in their own persons.[7] The Fourth Amendment was meant to protect citizens from government overreach, turning away from the colonial practice of general warrants and subjecting citizens to searches without any articulable suspicion.[8] By the terms of the Fourth

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[4] *See Boyd v. United States*, 116 U.S. 616 (1886).

[5] *Id.* at 625. *See also Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *Marron v. United States*, 275 U.S. 192, 195-197 (1927).

[6] *Boyd*, 116 U.S. at 625.

[7] *See Payton v. New York*, 445 U.S. 573, 583-585 (1980); *Marron*, 275 U.S. at 195.

[8] *Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Mo.*, 367 U.S. 717, 738 (1961) (Black, J., concurring).

Amendment, every citizen is entitled to a reasonable expectation of his own privacy unless the government has clear and unquestionable authority to supersede that expectation.[9]

The Fourth Amendment was drafted to be meaningful, but the doctrine at issue in this case, namely the subjective labeling of a place as a "high crime area" as the foundational basis of reasonable suspicion for a police officer to seize a person, functionally removes its teeth.

The designation of a "high crime area" deprives people who occupy that space of privacy rights.[10] Despite its importance, this term is so loosely defined that it often functions as an end-run around the fourth amendment's guarantees for persons of color and people who live in low-income communities.

I. THE HISTORY OF THE CONCEPT OF "REASONABLE SUSPICION" ITSELF IS IMBUED WITH RACISM.

When this Court handed down its ruling in *Terry v. Ohio*, 392 U.S. 1 (1968), the United States was a powder keg of civil unrest, and people sought to blame it on the actions of this Court.

> The last years of the Warren Court's "criminal procedure revolution" constituted a period of social upheaval, marked by urban riots, violence in the ghettos, and disorders on the campuses. The political assassinations and

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[9] *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

[10] *See, e.g.*, *Illinois v. Wardlow,* 528 U.S. 119, 124 (2000) (recognizing that the Court allows the fact that a stop occurs in a "high-crime area" to be taken into consideration in performing a *Terry* analysis).

> near-assassinations of the late 1960, both Congress's and presidential candidate Richard Nixon's strong criticism of the Court, the "obviously retaliatory" provisions of the Crime Control Act of 1968, and the ever-soaring crime statistics and ever-spreading fears of the breakdown of public order "combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.[11]

The ruling in *Terry* was the result of a beleaguered Court at the crux of a crisis. This is highlighted by the fact that the Court's own recitation of material facts in the *Terry* opinion are not supported by the underlying record.

> Warren reported that the two [Black] men looked into the window twenty-four times. That figure is reported with a certainty that the evidence does not support. [Officer] McFadden was confused about how many times this occurred; a fair reading of the many times he stated what happened leads to the conclusion that they looked into the window between four and twenty-four times. His police report written immediately after the arrests stated that each man made three trips. This fact is critical because it is unclear as to whether the seizure would have been

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11 Yale Kamisar, *The Warren Court (Was it Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T (Yale U. Press, 1983).

reasonable based on fewer observations of the store window."[12]

In the initial offense report filed by Officer McFadden, McFadden identified an airline office as the locus of Terry and his companion's interest. A year later, at a suppression hearing, McFadden indicated that he thought then men were looking through the window of a jewelry store. McFadden also admitted that he did not have any experience in observing suspects who were actually "casing" a location for a robbery.[13]

Whichever store window they were looking in, the two men walked away and conferenced with a third (white) man, and at the point they were confronted by McFadden, they were, according to McFadden's own testimony, "acting like anybody else."[14] At that time in segregated Cleveland, there was a police mythology that when a white man was speaking with a Black man, crime was afoot.[15] When he approached the three men, McFadden wrote in his report that he immediately "ordered" them to keep their hands out of their pockets, and specifically uses the word "searched" when he talked about what happened next.[16]

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[12] Lewis R. Katz, *Terry v. Ohio at Thirty: A Revisionist View*. 74 MISS. L.J. 423 (2004). Faculty Publications. 261. https://scholarlycommons.law.case.edu/faculty_publications/261. (citations omitted).

[13] *Id*. at 431

[14] *Id*

[15] *Id*. at 432.

[16] "At this point I approach these three men and informed them I was a police officer and told them to keep their hands out of their pockets. First one I searched was John Woods Terry

Suddenly and horribly, McFadden's suspicion in *Terry* seems much more articulable. McFadden stopped and seized Terry and his companion in segregated Cleveland because they were Black. The ruling in *Terry* served to give police the language of authority to entrench and institutionalize the cataclysmic racism that was at the forefront of the country's minds.

