No. _____

In the
Supreme Court of the United States

DiAngelo Johnson,
Petitioner,

vs.

United States of America,
Respondent.

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

Petition for Writ of Certiorari

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Question Presented

Because *Whren v. United States*[1/] permits pretextual traffic stops, it has become notorious for its effective legitimation of racial profiling. *Whren*'s endorsement of racial profiling conflicts with public policies aimed at eliminating invidious racial discrimination and deterring wrongful police conduct. Should this Court overrule *Whren*?

Parties to the Proceeding

All parties appear in the caption on the title page.

[1/] 517 U.S. 806 (1996).

Table of Contents

Table of Authorities

Page

Cases

Constitutional Provisions

Federal Statutes

Other Authorities

Petition for Certiorari

Petitioner DiAngelo Johnson respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below

The Ninth Circuit affirmed petitioner's conviction, finding that the district court properly denied Johnson's motion to suppress evidence obtained during a warrantless traffic stop.[2/] No petition for rehearing was filed.

Jurisdiction

The Ninth Circuit filed its judgment on February 12, 2019.[3/] Thus, the jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

[2/] *United States v. Johnson*, Nos. 17–50315, 17–50316 (9th Cir. Feb. 12, 2019). A copy of the memorandum is attached as Appendix A.

[3/] App. A at 3.

Constitutional Provision Involved

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[4/]

Statement of the Case

In January 2017, Johnson was driving a 2017 Cadillac SUV in San Diego when he was stopped by police officers serving on a gang-suppression unit — not a traffic-enforcement unit.[5/] Johnson and his passenger were African American. The officers told Johnson that they stopped him to confirm a discrepancy concerning the Cadillac's registration.[6/] Because of *Whren*, the district court would not delve into whether the state reason for the stop was a pretext for racial profiling.[7/]

[4/] U.S. Const. amend. IV.

[5/] 2ER 129, 135.

[6/] 2ER 129, 135.

[7/] 1ER 29.

During the stop, the officers learned that Johnson's passenger was on probation and had waived his Fourth Amendment rights.[8/] They told Johnson they were going to search the car, removed him from the vehicle, and asked if he had any weapons.[9/] When asked if he had any weapons, Johnson immediately admitted that he had a firearm in his coat's breast pocket.[10/]

Johnson was arrested and charged with being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1).[11/] Before trial, Johnson moved to suppress the firearm as the fruits of an unlawful search.

At the motion hearing, the district court refused to discuss the officers' real motives for stopping Johnson, dismissing defense counsel's assertion that the officers targeted Johnson's vehicle because they saw "two African Americans driving in that neighborhood driving a new Cadillac."[12/] Citing *Whren*, the district court said that

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[8/] 2ER 130, 135–36.

[9/] 2ER 130, 136.

[10/] 2ER 130, 136.

[11/] 2ER 141–43, 256.

[12/] 1ER 29.

the real reason for the stop "doesn't matter."[13] The district court denied the suppression motion.[14]

A jury convicted Johnson.[15] The Ninth Circuit affirmed the conviction on appeal.[16]

Reasons for Granting the Petition

This Court should grant the petition to decide whether *Whren*'s approval of racial profiling — a form of invidious racial discrimination — should be overturned.

1. Scholars and Justices of this Court have criticized *Whren* for legitimizing and encouraging invidious racial discrimination in the criminal justice system, and they have therefore called for its reexamination.

In *Whren*, two defendants challenged a traffic stop's legality, arguing that it violated the Fourth Amendment because the stop was pretextual — i.e., even though probable cause existed, the officers stopped the defendants based on other, impermissible

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[13] 1ER 29.

[14] 1ER 39.

[15] 2ER 180–82

[16] App. A.

factors.[17] The defendants proposed a "would have" test as a constraint on law enforcement officers' discretion.[18] Under their proposed test, the question would be "whether a police officer, acting reasonably, would have made the stop for the reason given.[19]

In a unanimous 1996 decision, this Court rejected the *Whren* defendants' proposed "would have" test, concluding that the Fourth Amendment's reasonableness inquiry is controlled by a purely objective standard.[20] It reasoned, in part, that administering the proposed test would be too difficult.[21] But the Court also explained that the "principal basis" for using a purely objective test "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[22]

Underscoring the absoluteness of its holding, the *Whren* court emphasized that an arrest supported by probable cause is

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[17] 517 U.S. at 809–10.

[18] *Id.* at 810.

[19] *Id.*

[20] *Id.* at 811–14.

[21] *Id.* at 814–15.

