No. 20-5074

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT BANKS III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should overrule Whren v. United States, 517 U.S. 806 (1996).

2. Whether the court of appeals correctly determined that petitioner's traffic stop complied with the Fourth Amendment.

3. Whether this Court's interpretation of 18 U.S.C. 1962(d) in Salinas v. United States, 522 U.S. 52 (1997), rendered the statute overbroad or unconstitutionally vague.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

United States v. Pittman, No. 13-cr-4510 (Mar. 21, 2017)

United States Court of Appeals (9th Cir.):

United States v. Banks, No. 17-50103 (Jan. 15, 2020)

United States v. Brown, No. 16-50495 (Jan. 15, 2020)

Supreme Court of the United States:

Brown v. United States, No. 20-5064 (filed July 6, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is not published in the Federal Reporter but is available at 800 Fed. Appx. 455.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2020. A petition for rehearing was denied on April 7, 2020 (Pet. App. B1-B2). By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of

the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on July 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiring to conduct illicit enterprise affairs under the Racketeer Influenced and Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(d); one count of transporting a minor for sexual activity, in violation of 18 U.S.C. 2423(a) (2000); and three counts of sex trafficking of minors, in violation of 18 U.S.C. 1591(a)-(b) and 2. Judgment 1. The district court sentenced petitioner to 85 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A12.

1. Skanless and the Black Mob are street gangs that claim territory in the North Park area of San Diego. Pet. App. A2 n. 1; see Pet. C.A. App. 408, 412, 426; Supp. C.A. App. 1629.* Each was founded in the 1990s and has its own unique hand sign, color, and number. Pet. C.A. App. 405, 408, 411-412. The two

* "Pet. C.A. App." refers to the excerpts of the record filed by petitioner in the court of appeals. "Supp. C.A. App." refers to the supplemental excerpts of the record filed by the United States. "Brown C.A. App." refers to the excerpts of the record filed by petitioner's co-defendant Brown in their consolidated appeal.

gangs are not rivals; they are "very closely tied together." Id. at 412. Members of both gangs associate together at parties, on the streets of North Park, and on social media. Id. at 427. The two gangs have developed shared symbols (e.g., the North Park Water Tower) and lingo (e.g., "Norf" as shorthand for North Park). Id. at 428-429. Cliques of members from each gang have also developed their own hand signs, Id. at 435; Brown C.A. App. 176, and members hold out both gangs as a united front on social media. Supp. C.A. App. 1041, 1045, 1049. Skanless and Black Mob also have a documented history of committing the same crimes -- residential burglary, armed robbery, drug sales, and especially prostitution. Pet. C.A. App. 429-430.

Petitioner has long been involved with prostitution for Skanless. In August 2000, he tried to prostitute a 16-year-old girl, whom he transported from San Diego to Las Vegas. Supp. C.A. App. 367-400, 408-470. In March 2001, petitioner was also implicated in the attempted prostitution of three 15-year-old girls. Pet. C.A. App. 649-688, 745-767; Supp. C.A. App. 766-802.

Officers became aware of the March 2001 attempt to prostitute underage girls when two Los Angeles Police Department members on patrol near Sunset Boulevard observed petitioner make a rapid lane change without using a turn signal, nearly causing an accident. Pet. C.A. App. 134-135; see also id. at 113; Supp. C.A. App. 769. The officers conducted a traffic stop, during which they ordered petitioner to step out of the car and patted him down. Pet. C.A.

App. 134-135; see id. at 106, 116-117. Petitioner had no license or identification and gave a false name. Id. at 135; see id. at 106, 116-117; Supp. C.A. App. 769-770. One of the officers handcuffed petitioner and placed him in the back of the patrol car, Pet. C.A. App. 135, intending to arrest him for being an unlicensed driver, id. at 106-107, 117-118.

The officers then questioned the passengers and determined that nobody in the car had a driver's license and that two of the passengers were underage females. Pet. C.A. App. 135; see id. at 106-107, 118-122. They further determined that one of the juveniles appeared to be a runaway and that there was "reason to take them to the station to continue the investigation." Id. at 135. The officers radioed for backup to take charge of petitioner's car, id. at 123, and -- approximately 30 minutes after the stop had begun -- petitioner, his car, and all of the car's passengers were transported to the police station, id. at 135; 106-107, 123-126.

At the station, the two underage female passengers, as well as a third underage female located by the police, all gave statements indicating that they were being prostituted by petitioner. Brown C.A. App. 67-69.

2. A federal grand jury in the Southern District of California returned a superseding indictment charging petitioner with one count of conspiring to conduct enterprise affairs through a pattern of racketeering activity, in violation of 18 U.S.C.

