18-1697

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

– against –

CALVIN WEAVER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* STOP-AND-FRISK CLASS COUNSEL IN SUPPORT OF DEFENDANT-APPELLANT CALVIN WEAVER AND REVERSAL OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae hereby certify that they have no parent corporations and that no publicly held corporations own 10% of more of their stock.

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INTRODUCTION

A police officer, hand on his holstered firearm, ordered Calvin Weaver to assume the search position by standing spread eagle, bent over the trunk of a car, in full public view.[1] A panel majority of this Court held that this intrusion on Mr. Weaver's person and liberty, without reasonable suspicion that he was armed and dangerous, violated the Fourth Amendment. Amici, who are counsel in three related stop-and-frisk class actions, submit this brief in support of the panel majority's decision.[2] Amici provide accounts drawn from the statements of hundreds of Black and Latinx people, which were given during the remedial process in amici's stop-and-frisk litigation. The experiences of these New Yorkers—all of whom were subjected to or affected by the unconstitutional stop-and-frisk practices of the New York City Police Department ("NYPD")—underscore the humiliation, fear, and significant restraint Black and Latinx people endure during stops and frisks. Their statements illustrate why the police encounter here was a serious intrusion on Mr. Weaver's person and why this Court should adopt the panel majority's conclusions and reverse the district court.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amici state that no party's counsel authored the brief in whole or in part, and no party, party's counsel, or any person other than amici curiae contributed money to fund preparing or submitting this brief.

[2] Amici submit this brief pursuant to the January 6, 2021 order in this case inviting the submission of amicus briefs. ECF No. 107.

The Fourth Amendment prohibits the police from subjecting people to degrading intrusions and restraints of the kind Mr. Weaver experienced without objective cause. The lived experiences of Black and Latinx New Yorkers are relevant to three central elements of this inquiry. First, these statements go to the heart of the Fourth Amendment analysis: how a reasonable person would experience the humiliation and fear of being splayed over the trunk of a car by a police officer in public view. Officer Tom could not subject Mr. Weaver to this indignity without having reasonable suspicion that he was armed and dangerous, which amici submit was lacking. Second, these statements illustrate the kinds of routine intrusions that would go unchallenged if this Court were to adopt the dissent's proposed rule that a search does not begin until there is physical contact.[3] Third, these statements show the unreliability—and the unfortunate prevalence—of the subjective justifications offered by the police in this case, and how such amorphous justifications lead to systematic intrusions upon Black and Latinx people while fueling racial disparities in policing. These experiences therefore offer important context in support of the

[3] There is a disagreement about whether Mr. Weaver did anything after being ordered into the search position, but before the moment when Officer Tom began touching him, that could give rise to reasonable suspicion. *See* Defendant-Appellant's Brief at 43–44, ECF No. 109. Amici strongly agree with Mr. Weaver that standing close to the car and then, when asked, taking a short step backwards do not give rise to reasonable suspicion that he was armed and dangerous. *Id.* Nonetheless, even if this were not the case, the Fourth Amendment would still have required reasonable suspicion that Mr. Weaver was armed and dangerous before Officer Tom ordered him into the search position in the first place.

panel's decision that forcing Mr. Weaver to stand bent over a car with his legs spread violated the Fourth Amendment.

The experiences shared in this brief are drawn from the remedial process in which amici are currently involved as part of their class action lawsuits against the City of New York.[4] The parties and court-appointed facilitator in these cases collaborated to design and implement a process for soliciting input on reforms from the people most affected by the challenged police practices. This part of the stop-and-frisk remedial process—called the "Joint Remedial Process"—took place between 2015 and 2018, and involved 64 focus groups with hundreds of participants,[5] as well as 28 community forums held across the five boroughs, which also involved hundreds of people.[6] The focus groups and forums, which took place several years after the NYPD's stop-and-frisk practices were enjoined, were designed to elicit input from the people and communities that bore the brunt of those unconstitutional and racially discriminatory practices.[7]

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[4] *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); *Davis v. City of New York*, 959 F. Supp. 2d 324 (S.D.N.Y. 2013); *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013).

[5] Hon. Ariel E. Belen, *Final Report and Recommendation* at 135, *Floyd*, 959 F. Supp. 2d 540 (No. 597).