[22] *Id.* at 815.

reasonable under the Fourth Amendment even if the arrest was actually motivated by "considerations such as race."[23/] Hence, as the Court later explained in *Ashcroft v. al-Kidd*,[24/] the *Whren* decision bars courts from "look[ing] behind an objectively reasonable traffic stop to determine whether racial profiling … was the real motive."

Since 1996, a large body of overwhelmingly critical literature has mounted.[25/] The reasons for the scholarly criticism "include that it puts all motorists at risk of arbitrary police detention, underestimates the frequency or costs of racial profiling, causes resentment and hostility between the community and the police, ignores the psychological realities of police behavior, overlooks the problem of police perjury, leaves victims of unconstitutional behavior remediless, facilitates the financial self-interest of police agencies through

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[23/] *Id.* at 813.

[24/] 563 U.S. 731, 739 (2011).

[25/] *See, e.g.*, Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 Geo. Wash. L. Rev. 882, 884 n.2, 886 & nn. 12–20 (2015) (collecting and summarizing scholarly works criticizing *Whren*).

forfeitures, and ignores evidence demonstrating the ineffectiveness of racial profiling."[26/]

Critically, scholars have criticized *Whren* for infecting the criminal justice system with invidious racial discrimination. For instance, one scholar has suggested that *Whren* reflects "a systematic disregard for the distinctive concerns of racial minorities [that] has become embedded in the structure of the Fourth Amendment doctrine."[27/]

Whren's approval of racial profiling in the Fourth Amendment context is particularly troubling given that the Fourth Amendment arguably exists, in part, to foster citizens' trust of law enforcement.[28/] Contrary to the Fourth Amendment's trust-fostering purpose, racial profiling engenders resentment and hostility.[29/] And racial profiling's deleterious social impact doesn't end there. Its ripples include higher

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[26/] *Id.* at 886 (footnotes omitted).

[27/] David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 274.

[28/] Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 Yale L.J. 1072, 1104–05 (2007).

[29/] Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 386 (1998).

incarceration rates for minorities, which in turn leads to race-based disenfranchisement.[30/]

The Justices of this Court have echoed scholars' concerns regarding *Whren*'s consequences.[31/] For example, in *Arkansas v. Sullivan*,[32/] a per curiam decision approving a traffic stop where the officer used probable cause that traffic laws were violated as a pretext for a drug investigation,[33/] Justice Ginsburg wrote a separate opinion concurring in the result "[g]iven the Court's current case law."[34/] Her concurrence, joined by three other Justices, also warned that under *Whren* and its progeny "such exercises of official discretion are unlimited by the Fourth Amendment."[35/] It also suggested that the Court prepare to reexamine *Whren* if and when abuses of unlimited police discretion arose.[36/]

[30/] *See generally* Michelle Alexander, The New Jim Crow (2010).

[31/] *See* Chin & Vernon, *supra* note 25, at 916–17.

[32/] 532 U.S. 769 (2001) (per curiam).

[33/] *Id.* at 771.

[34/] *Id.* at 773 (Ginsburg, J., concurring) (joined by Justices Stevens, O'Connnor, and Breyer).

[35/] *Id.*

[36/] *Id.*

In *Maryland v. Wilson*,[37] the majority opinion held that officers may order passengers out of a vehicle during a traffic stop without any individualized suspicion. Dissenting, Justice Kennedy foresaw a growing risk of arbitrary police action.[38] He explained that coupling the effects of *Whren* (i.e., "allow[ing] the police to stop vehicles in almost countless circumstances") with *Wilson* (letting officers order passengers out of vehicles for no reason whatsoever) "puts tens of millions of passengers at risk of arbitrary control by the police."[39]

In her 2016 dissent in *Utah v. Strieff*,[40] in which the majority opinion held that the exclusionary rule doesn't apply where the discovery of a warrant "attenuates" the discovery of contraband from an initially unlawful stop,[41] Justice Sotomayor drew "on [her] professional experiences" to describe how unbridled police discretion has torn American society in two.[42] Citing *Whren*, she wrote that "[t]his

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[37] 519 U.S. 408, 415 (1997).

[38] *Id.* at 423 (Kennedy, J., dissenting).

[39] *Id.*

[40] 136 S. Ct. 2056 (2016).

[41] *Id.* at 2063.

[42] *Id.* at 2069–71 (Sotomayor, J., dissenting).

