No. 17-1349

In the Supreme Court of the United States

RANDY JOHNSON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

April 25, 2018

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute ("Cato") is a nonprofit, nonpartisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is the continuing vitality of the Fourth Amendment and its ability to act as a meaningful restraint on the exercise of government power. In the modern era of rampant overcriminalization, an extension of the ability to make pretextual stops for violations of minimal, fine-only offenses threatens to expose any American to search and seizure on a daily basis.

SUMMARY OF ARGUMENT

The Petition presents a crucial question that goes to the heart of the Fourth Amendment and raises serious concerns about government power. Should the logic of *Whren v. United States*, 517 U.S. 806 (1996)—permitting pretextual searches and seizures whenever there is probable cause for a traffic offense—be permitted to cover any and all trivial violations? If the Court per-

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

mits such an extension, then it will effectively resurrect the power of the general warrant—227 years after the Fourth Amendment was ratified.

The general warrant, which historically gave officers broad discretion to search wherever and whatever they deemed necessary, began to rapidly lose favor in Britain by the beginning of the 18th century. Contempt for those arbitrary practices in the American colonies was a major cause for the Revolutionary War itself, and the Fourth Amendment was passed to obliterate the possibility that Americans might be subject to such behavior.

Unfortunately, the Court's decision in *Whren*—in conjunction with the many exceptions to the warrant requirement—has severely undermined those exact protections that the Framers sought to enshrine. By authorizing pretextual stops whenever a police officer has probable cause to believe any traffic violation has occurred, *Whren* gives enormous discretion to law enforcement to stop anyone driving a car anytime, for any reason. After all, it is a truism that in practice, no one can actually operate a motor vehicle for an extended period of time without running afoul of *some* traffic regulation.

But as dangerous as *Whren* is already, extending the doctrine to *parking* violations—and presumably, trivial, fine-only offenses of any sort—would be far worse. With *malum prohibitum* criminalization of every aspect of life growing rapidly, extending *Whren* beyond moving violations, and with no limiting principle, will effectively subject every individual to the whims of any law enforcement officer, at any time.

This case is an ideal vehicle for the Court to follow Justice Ginsburg's recent suggestion that *Whren* itself

should be reconsidered. *See District of Columbia v. Wesby*, 583 U.S. ___, No. 15-1485, slip op. at 2 (Jan. 22, 2018) (Ginsburg, J., concurring in the judgment in part). But at the very least, the Court should grant the Petition to reverse the decision below, and clarify that *Whren* will not be extended beyond its current parameters. In 2018, Americans should not find themselves again in the position that James Otis, Jr. railed against 257 years ago, in which "the liberty of every man [is] in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

ARGUMENT

I. THE FOURTH AMENDMENT WAS DESIGNED TO PREVENT THE ARBITRARY ABUSES OF POWER THAT EXISTED UNDER GENERAL WARRANTS.

As the Court has acknowledged many times, "[i]t cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England. These writs, which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). As described in another decision, "[t]he Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence." *Chimel v. California*, 395 U.S. 752, 761 (1969).

The general warrant that colonists found particularly bedeviling was the writ of assistance—a tool is-

sued to aid the British in combatting the colonial reaction to new and increased taxes by giving law enforcement carte blanche authority to search for smuggled goods. RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 8 (2013). A few notable cases in particular stoked the colonists' hatred of these expansive and arbitrary powers during "the period of 1761-1791 [which] was characterized by aggressive British search and seizure practices," and during which time "the principles that found their way into the Fourth Amendment crystallized." Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 980 (2011).

In Paxton's Case, James Otis, Jr. represented a group of Boston merchants in a lawsuit designed to publicize and coalesce public opinion against the practice of utilizing writs of assistance to arbitrarily invade the lives of colonists. Radley Balko, *General Warrants, NSA Spying, And America's Unappreciated Founding Father, James Otis, Jr.*, HUFFINGTON POST, July 4, 2013, updated Dec. 6, 2017, http://bit.ly/2vLAmrR. In his "impassioned, wide-ranging, five-hour polemic against the practice of general warrants," *id.*, Otis called writs of assistance "the worst instrument of arbitrary power, the most destructive of English liberty[] and the fundamental principles of law, that ever was found in an English law book" because they placed "the liberty of every man in the hands of every petty officer." *Boyd*, 116 U.S. at 625.