[6] *Id.* at 194.

[7] *Id.* at 135, 205. The transcripts are available through links attached to Judge Belen's report. *Floyd*, 959 F. Supp. 2d 540 (No. 598-8).

The experiences shared in the Joint Remedial Process describe humiliations at the hands of police that are both jarring and routine for Black and Latinx people. They recount the humiliation and sense of being put on display when police officers publicly exert authority over their bodies. They talk about the fear that arises when ordered into defenseless positions by the police, reflecting how often people in neighborhoods that are predominantly Black and Latinx will have witnessed or personally experienced police violence. Many also testified about how being targeted based on their race or racial stereotypes makes the experience even more degrading. These experiences illustrate how such encounters are far from *de minimis* intrusions for those subjected to them. To find that key stages of these encounters fall outside the protections of the Fourth Amendment would permit officers to subject Black and Latinx people to such humiliating and degrading personal intrusions with greater impunity.

These statements also provide crucial context that is oftentimes missing in cases like these. As Judge Guido Calabresi noted in his concurring opinion, it is the nature of the exclusionary rule that such cases will generally come before the courts when charges are filed or evidence found. *United States v. Weaver*, 975 F.3d 94, 108 (2d Cir. 2020) (Calabresi, J., concurring). This may leave the impression that aggressive law enforcement tactics, profiling, or pretextual stops typically bear fruit. But the opposite is true. As uncontested evidence submitted in amici's lawsuits

showed, out of 4.4 million stops, nearly 90% of people stopped were released without charges, while 0.1% of stops resulted in the discovery of a gun. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 573–74, 574 n. 118 (S.D.N.Y. 2013). Even 98.5% of purportedly protective frisks uncovered no weapons of any kind. *Id.* at 573. Further, the odds of a stop and frisk finding weapons or contraband were *lower* if the person stopped was Black than if they were white. *Id.* at 574. As such, cases in which the exclusionary rule is ultimately invoked are a vanishingly small fraction of the stops and searches to which Black and Latinx people are regularly subjected. It is experiences like those detailed below—which make up the vast majority—that show the true societal cost of such practices.

STATEMENT OF INTEREST

The Bronx Defenders ("BxD") is a nonprofit provider of criminal defense, family defense, immigration defense, civil legal services, and social work support and advocacy to low-income Bronx residents. In addition to representing roughly 30,000 people a year, BxD has litigated several systemic challenges to NYPD practices, including a lawsuit against the widespread use of unlawful stops to investigate trespassing around Bronx apartments. *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013).

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Since its incorporation in 1940, LDF

has fought to eliminate the arbitrary role of race in the administration of the criminal justice system by challenging laws, policies, and practices that discriminate against Black people and other communities of color. LDF's advocacy includes cases like *Davis v. City of New York*, 959 F. Supp. 2d 324 (S.D.N.Y. 2013), which challenges the NYPD's unlawful trespass enforcement practices in New York City Housing Authority residences.

The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union. NYCLU is a nonprofit, nonpartisan organization committed to the defense and protection of civil rights and civil liberties, with over 100,000 members across the State. NYCLU has brought many court challenges seeking police accountability, including serving as lead counsel on *Ligon*.

The Center for Constitutional Rights ("CCR") is a national, nonprofit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the U.S. Constitution and international law. Founded in 1966, CCR has litigated numerous cases challenging the constitutionality of stop-question-and-frisk and other policing tactics employed by law enforcement officers in New York State and around the country, including *Floyd*, 959 F. Supp. 2d 540.

The Legal Aid Society ("Legal Aid") is the oldest and largest provider of legal services to low-income families and individuals in the United States. Founded in

1876, Legal Aid serves as the primary public defender of low-income people prosecuted in the New York court system in all five New York City boroughs, representing hundreds of thousands of individuals every year, and engages in law reform work to address systemic injustices affecting Legal Aid's clients, including serving as class counsel in civil rights litigation such as *Davis*.

Beldock Levine & Hoffman LLP ("BLH") is a law firm specializing in civil rights actions, including police misconduct, wrongful convictions, and employment discrimination. BLH attorneys have brought numerous cases on behalf of individuals and as class actions including *Floyd* and the precursor case *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001), which BLH filed with CCR.

