NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JASON BRISCOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), which permits pretextual traffic stops so long as the police have probable cause to believe a traffic violation has occurred, should be overruled?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jason Briscoe, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Briscoe*, 19-3261, is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Kansas had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on September 23, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISION

The Fourth Amendment provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

STATEMENT OF THE CASE

On the morning of March 6, 2018, two local police detectives were patrolling what they described as a bad part of town in Salina, Kansas. (Vol. 3 at 136-37, 140, 177.)[1] Passing through the parking lot of a budget hotel, they noticed a parked Chevy Impala, in which the driver was waiting. (*Id.* at 137, 177.) They found it suspicious, the detectives later said, that the vehicle had backed into the parking space, rather than pulling in forward. (*Id.* at 141, 161-63, 177.) Making a mental note of the Impala, they continued on patrol, but when they saw the car a short time later leaving the hotel with a passenger, later identified as petitioner Mr. Briscoe, they decided to follow it based on their earlier hunch. (*Id.* at 137-38, 161, 177-78.) Shortly thereafter, they noticed that the car's brake lights weren't working properly, and called dispatch to have a uniformed officer make a traffic stop. (*Id.* at 137-40, 161-63, 178-80.)

When that officer activated his cruiser's lights to initiate the traffic stop, the Impala kept driving a few more blocks before dead-ending in a cul de sac. (*Id.* at 202-03, 215.) When it stopped, Mr. Briscoe ran, but he surrendered not long into the foot chase that ensued. (Vol. 1 at 167; Vol 3 at 206-07.) Based on drugs and firearms found following a search of the scene, the federal government charged him with a variety of crimes, possession with intent to distribute a controlled substance, possession of a

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page, and are provided in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

firearm in furtherance of a drug trafficking crime, and possession of a firearm by a previously-convicted felon. (Vol. 1 at 49-52; Vol. 2 at 11; Vol. 3 at 183, 208-10, 241-45, 251-56, 384-85.)

Mr. Briscoe moved to suppress the evidence. As pertinent here, he argued that the detectives' decision to initiate a traffic stop was pretextual—they had a hunch, and the faulty brake lights gave them a basis for initiating the traffic stop. (Vol. 1 at 127-31.) The district court agreed, holding, in relevant part, that the stop was "clearly" pretextual. (*Id.* at 131-32.) But the court correctly explained that this didn't violate the Fourth Amendment because under this Court's decision in *Whren v. United States*, the "constitutional reasonableness of traffic stops" does not "depend[] on the actual motivations of the individual officers involved." 517 U.S. 806, 813 (1996). It denied Mr. Briscoe's motion, and a jury convicted him of the charged offenses. (Vol. 1 at 228-30; Vol. 3 at 521-22.)

On appeal, Mr. Briscoe pressed his challenge that the traffic stop was pretextual, while acknowledging, of course, that the court of appeals was bound by *Whren*. (Opening. Br. at 25) He also argued that six (of nine) of his convictions were multiplicitous, in violation of the Double Jeopardy Clause, and that a plain sentencing error had unlawfully increased his guidelines sentencing range. (*Id.* at 8-25.) The government conceded both of those points, and the Tenth Circuit agreed, vacating

the disputed convictions and remanding for resentencing.[2] (Appendix at A1-A3.) This petition follows.

REASONS FOR GRANTING THE WRIT

Traffic stops, of course, entail the seizure of the vehicle and its occupants within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *Brendlin v. California*, 551 U.S. 249, 254 (2007). Such seizures, therefore, must be reasonable. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) ("[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable."). This Court's 1996 decision in *Whren* allows officers to stop a vehicle without violating the Fourth Amendment whenever they "have probable cause to believe that a traffic violation has occurred," regardless of the subjective intentions or prejudices of the officer. 517 U.S. at 810, 813 & 818. That is, pretextual traffic stops, motivated by hunches unrelated to traffic law enforcement are not unreasonable under the Fourth Amendment. Because the breadth of traffic regulations nationwide grants nearly unfettered discretion to law enforcement to stop almost any motorist an officer chooses, Mr. Briscoe contends that *Whren* was wrongly decided and should be overruled.

[2] Mr. Briscoe is currently scheduled to be resentenced in the District of Kansas on May 3, 2021.

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. Although the officers had probable cause of a traffic violation, the defendants asserted that more 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. *Id.* This Court, however, declined to require more, concluding that, "[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 subjective motivations of the officers. *Id.* at 810, 814 (citations omitted).

In the ensuing years, the scope of *Whren* has been the subject of concern and criticism, voiced not only by commentators, but also members of this Court.