John Adams—a man to whom responsibility for the language and structure of the Fourth Amendment has been attributed—was thoroughly inspired by James Otis' arguments against arbitrary power. *See* Clancy, *supra*, at 981. Adams famously recalled that "[e]very

man of an immense crowded audience appeared to me to go away as I did, ready to take arms against writs of assistance." BALKO, *supra*, at 10. Adams felt that Otis' passionate attack sparked the revolution, recalling that "[t]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there, the child Independence was born." *Id.*

Another major incident that raised colonial ire against general warrants and writs of assistance was the Wilkes Case. *See* WILLIAM CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 440-465 (2009). Despite occurring in England, it was publicized and followed closely in the American colonies. *Id.* John Wilkes, a radical English journalist, stated in Issue No. 45 of *The North Briton* that the British secretaries of state were "the tools of corruption and despotism," even going as far as to criticize the King. *Id.* at 440.

While carrying out a general warrant issued to find the authors, printers, and publishers of the despised No. 45, officials broke hundreds of locks, dozens of trunks and at least 20 doors while "promiscuously" dumping thousands of books, charts, and manuscripts—indeed, "[t]he zealous invaders even seized Wilkes' will, pocket book, and prophylactics." *Id.* at 442-43. A single general warrant had provided for the arrest of 49 people (who were mostly innocent) and the search of at least five houses, all in 30 hours' time. *Id.* at 443. For deciding to fight against the practice of the general warrant and abuses that accompanied them, Wilkes became a household name in the American colonies, and a hero on both sides of the pond.

These abuses at the hands of officials acting under the authority of a general warrant and aided by writs

of assistance were "vivid in the memory" of the Framers as the Fourth Amendment was crafted. *Stanford v. Texas*, 379 U.S. 476, 481 (1965). Though there was some discussion of various options, and "the framing-era sources did not always agree on the details of the criteria for regulating searches and seizures, they were united in seeking objective criteria to measure the propriety of government actions." Clancy, *supra*, at 980. The language selected was "precise and clear," "reflect[ing] the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford*, 379 U.S. at 481.

II. *WHREN'S* SANCTION OF PRETEXTUAL STOPS HAS ALREADY BROUGHT US DANGEROUSLY CLOSE TO LIVING UNDER GENERAL WARRANT CONDITIONS.

In *Whren*, this Court "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." 517 U.S. at 813. In other words, even where the alleged probable cause is merely pretext for a stop motivated by an entirely separate concern—even pretext for unlawful motives, such as "selective enforcement of the law based on considerations such as race," *id.*—such stops are nevertheless still "reasonable" under the Fourth Amendment.

The practical effect of this decision has been to give police officers nearly unfettered discretion to stop any person they choose at any time. This is because, "on any given day, one or more of these [minor] violations [such as driving less than five miles an hour over the

speed limit, turning or changing lanes without signaling, or swerving slightly out of one's lane] are surely committed by the majority of drivers on the road." Brian J., O'Donnell, Note, Whren v. United States: *An Abrupt End to the Debate over Pretextual Stops*, 49 ME. L. REV. 207, 210 (1997). It is therefore hardly surprising that *Whren* has been subjected to extensive criticism, mainly on the grounds that it invites arbitrary exercises of power and unequal application of the law.[2]

Law enforcement has certainly not hesitated to take full advantage of the power to make pretextual stops. For example, in *United States v. Escalante*, 239 F.3d 678 (5th Cir. 2001), the Fifth Circuit upheld a search and seizure where the purported probable cause was that the defendant violated Mississippi's careless driving statute by "weav[ing] across the lane divider lines two or three times." *Id.* at 679. But this justification was almost certainly pretextual, as the officer "candidly acknowledged at the suppression hearing that he suspected drug smuggling when Escalante passed him." *Id.* at 682 (Stewart, J., dissenting). As the dissent noted, the officer here went beyond even a pretextual stop, and effectively "manufacture[d] probable cause by tailgating a motorist." *Id. See also United States v. Chhien*, 266 F.3d 1, 4 (1st Cir. 2001) (upholding search and seizure by member of an elite police team trained to "look beyond the traffic ticket," and

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[2] *See generally* Jonathan Witmer-Rich, *Arbitrary Law Enforcement is Unreasonable: Whren's Failure to Hold Police Accountable for Traffic Enforcement Policies*, 66 CASE W. RES. L. REV. 1059 (2016); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815 (2002); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

use "routine traffic patrols" to "ferret out serious criminal activity").