ARGUMENT

I. FORCING MR. WEAVER INTO THE SEARCH POSITION WAS A SIGNIFICANT INTRUSION ON HIS PERSON AND LIBERTY.

When Officer Tom gave a direct order to Mr. Weaver to stand spread eagle against the trunk of a car in public view, the Fourth Amendment was clearly implicated. *See Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) ("[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.'"). The dissent analogizes this order to an officer telling someone to step out of a vehicle during a traffic stop, which it characterizes as "not even a Fourth Amendment event." *Weaver*, 975 F.3d at 113 (Livingston, C.J., dissenting) (citing *Pennsylvania v.*

Mimms, 434 U.S. 106, 111 (1977)). But what happened here is precisely the sort of intrusion that should trigger the Fourth Amendment, as demonstrated by the experiences of Black and Latinx people who have personally lived through these types of encounters.

Whether understood as the beginning of a search or a further restraint on Mr. Weaver's liberty beyond telling him to step out of the car, how a reasonable person in his shoes would experience being ordered to assume the search position is central to the Fourth Amendment inquiry. The analysis of when and how the Fourth Amendment is implicated by a search turns on "the degree of expectation of privacy and the intrusiveness of the search." *Anobile v. Pelligrino*, 303 F.3d 107, 119 (2d Cir. 2002). Similarly, the seizure analysis asks "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Simon v. City of New York*, 893 F.3d 83, 99 (2d Cir. 2018) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)). Even if someone has been lawfully stopped, further intrusions on their person or restraints upon their liberty require further justification, since "[t]he Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Terry*, 392 U.S. at 17–18, 28–29.

Traffic stops are no exception. Only *de minimis* intrusions on a passenger are permitted absent further cause. The liberty interests of a passenger are "stronger than

that of the driver," *Maryland v. Wilson*, 519 U.S. 408, 413 (1997), and police officers are limited in their authority to infringe on passengers' rights in any manner that goes beyond effectuating the traffic stop, *see Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (scope of permissible liberty infringement "is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns" (citations omitted)). As such, "while the concern for officer safety in th[e] context [of a traffic stop] may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify . . . greater intrusion[s]." *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); *accord Wilson*, 519 U.S. at 415 n.3 (refraining from "hold[ing] that an officer may forcibly detain a passenger for the entire duration of the stop"). Thus, further Fourth Amendment justification would be required for any intrusion beyond the *de minimis* order that a passenger step outside of the vehicle.

The experiences shared in the Joint Remedial Process demonstrate that the intrusiveness of being forced to bend over a car trunk to be frisked goes far beyond the minimal burden of being asked to exit a car. Focus group participants described how being forced to assume a demeaning position in public feels like a display of authority over their bodies. One person summed up the experience succinctly: "They were making a show of us." 11/18, 14:461–462; *see also* 12/15_4BX, 5:18–19 (describing police encounter as "almost like they were trying to intentionally

humiliate them"). A parent described feeling a profound disrespect after being repeatedly stopped "with my daughter," without reason and without finding anything. 11/18, 1:10–14; *see also* 11/18, 15:477–78 (same). Another recounted being ordered to "get on the floor" in front of their girlfriend. 11/18, 15:476–477. Still another described how one could be "[w]ith your mother there and they're still going to search you." 11/18, 6:180–181. There is also the humiliation young men experience after being forced to submit to physical invasion by the police, sometimes in front of their peers, which can leave a formative impression on their views of police.[8] *See* 3/24, 8:31–9:25 (several participants describing first being stopped when between 12 and 16 years old). These experiences are degrading for the person being forced to assume uncomfortable and undignified positions, but they also send a message to Black and Latinx onlookers that they too have only as much control over their own bodily integrity as the police wish to allow.[9]

The indignity of the search position is accentuated by knowing what is about to come next: "A thorough search . . . of [your] arms and armpits, waistline and back,

[8] *See* Tom Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. Emp. Legal Studies 751, 752, 756–57 (2014).