1962(d); one count of transporting a minor for sexual activity, in violation of 18 U.S.C. 2423(a) (2000); and three counts of sex trafficking of minors, in violation of 18 U.S.C. 1591(a)-(b). Superseding Indictment 1-35. The indictment alleged facts showing the close connection of Black Mob and Skanless, and alleged that they were a unified RICO enterprise, referred to as Black Mob Skanless or BMS. Id. at 2-13.

Petitioner moved to suppress all evidence obtained as a result of the March 2001 traffic stop. Pet. C.A. App. 65-87, 89-94, 96-99. In his briefing, he asserted that it was the government's burden to justify the stop, and that "[e]ven if the government attempt[ed] to justify the stop based on an alleged traffic violation," the stop was impermissibly extended. Id. at 81; see also id. at 91-92, 129. After a hearing, the district court denied the motion. Id. at 134-136. The court first described the facts of the initial stop and explained that "the question now becomes whether or not the lawful stop evolved into an unlawful detention." Id. at 135. It determined that the 30-minute seizure was "reasonable under the Fourth Amendment because of the circumstances facing the officers," including the discovery of two juveniles, one of whom might be a runaway. Ibid.

Petitioner also joined a motion filed by a co-defendant to dismiss the RICO conspiracy charge on the grounds that (1) imposing punishment for membership in an organization absent significant action to further the organization's criminal aims violates due

process, and (2) the RICO conspiracy statute, 18 U.S.C. 1962(d), is unconstitutionally vague. Pet. C.A. App. 147, 151-162, 173-174. The court denied the motion. Id. at 245, 248, 256.

The jury found petitioner guilty on all counts. Judgment 1. The district court sentenced him to 85 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A12.

The court rejected petitioner's argument that the evidence obtained during the 2001 traffic stop should have been suppressed. Pet. App. A7-A8. The court explained that the officers had probable cause to detain petitioner after initiating the traffic stop because, "[w]hen the investigating officers pulled him over, [petitioner] was driving without a license," which is an offense under California law. Id. at A7. The court further determined that the 30-minute seizure of petitioner while police determined what to do with his vehicle was reasonable. Id. at A7-A8.

The court of appeals also rejected petitioner's challenges to his RICO conspiracy conviction under 18 U.S.C. 1962(d). Pet. App. A3, A8. The court found sufficient evidence to establish that Black Mob and Skanless had formed a single RICO enterprise and that petitioner's acts were undertaken for the benefit of that enterprise. Id. at A3. The court additionally rejected petitioner's argument that Section 1962(d), as interpreted in Salinas v. United States, 522 U.S. 52 (1997), is unconstitutionally overbroad. Pet. App. A8. It explained that the statute did not

raise any due process concerns because, under Salinas, a RICO enterprise charge requires proof that a RICO conspirator "knew about and agreed to facilitate the scheme." Ibid. (quoting Salinas, 522 U.S. at 66).

ARGUMENT

Petitioner contends (Pet. 24-28) that the Court should reconsider its decision in Whren v. United States, 517 U.S. 806 (1996), which held that an officer's subjective motivations are irrelevant to the lawfulness of a traffic stop supported by probable cause. Petitioner alternatively contends (Pet. 28-32) that, irrespective of Whren, he was subject to an unconstitutional traffic stop. Finally, he renews his assertion (Pet. 32-39) that 18 U.S.C. 1962(d), as interpreted by this Court in Salinas v. United States, 522 U.S. 52 (1997), is both overbroad and unconstitutionally vague. The decision below is correct and does not conflict with any decision of this Court or another court of appeals, and petitioner failed to preserve two of the arguments he now presses. Further review is unwarranted.

1. Petitioner's request (Pet. 5) that this Court revisit and overrule Whren does not warrant certiorari. The Court's decision in Whren is consistent with settled Fourth Amendment principles, and the issue was not preserved below.

a. In Whren, two defendants claimed that their Fourth Amendment rights were violated when police officers pulled them over for a traffic code infraction. 517 U.S. at 810. The

defendants acknowledged that the officers had probable cause of a traffic violation, but they asserted that some additional showing was necessary to prevent officers from using traffic stops "as a means of investigating other law violations" and to prevent stops based on "impermissible factors, such as * * * race." Ibid. This Court rejected that assertion, explaining that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." Id. at 814 (emphasis omitted). Thus, "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred," regardless of the alleged subjective motivations of the officers. Id. at 810 (citing Delaware v. Prouse, 440 U.S. 648, 659 (1979), and Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam)).