Of course, it is reasonable to give police the power to investigate and prevent crimes. Amici do not argue that police should not have that essential power, but the standard for how police exercise that power with relation to Fourth Amendment concerns should be more crystalline, for the sake of both the officer and the suspect. *Terry's* "articulable suspicion" standard is something officers still don't know the meaning of, to the great detriment of citizens' rights.[17]

II. THE COURT'S ACCEPTANCE OF THE TERM "HIGH CRIME AREA" AS GROUNDWORK FOR REASONABLE SUSPICION IS FUNCTIONALLY RACIST.

The term "high-crime area" was first used by the Supreme Court in *Adams v. Williams*, 407 U.S. 143, 147–48 (1972) ("While properly investigating the activity of a person who was reported to be carrying

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age 31 colored of 1275 East 105th St." Katz at 434, quoting *Police Report*, *supra* note 42.

[17] Jon B. Gould and Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior under the U.S. Constitution*, 3 CRIME & PUB POl 315, 325, 330, 333, 345-46 (2004) (showing that officers violated Fourth Amendment standards for searches in 46 percent of a sample of 44 searches and 571 encounters, based on ratings of researcher-generated narratives, a sample of which were checked by a panel of defense lawyers, prosecutors, and retired judges, who agreed with 90 percent of the researcher's assessments).

narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly had ample reason to fear for his safety.").

The fact that the neighborhood was a "high crime area" was low on the list of important facts the officer was aware of in order to formulate reasonable suspicion. Most crucially, the officer had received a report immediately prior to approaching Adams from an informant that the officer knew, saying that Adams was sitting in a particular car with a gun in his waistband and a stash of heroin.[18] Even if Adams had not been in a "high crime area," the facts here create articulable suspicion that crime is afoot.

A reasonable police officer might have concluded that had the scenario in *Adams* played out in a particularly *low-crime* neighborhood, there would have been even *more* reason to find Adams' behavior suspicious, the tip more credible, and the urgency of intervening more pressing. The ambiguity of the importance of "high crime area" is one of the major signals that its meaning is too dilute, and that equal protection is drowning in its shallows.

In *Illinois v. Wardlow*, this Court considered the "character" of the neighborhood to be one factor in finding "reasonable suspicion" to stop someone. While not allowing the character of the neighborhood to be the *sole* justification for a stop based on reasonable suspicion, it has narrowed the totality of circumstances needed to two factors: "high-crime area" and unprovoked flight from police. 528 U.S. 119, 124 (2000). This

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[18] *Id.*

has been reduced, over the past twenty years of practice, to the now-meaningless repetition of the phrase "high crime area" as determined by the individual police officer performing the detention plus one other thing that may or may not be suspicious in and of itself.[19]

In Amici's experience, officers are not called upon to actually articulate their suspicion until after they have effectuated the detention, investigation, and arrest. Sometimes, in busy municipalities, officers may not have time to write a report for hours or days after an arrest, and even the most well-meaning officers may have "confirmation bias" after a search proves fruitful and they later have to identify their initial suspicions in the light of a successful arrest.[20] Other officers, failing to lay out their suspicion in an offense report, are not called on to articulate their suspicions,

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19 *See*, *e.g.*, *United States v. Baskin*, 401 F.3d 788, 793 (7th Cir. 2005) (finding reasonable suspicion to stop person who tried to evade police near a methamphetamine lab); *United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004) (finding reasonable suspicion to stop person because of his flight in a high-crime area coupled with information from reliable source); *Bolton v. Taylor*, 367 F.3d 5, 9 (1st Cir. 2004) (finding reasonable suspicion to stop driver in known area of prostitution because suspect quickly pulled out of parking lot upon seeing officer); *United States v. Jordan*, 232 F.3d 447, 447–49 (5th Cir. 2000) (finding reasonable suspicion to detain person seen running in a high-crime area because of knowledge that nearby store had recently been robbed); *United States v. Moore*, 235 F.3d 700, 703–04 (1st Cir. 2000) (finding reasonable suspicion to search individual running through an apartment building because apartment was in high-crime area and police had observed suspicious people and known drug user leaving building).

20 *See, generally* L. Song Richardson, *Cognitive Bias, Police Character, and the 4th Amendment*, 44 ARIZ. ST. L.J. 267 (2012).

if at all, for months or years until a suppression hearing is held. Being able to haphazardly designate an area as "high crime" contributes to inaccurate descriptions and poor policework.[21]

The biggest problem with "high crime area" designations by officers, though, is that the comparative level of crime in a specific area is something that we can empirically evaluate. It is not something that needs to be left to the conjecture of individuals. Much in the way that this Court would not allow officers to invent definitions for other terms of legal specificity, this Court should not continue to allow officers to invent definitions for what constitutes a "high crime area."