[9] *See* Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2108 (2017) (observing that "ritualistic observation of black men and women having unjust, and often deadly, interactions with law enforcement conveys a message to their coethnics and other similarly situated observers").

the groin and area about the testicles, and entire surface of the legs down to the feet." *Terry*, 392 U.S. at 17 n.13; *see also* 11/03 at 4 ("[I]t was two big [] officers, and both of them searched me, put their hands in my back pockets, checked my ass cheeks, one by one, felt my breasts, and everything."). Black and Latinx New Yorkers subjected to the NYPD's discriminatory stop-and-frisk policy have described the experience of a frisk—and the moments before—as "[v]ery uncomfortable," 11/17_5AY, 1:32, and "violating," 11/18, 4:123–29. Nor is a frisk the type of encounter with harms that are limited to the moment of the intrusion. *See* 12.21_12DX, 11:46 (recalling violation from frisk, "I will never forget that. I will never forget them cops").

Being routinely degraded takes a heavy emotional toll.[10] One participant explained the effect: "One of them gets stopped. And after that it messes up their whole mood. They get angry. They just shut down when they get stopped. Stop and frisk changes their whole feeling of things." 11/17_5AY, 3:88–91. Multiple people described how this fear seeped into all aspects of their daily lives:

> "After you get stopped and frisked the first time, pretty much down the line, every time after that whenever you even hear a siren or see the cops coming towards you, you're so scared or you get angry."[11]

[10] *See, e.g.*, Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am. J. Pub. Health 2321, 2324 (2014) ("[Y]oung men reporting police contact, particularly more intrusive contact, . . . display higher levels of anxiety and trauma associated with their experiences.").

[11] 02/03_9DX, 29:29–31.

> "You see the lights. It's trauma. It's a very traumatic experience. . . . So I feel like, even [if] they very clearly told me I could go, and I could walk away, I would still feel like, they're about to tackle me, and they're going to lie, and they're going to say I ran off and that I was running into my building. . . . I would still feel fear."[12]

> "You can never return [the] trauma that you've experienced, and a lot of times you'll try to talk about it. You'll get support. But it's just like, it'll continue sticking; and it's just a lifetime of work to mend or come to terms or to peace with what happened to you."[13]

> "For a while now, since, then [I try] not to go out, because [I'm] scared that [I'll] be arrested constantly."[14]

> "People now are even scared to go to their friend's house without the cops stopping them."[15]

> "I would like to just sit here and smoke my cigarette without feeling like I'm going to have someone come and attack me and throw me in jail."[16]

Given these harmful and traumatic effects, it is especially troubling how quickly police resort to such techniques. One person described how officers would almost immediately and without explanation order people to assume degrading search positions: "the next thing you know it's, 'Put your hands up against the wall.'" 11/17_5AY, 1:27–28; *see also* 1/21_17DY, 18:42–43 ("So, the first thing they do,

[12] 11/05, 12:30–40.
[13] 11/05, 21:4–8.
[14] 11/05, 7:9–10.
[15] 10/28, 6:41–42.
[16] 11/02, 6:33–35.

they're going to check you. And from what I've noticed, they don't ask."); 11/18, 14:473–15:474 (describing police arriving and immediately ordering people to "get the fuck on the floor"). One study found that 85% of young men in highly-policed areas of New York City had been stopped by police once, and nearly half of them had been stopped in the year they were surveyed.[17] Another found that among majority non-white Chicago public school students, by ninth or tenth grade, half had been stopped and questioned by police, and between a quarter and a third searched, with rates being highest for Black students.[18] Even putting aside how intrusive an encounter is, being stopped or frisked over and over again can have negative effects on people emotionally and on their perceptions of police.[19] This is further reason to ensure that initial stages of police encounters undergo Fourth Amendment scrutiny.

The humiliation of such experiences is palpable, but it is not the only danger. Being put in a spread eagle position is being forced to "stand[] helpless." *Terry*, 392 U.S. at 17. How a Black man like Mr. Weaver would experience this helplessness must be understood against the backdrop of "the history of police brutality against blacks in this country, as well as the present climate of fear and distrust toward police

[17] Geller et al., *supra* note 10, at 2323.

[18] John Hagan et al., *Race, Ethnicity, and Youth Perceptions of Criminal Injustice*, 70 Am. Soc. Rev. 381, 390 (2005).