Court has allowed an officer to stop you for whatever reason he wants — so long as he can point to a pretextual justification after the fact."[43] And the post hoc justification may be drawn from such factors as "your ethnicity, where you live, what you were wearing, and how you behaved. The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction — even one that is minor, unrelated, or ambiguous."[44]

Justice Sotomayor explained that "it is no secret that people of color are disproportionate victims of this type of scrutiny."[45] Pretextual detentions, even when brief, impose on minorities "[t]he indignity" of having "an officer tell[ ] you that you look like a criminal."[46] The indignity can extend to a frisk if the officer thinks you are dangerous, allowing the officer to " 'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms

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[43] *Id.* at 2069.

[44] *Id.* (citations omitted).

[45] *Id.* at 2070.

[46] *Id.*

and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' "[47]

Moreover, the officer might "handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or" driving without a seatbelt.[48] While an arrest carries further indignities, like fingerprinting, DNA swabbing, delousing, and strip searching, it also carries the risk of the "civil death" that accompanies an arrest record, whereby an arrestee — even if innocent — is subjected to "discrimination by employers, landlords, and whoever else conducts a background check."[49]

Because *Whren* and its progeny let police discriminate against people of color, the indignities of a police stop and the "civil death" accompanying arrest have produced a "double consciousness."[50] Minorities are treated as, and feel that they are, second-class citizens.[51] This double consciousness is so deeply imbedded that

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[47] *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 17, n.13 (1968)).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 2069–70.

generations of "black and brown parents have given their children 'the talk,' " instructing them how to avoid being shot by police officers.[52/]

Justice Sotomayor further warned that "legitimizing the conduct that produces this double consciousness … implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[53/] "[T]he countless people who are routinely targeted by police … are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere."[54/] Their experience shows how "unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but."[55/]

More recently, in 2018, Justice Ginsburg again called for reexamining *Whren* in *District of Columbia v. Wesby*.[56/] She "would leave open, for reexamination in a future case, whether a police officer's

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[52/] *Id.* at 2070.

[53/] *Id.* at 2070–71.

[54/] *Id.* at 2071.

[55/] *Id.*

[56/] 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring).

reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry."[57/]

The time has come to reexamine *Whren*. As Justice Sotomayor has recognized, systemic invidious racial discrimination infects our criminal justice system.[58/] Arbitrary police action has eroded social mores by inflicting innumerable indignities on innocent Americans, creating a chasm between the police and a class of second-class citizens.[59/]

So, this Court should follow Justice Ginsburg's suggestion and reexamine *Whren*.[60/] Because it has allowed invidious racial discrimination to infect our criminal justice system with injustice,[61/] *Whren* and its progeny must go.

[57/] *Id.*

[58/] *See, e.g.*, *Strieff*, 136 S. Ct. at 2069–71 (Sotomayor, K., dissenting).

[59/] *Id.*

[60/] *Wesby*, 138 S. Ct. at 594 (Ginsburg, J., concurring); *Sullivan*, 532 U.S. at 773 (Ginsburg, J., concurring).

[61/] *Strieff*, 136 S. Ct. at 2069–71 (Sotomayor, K., dissenting).

2. *Whren*'s approval of racial discrimination should be replaced with a bright line rule barring law enforcement officers from selectively enforcing laws based on racial discrimination because such a bar furthers the goals of this Court's Fourth Amendment jurisprudence.

Because law enforcement agencies lack unlimited resources, selective enforcement of criminal and traffic laws is inevitable.[62/] Agencies and individual officers must exercise discretion to wisely use their time and assets.[63/] Agencies must decide when, where, and how to assign officers to accomplish myriad police functions, including investigating crimes, providing security, and enforcing traffic laws.[64/] And when an individual officer is on patrol, he or she must exercise discretion about what traffic violations to enforce because time spent writing a citation is time not spent on other enforcement tasks.[65/]

[62/] Chin & Vernon, *supra* note 25, at 895 (footnotes omitted); *Ustrak v. Fairman*, 781 F.2d 573, 575 (7th Cir. 1986).

[63/] *See, e.g.*, William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 Ecology L.Q. 493, 505 n.70 (2007).

[64/] Chin & Vernon, *supra* note 25, at 897.

[65/] *Id.*

For example, an officer on road patrol might choose to stop motorists who have committed more serious violations — e.g., egregious speeders, but not speeders driving five miles per hour over the limit.[66/] Or an officer might choose to stop motorists who, in addition to violating a traffic law, exhibit slight signs of intoxication.[67/] In a real world of limited resources, agencies and officers must be permitted to exercise such discretion when enforcing laws.

But that discretion shouldn't be unlimited. Its authorized scope should not be so broad that invidious racial discrimination is constitutionally permitted and encouraged.