The impact of *Whren* is compounded by the doctrine's intersection with other increasingly expansive exceptions to the warrant requirement. In theory, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). In practice, however, these "exceptions" have become so expansive that "warrants are the exception rather than the rule." William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991).

Most notable among these is the vehicle exception, first articulated in *Carroll v. United States*, 267 U.S. 132 (1925). The professed theory for this doctrine is that it often "is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.* at 153. But over time it has been extended to include "vehicles" that are not functionally mobile, in situations that do not appear to implicate any of *Carroll*'s practical concerns. *See Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (upholding warrantless search despite lack of exigency); *Florida v. Meyers*, 466 U.S. 380, 382-383 (1984) (approving warrantless search of impounded car in secured area); *Texas v. White*, 423 U.S. 67, 68-69 (1975) (upholding search of seized car despite being parked at police station); *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970) (approving warrantless search and seizure despite car being impounded and occupants jailed).

Exigency, another exception to the warrant requirement, has likewise been applied liberally in favor of police expediency. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (to fight fire and investigate cause); *Ker v. California*, 374 U.S. 23, 40-41 (1963) (to prevent imminent destruction of evidence). The same can also be said of the circumstances necessary to obtain consent to search. *See, e.g. Ohio v. Robinette*, 519 U.S. 33 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (upholding "consent search" of vehicle despite consenter's lack of knowledge that he could refuse). Police likewise have authority to conduct broad searches incident to lawful arrests. *See New York v. Belton*, 453 U.S. 454, 462-63 (1981).

The aggregation of these and other doctrines "already enables a host of aggressive and intrusive police tactics." *United States v. Johnson*, 874 F.3d 571, 577 (7th Cir. 2017) (en banc) (Hamilton, J., dissenting). Judge Hamilton's dissent explains how *Whren* enables a cascade of severe consequences for anyone committing even a trivial traffic violation:

> Officers who have probable cause for a trivial traffic violation can stop the car under *Whren* and then order all occupants out of the car, *Maryland v. Wilson*, 519 U.S. 408 (1997), often frisk them, *Arizona v. Johnson*, 555 U.S. 323 (2009), question them in an intimidating way, visually inspect the interior of the car, *Colorado v. Bannister*, 449 U.S. 1, 4 & n.3 (1980), often search at least portions of the vehicle's interior, *Arizona v. Gant*, 556 U.S. 332 (2009); *Michigan v. Long*, 463 U.S. 1032 (1983), and hold the driver and passengers while a drug-detection

> dog inspects the vehicle, *Illinois v. Caballes*, 543 U.S. 405, 406-08 (2005).
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> . . .
>
> The Fourth Amendment also allows police to arrest suspects for minor traffic infractions even if a court could impose only a fine, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and arrested persons can be strip-searched, *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 339 (2012), fingerprinted, photographed, and perhaps even subjected to a DNA test, *see Maryland v. King*, 569 U.S. 435, 481 (2013) (Scalia, J., dissenting). Moreover, a *Terry* stop can even be justified by an officer's *mistake* of either law or fact. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014).

Johnson, 874 F.3d at 577-78. *Whren*'s authorization of pretextual stops therefore effectively amounts to "'the twentieth-century version of the general warrant.'" *Id.* at 575 (quoting Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616, 1669 (2016)).

III. EXTENDING *WHREN* WOULD BE ESPECIALLY DANGEROUS GIVEN THE CURRENT STATE OF OVERCRIMINALIZATION.

Pretextual searches might not be quite so concerning if it were a serious and meaningful hurdle that police establish probable cause to believe that *some* crime has occurred. If the scope of criminal liability were reasonably limited in the first place, then the *Whren* doctrine would at least have the virtue of not giving such broad, unfettered discretion to law enforcement. The

problem under *Whren*, of course, is that it is nearly impossible for anyone to operate a motor vehicle for an extended period of time without committing *some* traffic offense. But as broad as such liability already is, upholding the decision below—and extending *Whren* to any and all of even the most trivial "criminal" violations—would be even more concerning.

The explosion of laws, rules, regulations, and ordinances governing the lives of individual Americans is overwhelming and deeply disconcerting to those intent on living as free people. *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008). Forty percent of the roughly 4,500 federal criminal offenses contained in the federal code have been enacted since around 1980. HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 202 (2009). The number of potential federal crimes swells to an estimated 300,000 when regulations that are incorporated into the criminal code by reference are included. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 729 (2013).