[19] *See* Tyler et al., *supra* note 8, at 771.

officers" and "the possible repercussions—bodily injury or death."[20] This fear was a constant theme in the focus groups. "[T]hat's your life they're playing with," said one participant, describing the fear of an officer drawing a weapon during a frisk. 11/18, 8:255–58; *see also* 11/18, 12:405–07 ("[T]hey do pull out guns on you for no reason to keep you still. . . . It's like another human being about to kill you."); 11/18, 8:251–52 ("[T]hey're real [loose] with pulling their guns out."). Indeed, Officer Tom already had his hand on his gun when he forced Mr. Weaver to assume the search position. *Weaver*, 975 F.3d at 114 (Livingston, C.J., dissenting); *see also* 12/15_4BX, 8:33–34 ("Putting the hand on the weapon is the biggest thing that the cops in my area do.").

This fear is eminently reasonable—and common. It reflects how often Black and Latinx people will witness or experience police violence:

> "I watched [my friend] literally get the baton on him, beat him with it, they broke his leg, fractured his arm, broke his rib."[21]
>
> "Sometimes I see a handcuffed person on the floor, but the cops still kicking, beating him."[22]
>
> "I've seen a girl get stopped and thrown to the wall."[23]

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[20] Erika L. Johnson, *"A Menace to Society:" the Use of Criminal Profiles and Its Effects on Black Males*, 38 How. L.J. 629, 663 (1995).

[21] 10/27, 34–36.

[22] 11/17_5AY, 15:564–65.

[23] 10/27, 5:12.

> "I've been pepper sprayed before by cops while I'm already on the floor and handcuffed."[24]

See also 1/06, 3:13–14 (describing police breaking her father's leg). People are left feeling defenseless when it comes to both their bodies and their rights:

> "He was just stopping me. I felt him coming towards me. I just paused, and my stomach dropped, because I didn't know what he was going to do."[25]

> "[Your] first reaction, as a human, is to fear for your life." [26]

> "I didn't do anything, because I didn't want anything to happen. I didn't want to get shot."[27]

> "My main concern is they're going to shoot me and get away with it."[28]

> "I don't want anything bad to happen to me because it's crazy what I be seeing to black kids and Hispanic kids."[29]

This humiliation and fear are compounded by the knowledge that such police tactics may lack basis, but are hardly random.[30] "You got Jordan's on [your] feet, you're black, you're a target. Spanish, you're in a hood, you got Jordan's on your feet, you're a target." 10/20, 17:18–19; *see also* 12/09, 7:2–3 ("They've got targets. I'm a target. They have targeted areas where they just go fishing."); 10/20, 38:25–

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[24] 11/18, 3:81–82.
[25] 12/08_4BX, 1:14–16.
[26] 11/18, 13:417.
[27] 12/14_10AY, 1:29–30.
[28] 1/12, 21:10–11.
[29] 11/17_5AY2, 10:45–11:4.
[30] *See, e.g.*, Tom Tyler et al., *supra* note 8, at 756.

30 ("[T]hey come into neighborhoods . . . and just automatically put people into stereotypes like they know them. . . . like you're all criminals."). One of the most common sentiments was that "[we're] targeted because we are the minority." 10/27, 4:24; *see also* 10/22, 6:13–14 (same); 12/09, 20:31 (same); 12/14_10AY, 5:25–45 (same). Concerns about racial profiling are particularly stark where the justification for the stop and frisk is plainly pretextual, as Judge Calabresi noted in his concurrence was the case here. *See Weaver*, 975 F.3d at 107 (Calabresi, J., concurring); *see also* 12/08_8DY: 3:32–34 ("He'll follow you until you do something. If you're smoking a cigarette, he's going to follow you until you throw that little cigarette on the floor so he can stop you."). Such profiling is harmful, unconstitutional, and, as the uncontested data in *Floyd* showed, led to stops that were *less* effective at uncovering weapons or drugs. 959 F. Supp. 2d at 574.