It is verifiable that officers are actually terrible at determining whether an area is "high crime." In a study of over two million stops in New York City between 2007 and 2012, researchers concluded:

> Taken together, our findings provide empirical evidence that *Wardlow* may have been wrongly decided. Indeed, implementation of the high-crime area standard appears haphazard at best and discriminatory at worst. Officers call nearly every block in the city high crime at one time or another. Their assessments of high-crime areas are only weakly correlated with actual crime rates. The suspect's race predicts whether an officer deems an area high crime as well as the actual crime rate

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[21] Andrew Ferguson, *The High-Crime Area Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis,* 57 AM. U.L. REV. 6 (October 2008) 1587-1644.

> itself. The racial composition of the area and the identity of the officer are stronger predictors of whether an officer deems an area high crime than the crime rate. And officers may even be using high-crime area as cover to bolster the appearance of constitutional validity in their weakest stops. These findings raise important questions about whether police officers can responsibly wield the discretion granted to them under *Wardlow*.[22]

Though the study was restricted to evaluation of stops in only the megalopolis of New York City, it is reasonable to assume that in communities with less resources to devote to officer training, less interest in promoting a diverse police force, and a less vibrant public awareness of individual rights, the results would likely be even worse.

III. THE INSTANT CASE IS AN EXAMPLE OF THE CURRENT MEANINGLESSNESS OF THE "HIGH CRIME AREA" ASSERTION.

In East Texas, it is said you can fairly judge how far one is from civilization by how close one is to the nearest What-a-Burger restaurant. The park-and-ride at FM 2004 and FM 523 is nearly seven miles from the closest What-a-Burger.[23] The legend is borne out by the facts: the park-and-ride is in an extremely rural area, populated only by a seasonal firework stand, and a few miles down the road, a waste processing

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[22] Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIFORNIA LAW REVIEW 345-404 (2019).

[23] https://goo.gl/maps/oYhtVPKzgTdwSpYn7

plant.[24] There is no discernable transit service to the park-and-ride, and counsel was unable to find any local municipalities or transportation services who provide bus service there. Instead, it is a place where people meet up to carpool to the local plant. *Pet. App. C* at 78a. This is not a location with a large bus terminal or even a hooded awning-the lot is unencumbered by trees or buildings or structures of any sort that persons could use to hide from view. It is an open parking lot in a field near an intersection, unattached to a business or residence.

[24] See: Exhibit 1, Google map last accessed Nov. 09, 2021.