And that, of course, is just on the federal level. It is hard enough for the average person to operate a motor vehicle without committing a moving violation of some sort—speeding by any amount, traveling too far *under* the speed limit, excessive lane changing, tailgating, failure to signal a turn soon enough, etc. How much more difficult would it be for average Americans to remain free of humiliating seizures and searches if the extraordinarily power bestowed on law enforcement by *Whren* were extended to permit pretextual stops based

on any other trivial violation an officer believes has been committed?

Even aside from the most bizarre and outlandish instances of criminalization,[3] every jurisdiction includes code enforcement provisions against trivial, *malum prohibitum* behavior. In addition to parking violations, such regulations would include, for example, prohibitions against jay-walking, littering, riding bicycles on the sidewalk, wearing saggy pants,[4] and placing recycling and trash bags in incorrect locations for collection.[5] Some jurisdictions require that all bicycles and pets be registered with the city or county.[6] Many have criminal prohibitions on broad, vaguely defined activities like "loitering" or "disturbing the peace." Most have extensive "health and safety" regulations for anyone selling food, drink, or other consumables—from restaurants, to food trucks, to children operating lemonade stands.[7]

Most Americans assume that their daily lives are not open to the possibility of invasion by police for the

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[3] *See United States of Crazy Laws*, Olivet Nazarene University, Jan. 14, 2016, http://bit.ly/2vFoM1s; Christina Sterbenz & Melia Robinson, *Here Are The Most Ridiculous Laws In Every State*, BUS. INSIDER, Feb. 21, 2014, https://read.bi/2vIyLDb.

[4] *See* Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail.*, N.Y. TIMES, Aug. 30, 2007, https://nyti.ms/2r0PFHL.

[5] *See* Alana Semuels, *The Trash Man Is Watching You*, ATLANTIC, June 26, 2015, https://theatln.tc/2vLAOX5.

[6] *See* Patrick Johnson, *Holyoke woman, sick with cancer, arrested on warrant issued after she failed to renew dog license*, MASSLIVE, Mar. 25, 2014, http://bit.ly/2vM2paE.

[7] Joe Dziemianowicz, *Your kid's lemonade stand might be illegal, here are the rules*, N.Y. DAILY NEWS, July 13, 2017, http://bit.ly/2vMAqru.

most mundane and insignificant infractions. The vast majority of the time, such harmless legal violations lead to no consequences whatsoever—or at most a warning or minor ticket. But by permitting pretextual stops for any and all of the above, the Seventh Circuit's decision subjects every citizen not just to the risk of prosecution for trivial offenses, but to the risk that police may leverage this staggering breadth of substantive overcriminalization as pretext for whatever other motives they might have.

"With authority to stop comes the authority to require the subject to submit to the stop, and to use reasonable force in doing so," and "[i]n these encounters, the danger of further escalation is always present." *Johnson*, 874 F.3d at 578 (Hamilton, J., dissenting). One need only have paid glancing attention to the news for the last few years to know that it is easy for interactions between civilians and law enforcement to escalate rapidly, and that deadly force may be employed.

In 2014, for example, Eric Garner was killed by a police officer who decided to arrest and place Garner in a department-prohibited chokehold for the nefarious offense of selling cigarettes on the street. Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES, June 13, 2015, https://nyti.ms/ 2uwur8y. That tragedy vividly illustrates the potential consequences when the full force of stops and seizures is permitted for the most trifling legal violations. If the Seventh Circuit's opinion is upheld, such tragedies will only become more commonplace.

CONCLUSION

Writing separately in *District of Columbia v. Wesby*, 583 U.S. ___, No. 15-1485, slip op. (Jan. 22, 2018), Justice Ginsburg recently called into question *Whren*'s absolute sanction on pretextual stops, noting that "[t]he Court's jurisprudence . . . sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection," that "[a] number of commentators have criticized the path we charted in *Whren v. United States*," and that she would "leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry." *Id.* (Ginsburg, J., concurring in the judgment in part), slip op. at 2.

This is exactly such a "future case." For all of the reasons given above, *Whren* ought to be reconsidered and revised—or at the very least, the Court should ensure that lower courts do not extend it any further than current precedent demands. For the foregoing reasons, and those set forth by the Petitioner, the Court should grant the Petition.

Respectfully submitted,

April 25, 2018

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