These experiences "arouse strong resentment," *Terry*, 392 U.S. at 17, and leave Black and Latinx people with a sense of "hopelessness" that the police will treat them with respect.[31] As one participant concluded, "We need to be safe from police. That's hard to say because they're supposed to serve and protect us." 11/17_5AY2, 25:13–14; *see also* 12/14_10AY, 5:13–22 ("They are hurting the community. . . [b]ecause they feel like they've got the authority to do whatever they

[31] Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 Urb. Aff. Rev. 858, 879 (2009).

want"); 10/28, 5:47 (the police "act like they can get away with anything, which basically they can"); 10/28, 15:19 (same). This distrust in turn hinders law enforcement:

> "[I]t made me feel uncomfortable with even calling 911 for help."[32]
>
> "[N]obody feels safe, and nobody feels like they can call them."[33]
>
> "Nobody calls the cops anymore."[34]
>
> "[Y]ou don't feel like [the police are] there to help you."[35]
>
> "I am terrified of the police."[36]
>
> "I'm just uncomfortable or afraid of them."[37]

All these experiences—fear, indignity, and distrust—are centrally relevant to how a reasonable person in Mr. Weaver's position would have felt when splayed over a car trunk for inspection by a police officer. They inform the Fourth Amendment analysis of the intrusion upon Mr. Weaver's person and why ordering him to assume the search position cannot be equated to a simple request to step out of the car. Further, as in *Terry*, allowing routine indignities to be imposed on Black and Latinx people would "exacerbat[e] police-community tensions." 392 U.S. at 11–

[32] 1/21_18AY, 18:18–19.
[33] 11/05, 6:36–37.
[34] 10/28, 18:31.
[35] 10/20, 43: 31–32.
[36] 1/06_SH, 9:31.
[37] 10/20, 43:44.1`

12, 17 n.14. Simply put, what happened to Mr. Weaver was not *de minimis* and, thus, required objective and tailored cause—that is, reasonable suspicion that Mr. Weaver was armed and dangerous. To hold otherwise would be to strip accountability for police tactics that have done so much to sow distrust, at the cost of Black and Latinx lives, police legitimacy, and public safety.

II. REQUIRING PHYSICAL CONTACT FOR SEARCHES WOULD PERMIT UNWARRANTED AND DEHUMANIZING INTRUSIONS OF PRIVACY.

As *Terry* emphasized, because the touchstone of the Fourth Amendment analysis is reasonableness, it is ill-suited to "rigid all-or-nothing" rules. 392 U.S. at 17–19. Yet the dissent advocates just that: a novel rule under which a "a verbal directive" can never constitute the beginning of a frisk. *Weaver*, 975 F.3d at 115 (Livingston, C.J., dissenting). But under the Fourth Amendment, whether a search occurs turns on the intrusion on someone's privacy and dignity, not specific terminology or an inflexible analysis of the physical means employed. The dissent's rule would strip away protections from a wide variety of intrusions experienced by Black and Latinx people that the Fourth Amendment must cover. It would also obscure the lived reality that orders from officers often presage sudden violence against Black and Latinx people. Given the coercive threat of violence, Officer Tom—hand on his gun—began the search when he ordered Mr. Weaver to assume

the search position, just as if Officer Tom had physically positioned Mr. Weaver into the search position with his hands.

As an initial matter, the dissent places great weight on the specific word "frisk." Yet *Terry* warned that treating specific words as "talismans" would "divert attention from the central inquiry under the Fourth Amendment: the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." 392 U.S. at 19. A frisk is only one kind of search, and not all searches—or even low-level searches—are frisks. The relevant question is whether a *search* took place and when it began, and the answer turns on the intrusion of bodily integrity and dignity. *Id.* at 24–27. Thus even if being ordered to assume the search position to be frisked was not the beginning of a *frisk*—though it certainly was—this would still not answer whether this intruded upon Mr. Weaver's person in a manner that triggered the Fourth Amendment's protections.

The experiences of focus group participants provide examples of the kind of intrusions that the dissent's rule would leave unprotected. Police officers routinely give verbal orders that have the effect of invading someone's privacy, such as telling someone to open a bag or "empty out your pockets," 1/27, 13:556–57; *see also* 1/27, 18:825–26 (same); 12/08_4BX, 17:33–36 (same). Under the dissent's proposed rule, Officer Tom would not have been engaged in a "search" that triggered Fourth Amendment protections if he had ordered Mr. Weaver to take off his pants—nor

would a police officer's order for a woman to undress be considered a "search" as long as there was no physical contact. *Cf.* 11/05, 16:17–18 (describing strip search); 11/05, 3:11–16 (same).