Under the Fourth Amendment, law enforcement discretion should be circumscribed to bar invidious racial discrimination. Such a bar would serve the same policies as this Court's long-standing Fourth Amendment jurisprudence.[68/]

For instance, this Court's decisions have emphasized that the Fourth Amendment's reasonableness requirement protects citizens

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[66/] *Id.*

[67/] *Id.* at 897–98.

[68/] *Id.* at 906–12.

from *arbitrary police action* by requiring police officers to justify their actions based on objective factors.[69/] This Court has also explained that the exclusionary rule is premised on its deterrent effect — i.e., it deters officers from engaging in unlawful conduct.[70/] A rule barring law enforcement from selectively enforcing laws based on invidious racial discrimination would serve those policies because racial discrimination is arbitrary and wrong.

Such a rule would also provide a clear, bright line rule for regulating police conduct, another goal of this Court's Fourth Amendment cases.[71/] A bar against selectively enforcing laws based on racial discrimination provides clear guidance, allowing officers "to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."[72/] Decisions based on race would violate the Constitution. That is a simple rule to remember and follow.

[69/] *See, e.g.*, *Brown v. Texas*, 443 U.S. 47, 51 (1979).

[70/] *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984).

[71/] *See, e.g.*, *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988).

[72/] *Id.*

Further, barring racial discrimination in an officer's exercise of discretion naturally follows this Court's efforts to eradicate invidious racial discrimination from American society. This Court has held that racial discrimination violates the Constitution in such varied contexts as public schools[73/] and laws governing marriage.[74/] Indeed, in *Georgia v. McCollum*,[75/] this Court said that "[r]acial discrimination" is "repugnant *in all contexts*."

This Court has explained that racial discrimination, "odious in all respects, is especially pernicious in the administration of justice."[76/] For instance, in 1986, *Batson v. Kentucky*[77/] declared that systematic racial discrimination in jury selection violates the Constitution and "undermine[s] public confidence in the fairness of our system of justice." More recently, in 2017, in *Peña-Rodriguez v. Colorado*,[78/] this Court held that racial discrimination in jury deliberations violates the Constitution.

[73/] *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

[74/] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

[75/] 505 U.S. 42, 50 (1992) (emphasis added).

[76/] *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

[77/] 476 U.S. 79, 87 (1986).

[78/] 137 S. Ct. 855 (2017).

Peña-Rodriguez explains that, although jurors' deliberative process has been given near sacred status, racial discrimination is so anathema to the Constitution that a racially motivated verdict cannot stand.[79/] This Court found that "there is a sound basis to treat racial bias with" more caution than other potential abuses: "A constitutional rule that racial bias in the justice system must be addressed … is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[80/]

The same should hold true here. Law enforcement officers must exercise discretion, and they shouldn't be overburdened with unnecessary infringement on that discretion. But invidious racial discrimination is a special kind of evil that has no place in American society.[81/] Its presence invalidates jury verdicts.[82/] And its presence should also invalidate racially motivated law enforcement discretion.

[79/] *Id.* at 863–69.

[80/] *Id.* at 869.

[81/] *See, e.g.*, *McCollum*, 505 U.S. at 50.

[82/] *Peña-Rodriguez*, 137 S. Ct. at 869, 871.

As this Court said in *Peña-Rodriguez*, our "Nation must continue to make strides to overcome race-based discrimination.... It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history."[83/] So, as in *Batson*, *Peña-Rodriguez*, and numerous other decision, this Court should once again confront and endeavor to eradicate racial discrimination from the criminal justice system.

This Court should overrule *Whren* insofar as *Whren* approves and encourages invidious racial discrimination.

3. This case is a perfect vehicle for reexamining and overruling *Whren*'s approval and encouragement of invidious racial discrimination.

Here, but for *Whren*, the district court should have permitted Johnson to challenge the officers' subjective motivations for stopping him. If the so-called traffic stop by the "gang-suppression unit" was motivated by invidious racial discrimination, the fruits of the racially motivated stop should have been suppressed. But *Whren* gave the officers cover to enforce the law in any manner whatsoever,

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[83/] *Id.* at 871.

even by targeting African Americans. And it allowed the district court to bar inquiry into the officer's subjective motivations.[84/]

Whren should be overruled insofar is it approves invidious racial discrimination. And this case should be remanded to permit Johnson to explore the officers' subjective motivations for stopping him. There is no place for racial discrimination in the criminal justice system.

Conclusion

This Court should grant this petition for a writ of certiorari, overrule *Whren*, and bar selective law enforcement based on invidious racial discrimination.

Respectfully submitted,

Date: _____ _____

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[84/] 1ER 29.