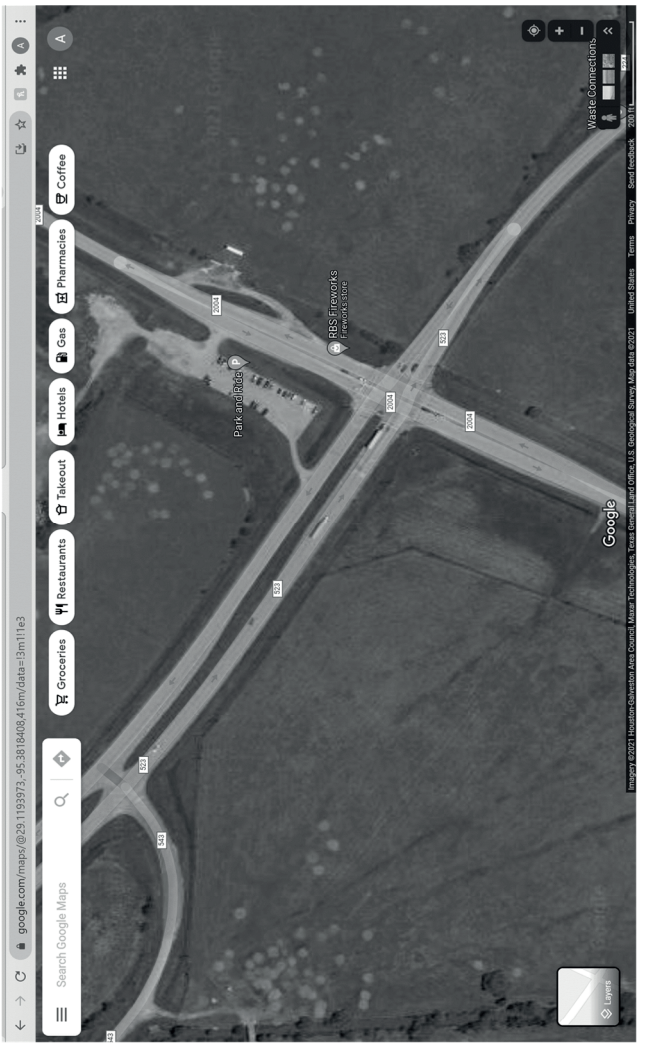

EXHIBIT 1
GOOGLE MAP, LAST ACCESSED NOV. 09, 2021

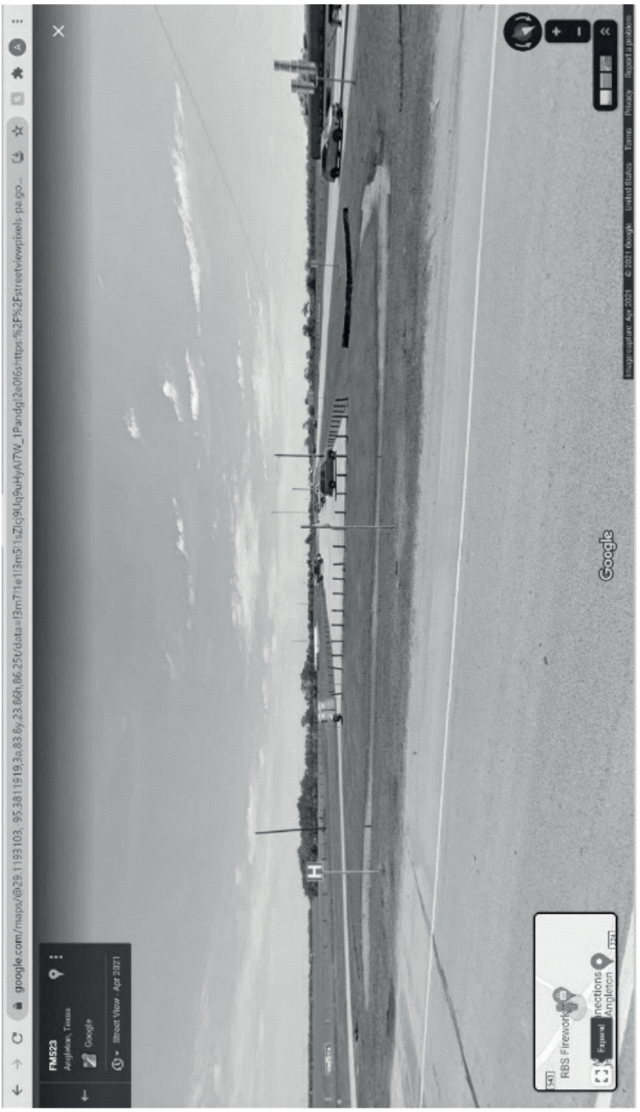

EXHIBIT 2
GOOGLE MAP STREET VIEW, LAST ACCESSED NOV. 09, 2021

Though most of the cases this brief has evaluated have been in reference to "high crime areas" in inner cities, the instant case locates a "high crime area" in the country. This is yet another example of how ambiguous this term has become. Is this higher crime than the surrounding pastures? How many calls for service have there been in the nearby city or the other parking lots in the area in comparison with this one?

It is unclear what the officer meant when he testified that he had responded to "maybe three or four" calls for service at the park-and-ride in the months surrounding August of 2016. *Pet. App. C* at 72(a). There is an intersection directly in front of the parking lot and calls for service could have easily been for traffic accidents. Another reasonable assumption might be that people who left their cars in the lot overnight or for a few days might call for assistance if their cars failed to start. "Call for service" does not equate to "crimes committed." The trial court's record is sorely lacking any evidence of how much crime actually occurs in that lot there, and because there is no guidance from this Court about what a "high crime area" is, the testimony of the officer is inexact and undeveloped by counsel.

This Court does not have to engage in conjecture about whether this is a high-crime area or what "calls for service" mean. There is an objective, empirical answer to whether this parking lot is a "high crime area" compared to other locations nearby. That evidence was not submitted to the trial court, any of the lower courts, or this Court, but that evidence certainly exists: in the Brazoria County Sheriff's calls for service logs, in the data maintained by the Brazoria County Clerk's office and the Brazoria County District Courts, the

Texas Department of Public Safety, and doubtless numerous other agencies that collect and collate crime statistics. The cure for bias is science.

CONCLUSION

This Court's holding in *Terry* aided in maintaining the racist system that has allowed people of color to be disproportionately targeted by police, and *Terry's* progeny allowing for "probable cause-lite" in the form of reasonable suspicion to suffice for a detention have further entrenched and justified racist actions by providing the language to hide them. This Court finds itself in a similar situation to Warren's court in 1968 — the country is rife with racial tension that is unresolved, people are screaming for justice from very different positions, and the Court is being looked to as a harbinger of change: but what change it will bring has not yet been determined.

Granting certiorari in this case would allow the Court to set discrete guidelines for what constitutes a "high crime area" for the purposes of reasonable suspicion of criminal activity. This Court has long held that a "mere hunch"[25] is insufficient to qualify as articulable suspicion to support a detention, but by refusing to define a high crime area and allowing it to be foundational in reasonable suspicion analysis, it allows officers to utter magic words to transform a "hunch" based on scant and untested personal recollection into reasonable suspicion. That cannot stand.

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25 *Terry v. Ohio*, 392 U.S. 1, 27.

Respectfully submitted,

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