Such orders from armed police carry the threat of violence, and people do not feel safe declining or asserting their rights. Consequently, words can have the same effect as a physical compulsion. "If a cop comes up to you and says open up your purse or empty your pockets, I'm going to do it—and I'm a lawyer—because there are three guys, there are guns, and they're telling me to do something." 12/08_4BX, 17:33–36; *see also* 1/12, 24:40–41 (describing fear that "he's going to pull his gun on me if I don't consent to this search or they going to arrest me if I don't consent to this search"). Even during low-level searches, "they come at you in a way that makes you think there's some kind of threat that's going to happen to you if you don't go along with what they're asking." 12/15_4BX, 9:31–33.

For these reasons, "[s]everal cases confirm that words alone may amount to a search" and that "[a]n officer cannot sidestep the requirements of the Fourth Amendment" by issuing verbal directives. *United States v. Street*, 614 F.3d 228, 233–34 (6th Cir. 2010) (citing cases); *see also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374 (2009) (verbal order by school officials for student to "pull out her underwear" was a search); *United States v. Foust*, 461 F.2d 328, 330 (7th Cir. 1972) ("direct[ing] the defendant to empty his pockets" was a search).

Furthermore, the Supreme Court has applied the Fourth Amendment to a wide variety of searches beyond traditional physical intrusions by considering privacy expectations. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2217–19 (2018).[38]

Leaving aside the legal infirmity of the dissent's proposed rule, it would also work a sea change in otherwise-settled law governing police encounters. This could undermine years of collaborative work among the NYPD, a court-appointed monitor, and amici to design police trainings for stops and frisks around the reasonableness standard. For example, one training instructs officers that, when there is no justification for a search, "You can't say, 'lift your shirt.' That's a search, not a Protective Measure. But you can say things like 'take your hands out of your pockets,' [or] 'raise your hands' . . . " as a protective measure.[39] Tens of thousands of officers have now received these trainings. A significant departure from this longstanding reasonableness inquiry—as compared to simply applying this

[38] Another justification given by the dissent for this bright line rule is that purpose is irrelevant to the Fourth Amendment analysis. However, such a ruling would upset existing law in a number of contexts. For example, police must typically obtain a warrant to conduct a blood test for investigatory purposes, but courts including this one have held that the analysis shifts when a blood test is performed for medical purposes only. *See, e.g.*, *Anthony v. City of New York*, 339 F.3d 129, 142 (2d Cir. 2003).

[39] *Floyd*, 959 F. Supp. 2d 540, ECF No. 571-1, at 31.

framework to a particular set of facts—must not be made lightly, nor should it be premised on the shaky legal grounds invoked by the dissent.

III. MR. WEAVER'S INNOCUOUS BEHAVIORS DID NOT PROVIDE REASONABLE SUSPICION JUSTIFYING A FRISK FOR WEAPONS OR FURTHER RESTRAINT.

The panel correctly held that Officer Tom did not have an "objectively reasonable suspicion that Weaver was armed and dangerous." *Weaver*, 975 F.3d at 100. Indeed, "[t]he ordinary person looking at the facts of this case would . . . no doubt conclude that the officers decided to search Weaver because of a hunch or a stereotype, and then went about finding a way to search him." *Id.* at 107 (Calabresi, J., concurring). The three reasons the police officer provided for searching Mr. Weaver are quintessential examples of post hoc justifications: that this was a "high crime area," that Mr. Weaver made furtive movements, and that he stared at the unmarked police car. These factors are, at best, unreliable and, at worst, provide cover for the type of racially biased policing that has harmed communities of color and fostered distrust between those communities and law enforcement.[40]

A. High Crime Area

The dissent places added importance on the fact that the stop occurred in "a dangerous neighborhood on the near west side of Syracuse." *Id.* at 110 (Livingston,

[40] Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 362–63 (1998).

C.J., dissenting). Yet the notion of a "high crime area" has regularly proven to be untethered from actual crime rates and instead a proxy for Black and Latinx neighborhoods.