Whren's holding accords with multiple other cases in which the Court has explained that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify the action.'" Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (brackets, citation, and emphasis omitted); see also Scott v. United States, 436 U.S. 128, 138 (1978) (explaining that the validity of searches and seizures under the Fourth Amendment must be determined under "a standard of objective reasonableness without regard to the underlying intent or motivation of the

officers involved"). For example, a search that is objectively justified based on exigent circumstances may not be challenged on the ground that the officers' subjective motive was to "gather evidence." Brigham City, 547 U.S. at 405. An arrest that is objectively supported by probable cause cannot be challenged on the ground that the officer's "subjective reason for making the arrest" is something other than "the criminal offense as to which the known facts provide probable cause." Devenpeck v. Alford, 543 U.S. 146, 153 (2004). And an otherwise valid boarding of a vessel by customs officials cannot be challenged on the ground the officials' actual motive was to investigate suspected marijuana trafficking. United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983).

"The reasons for looking to objective factors, rather than subjective intent," in the Fourth Amendment, "are clear." Kentucky v. King, 563 U.S. 452, 464 (2011). "Legal tests based on reasonableness are generally objective, and this Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" Ibid. (citation omitted).

b. Petitioner does not point to any precedent casting doubt on Whren or its rationale. Instead, he asserts (Pet. 10-11) that this Court should revisit Whren because in his view Whren has facilitated discriminatory traffic stops, including the stop in

this case. But Whren itself expressly considered the possibility that traffic violations might be used as a pretext to disguise racially motivated stops. 517 U.S. 813. It "agree[d] * * that the Constitution prohibits enforcement of the law based on considerations such as race." 517 U.S. at 813. It explained, however, that the "constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." Ibid. An equal protection claim provides a mechanism for challenging such unlawful activity without upsetting the longstanding rule that "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis." Ibid.

In this case, moreover, petitioner has not properly preserved a claim of racial profiling at all, making it an unsuitable vehicle to consider the continuing validity of Whren. Before the district court, petitioner acknowledged the officer testimony establishing that he was stopped because of "an unsafe lane change," and he focused his Fourth Amendment argument almost entirely on the assertion that the length of the resulting detention was "unreasonable." Pet. C.A. App. 129; see also id. at 80-81, 91-92. In the court of appeals, he reiterated that prolonged-detention argument and coupled it with an assertion that he should not have been arrested because his traffic violation could not give rise to jail time. Pet. C.A. Br. 13-16. Petitioner alluded to an allegedly improper motivation for his stop only in a single

footnote, in which he asserted that the "facts lead, ineluctably, to the conclusion that" he was stopped "for the purpose of general criminal investigation -- perhaps because [petitioner] is African-American." Id. at 14 n.4.

That is not enough to preserve the issue on which petitioner seeks review, and the court of appeals did not address it. See Pet. App. A7-A8 (addressing only petitioner's arguments that the officers lacked probable cause to arrest him and unreasonably prolonged the stop). This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). No basis exists for this Court to depart from that rule in this case.

2. Petitioner alternatively contends (Pet. 28-31) that the court of appeals misapplied settled Fourth Amendment principles to the facts of this case. The court of appeals correctly affirmed the constitutionality of the traffic stop, and petitioner's factbound claims to the contrary do not warrant this Court's review.

a. First, petitioner contends (Pet. 29-30) that the officers patted him down after ordering him out of the car without any individualized suspicion that he was armed or dangerous, in violation of Knowles v. Iowa, 525 U.S. 113, 118 (1998).

Petitioner never raised this claim or even cited Knowles in the district court or the court of appeals. See Pet. C.A. Br. 13-16; Pet. C.A. App. 80-81, 91-92, 129. That, again, by itself would typically "preclude[] a grant of certiorari." Williams, 504 U.S. at 41. In any event, Knowles involved a stop where a police officer who had probable cause to arrest a driver for a traffic offense instead issued a citation, and then nonetheless "conducted a full search of the car." 525 U.S. at 114. This Court held the search unlawful, declining to extend the search-incident-to-arrest doctrine to that scenario. Id. at 118-119. Here, in contrast, petitioner was arrested as part of the traffic stop, and the pat down was therefore justified as a search incident to arrest. See Rawlings v. Kentucky, 448 U.S. 98 (1980) (recognizing that even where -- as here -- a frisk occurs shortly before an arrest, it may still be justified as a search incident to that arrest). Regardless, the frisk did not give rise to any evidence that was introduced against petitioner at the trial or that served to prolong the stop, Pet. C.A. App. 116-117, so petitioner would not be entitled to any relief even if his constitutional argument had merit.

b. Petitioner also renews his contention (Pet. 30-32) that the officers unreasonably prolonged the traffic stop for 30 minutes, in violation of Rodriguez v. United States, 575 U.S. 348 (2015). The court of appeals correctly rejected that argument.