There are several problems with the concept of "high crime areas." First, the term is fundamentally imprecise. There is no definite standard for what constitutes an "area," which could be a street, intersection, block, neighborhood, or even an entire borough.[41] Second, officers are, in practice, unreliable at identifying high crime areas.[42] Research has found that "[t]he 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."[43] Similarly, the high crime area factor is invoked more often against Black men—even controlling for officers and narrowing geographic area.[44]

This is consistent with the uncontested evidence in *Floyd*, which showed that on NYPD forms justifying stops and frisks, "stops were 22% more likely to result in arrest if 'High Crime Area' was *not* checked." 959 F. Supp. 2d at 575. Further, officers indicated an area was "high crime" 55% of the time, *id.* at 574, which the court found to be true "regardless of the amount of crime in the precinct or census

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[41] Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Calif. L. Rev. 345, 367 (2019).

[42] *Id.* at 368–69, 383–85.

[43] *Id.* at 352.

[44] *Id.* at 385.

tract as measured by crime complaints," *id.* at 581–82. This suggests officers use high-crime area "as cover to bolster the appearance of constitutional validity in their weakest stops."[45]

B. Furtive Movements

As is the case here, an equally specious factor often used to justify searches and seizures is a suspect's purported "furtive movement." Yet the realities of police behavior again illustrate the dangers of overemphasizing movements that can be innocently explained. In *Floyd,* the uncontested evidence revealed that "stops were . . . 18% more likely to result in arrest if 'Furtive Movements' was not checked." 959 F. Supp. 2d at 575. More troubling was "that NYPD officers check 'Furtive Movements' in 48% of the stops of blacks and 45% of the stops of Hispanics, but only 40% of the stops of whites." *Id.* at 580–81. Yet stops of Black people were *less* likely to result in weapons or drugs. *Id.* at 574–75. In other words, far from introducing objectivity, police officers' perceptions of "furtive movements" increase both the imprecision and racial disparities in stops.

C. Staring at a Police Vehicle

Finally, there is the fact that Mr. Weaver looked at the unmarked police car for what one of the officers described as "probably a few seconds but it seemed longer than typically one would look at a vehicle." *Weaver*, 975 F.3d at 97. The

[45] *Id.* at 396.

unreliability of this justification is clear from the fact that law enforcement officers have attempted to cite every variation of looking or not looking at them as the basis for a stop or search. *See, e.g.*, *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (individual looking straight ahead instead of at police officer); *Joshua v. DeWitt*, 341 F.3d 430, 446 (6th Cir. 2003) (looking back at police officers); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1446 (9th Cir. 1994) ("failure to look at [law enforcement vehicle]"); *United States v. Peters*, 10 F.3d 1517, 1522 (10th Cir. 1993) ("looking at [the officer] out of the corner of his eye"); *United States v. Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990) ("looking away quickly"). Further, if the dissent is correct in crediting Officer Tom's characterization of the location as a "high crime area," that would make looking at "an unmarked car with tinted windows driving by slowly" even more innocuous. *Weaver*, 975 F.3d at 105.

More fundamentally, this factor cannot be divorced from the realities of race in America. In *United States v. Mendenhall,* the Supreme Court recognized that a person's race can make them feel "unusually threatened by [police] officers." 446 U.S. 544, 558 (1980). As Justice Sotomayor wrote in *Utah v. Strieff*, "[f]or generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." 136 S. Ct. 2056, 2070 (2016) (Sotomayor,

J., dissenting). Accordingly, it is clear that Black people, especially young Black men, may exhibit behaviors like staring at police vehicles that are interpreted as suspicious but are in fact indicative of a deep unease around police. *See, e.g.*, *Commonwealth v. Warren*, 475 Mass. 530, 540 (2016) ("[T]he finding that black males in Boston are disproportionately and repeatedly targeted for [police] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.").

In sum, while the factors considered have the veneer of objectivity, they are deeply subjective and allow for racial bias to seep into policing. Even taken together, these factors are far too problematic to serve as an objective basis for a frisk, search, or seizure. This Court should not look away from the realities of policing and race in America and the role that factors like "high crime area" and "furtive movements" have played in producing the humiliating and degrading police practices that too often unduly target Black and Latinx people.

CONCLUSION

Amici respectfully urge that this Court adopt the panel's conclusion that ordering Mr. Weaver into the search position implicated the Fourth Amendment and that reasonable suspicion was lacking.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) & 32(a)(7)(B)(i) and Local Rule 29.1 because the brief contains 6,495 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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