In Rodriguez, this Court held that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' -- to address the traffic violation that warranted the stop and attend to related safety concerns." 575 U.S. at 354 (citation omitted). "[A]bsent reasonable suspicion" that the motorist is engaged in criminal activity, a traffic stop may "last no longer than is necessary to effectuate" the traffic-related purpose of the stop. Id. at 353-354 (citation omitted). But an officer who develops "reasonable suspicion of criminal activity" in the course of a traffic stop is "justified [in] detaining [the individual] beyond completion of the traffic infraction investigation." Id. at 358.

Petitioner errs in contending (Pet. 30-32) that it was unreasonable for police to detain him for 30 minutes because, in his view, the record establishes that the officers prolonged the stop to investigate the female passengers. As the district court explained, in ascertaining whether the car would need to be impounded, police determined that none of the passengers had licenses; two were underage females; and one might be a runaway. Pet. C.A. App. 135. Those facts provided developing grounds for suspicion of criminal activity that permitted officers to extend the stop "beyond completion of the traffic infraction investigation." Rodriguez, 575 U.S. at 358. And in any event, the officers had probable cause that he had been driving without a license, and could constitutionally detain and arrest him on

that basis. Petitioner's factbound contrary arguments do not warrant this Court's review.

3. Finally, petitioner raises (Pet. 32-39) various challenges to his conviction for RICO conspiracy under Section 1962(d). None of those arguments has merit.

Petitioner primarily renews his contention (Pet. 32-34) that the RICO conspiracy statute, 18 U.S.C. 1962(d) is unconstitutionally overbroad as interpreted by this Court in Salinas, supra. Petitioner contends (Pet. 32) that Salinas's construction of Section 1962(d) permits defendants to be convicted based on nothing more than membership in a criminal enterprise. And, as a result, he asserts (Pet. 33-34) a conflict with Scales v. United States, 367 U.S. 203 (1961), which suggested that a statute might fall afoul of due process if it permitted a conviction based on "an expression of sympathy with [an] alleged criminal enterprise," without requiring proof of "guilty knowledge and intent." Id. at 228.

As the court of appeals correctly recognized, Pet. App. A8, Salinas does not punish mere membership in a criminal enterprise or otherwise conflict with Scales. To the contrary, Salinas held that to violate Section 1962(d), "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." 522 U.S. at 65. And in Salinas the Court found "ample evidence" that the defendant conspired to violate Section 1962(c) where he "knew about and

agreed to facilitate the scheme." Id. at 66. That is the sort of additional proof of "guilty knowledge and intent" that Scales required. 367 U.S. at 228. Similar evidence supported petitioner's conviction here, particularly because he was convicted of multiple underlying RICO predicate offenses -- namely, transporting a minor for sexual activity and three counts of sex trafficking of minors. See pp. 2-6, supra.

Petitioner also contends (Pet. 36-38) that 18 U.S.C. 1962(d) is unconstitutionally vague under Johnson v. United States, 576 U.S. 591 (2015), because it "creates uncertainty," Pet. 37, about whether expressing sympathy for conspirators' goals is enough for a conviction under Section 1962(d), and because 18 U.S.C. 1961(4) is unclear about what constitutes an enterprise. Those arguments lack merit. Again, petitioner did not merely express sympathy with a criminal enterprise, he committed several criminal acts. And -- as described above -- Salinas adequately defines the participation required to be part of a RICO conspiracy. Furthermore, RICO's definition of an enterprise as a group of individuals who are associated in fact, 18 U.S.C. 1961(4), permits a jury to determine whether two separately named gangs should be consider an enterprise, as the jury did here. Pet. App. A3.

Finally, petitioner briefly renews (Pet. 35-36) his case-specific contentions that no association-in-fact enterprise existed and that insufficient evidence connected his prostituting activity to the enterprise. Those factbound contentions do not

warrant this Court's review. In the court of appeals, the government laid out in great detail its evidence of an association-in-fact and that petitioner shared a common purpose with the enterprise. Gov't C.A. Br. 23-42. The court of appeals determined that the evidence was sufficient for the jury to find an enterprise that included petitioner. Pet. App. A3 (record "contains evidence describing and illustrating [petitioner's] conduct as [a] gang member[], including advertising [his] relationships with other Black Mob Skanless members, promoting and entrenching the enterprise's hold over pimping activity within its territory, and attending events with other Black Mob Skanless members celebrating their pimping prowess").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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