Most recently, in 2018, Justice Ginsburg expressly suggested that *Whren* may warrant reconsideration, noting 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." *D.C. v. Wesby*, 138 S.Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part). Before that, other members of this Court had voiced concern that the rule underlying *Whren* may facilitate seizures of extremely broad scope. *See, e.g.*, *United States v. Knights*, 534 U.S. 112, 116 (2001) (Souter, J. concurring) ("reserv[ing] the question whether *Whren*'s holding, that '[s]ubjective intentions play no role in ordinary, probable-cause Fourth

Amendment analysis,' should extend to searches based only upon reasonable suspicion"); *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (Kennedy, J. dissenting) (noting "[t]he practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances" and that "[w]hen *Whren* is coupled with today's holding [that police may order drivers and passengers to exit the vehicle], the Court puts tens of millions of passengers at risk of arbitrary control by the police"); *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (O'Connor, J. dissenting) (observing that "as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual").

A leading treatise has suggested the decision "blinks at reality." *See, e.g.*, 1 W. LaFave, Search and Seizure § 1.4(f) (5th ed. Oct. 2019 Update) (West) ("The apparent assumption of the Court in *Whren,* that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality."). Other commentators have raised issues with *Whren*'s reasoning and its effects, for reasons that 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 forfeitures, and ignores evidence demonstrating the ineffectiveness of racial profiling." 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, 884-86 & n.2, n.12, (2014); *see also* Stephen Rushin & Griffin Edwards, *An Empircal Assessment of Pretextual Stops and Racial Profiling*, 73 Stanford L. Rev. ___ (forthcoming), at 15 n.72 (collecting scholarly criticism).[3]

For three reasons, these concerns and critiques are well founded and *Whren* should be revisited.

1. First, the objective reasonableness rule adopted in *Whren* was not compelled by the precedent the Court relied on. *Whren*'s analysis turned on a review of prior Fourth Amendment cases, an analysis that led the court to reject the idea that the "constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." 517 U.S. at 812-13. But as one recent amicus succinctly explained, "[n]one of the four cases on which *Whren* relied compel [that] result":

> In *United States v. Villamonte-Marquez*, the Court made an uncontroversial observation that the Coast Guard's power to stop vessels without suspicion may also be used against vessels suspected of involvement with smuggling. 462 U.S. 579, 584 n.3, 592-93 (1983). The *Whren* Court misread the next precedent: What the Court claimed was the holding in *United States v. Robinson* was in reality a paraphrase of the respondent's factual argument in the lower court. 414 U.S.

[3] *Available at* https://ssrn.com/abstract=3506876.

> 218, 221 n.1 (1973). The lower court rejected the respondent's argument because it found the search to be unconstitutional for other reasons. *Id.* Whether the arrest was pretextual was not a question before the Court in *Robinson*. Rather, the Court assumed a lawful arrest and pronounced a bright-line rule that police officers may search a person incident to a lawful custodial arrest based on probable cause. *Id.* at 236. The same is true of *Gustafson v. Florida*, where "the petitioner ha[d] fully conceded the constitutional validity of his custodial arrest". 414 U.S. 260, 267 (1973) (Stewart, J., concurring). Finally, *Scott v. United States* is not a pretext case, and its observation that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional" is beside the point. 436 U.S. 128, 136 (1978).

Banks v. United States, No. 20-5074, Brief of *Amicus Curiae* Center on Race, Inequality, and the Law, at 21-22 (Aug. 14, 2020).

Moreover, and quite to the contrary, other precedent points in the opposite direction. For example, three pre-*Whren* precedents suggested that pretextual searches *are* problematic under the Fourth Amendment. In these cases, the Court had stated that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence", *Florida v. Wells*, 495 U.S. 1, 4 (1990); that it was significant that there had been "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation," *Colorado v. Bertrine*, 479 U.S. 367, 372 (1987); and that an upheld warrantless administrative inspection did not appear to be "a 'pretext' for obtaining evidence of . . . violation of the penal laws", *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987). The

Whren court distinguished these cases as relevant only to inventory and administrative inspections, but it is hard to see why the consideration of pretext should be so limited, and not also relevant considerations to situations, as here, where the low threshold of probable cause combined with the wide breadth of traffic violations, provides little protection against arbitrary seizures.[4]

2. Second, principles of *stare decisis* do not favor retaining *Whren*. The doctrine, of course, is "'at its weakest when [this Court] interpret[s] the Constitution' because a mistaken interpretation of that supreme law is often 'practically impossible' to correct through other means." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1405 (2020) (quoting *Payne v. Tennessee*, 501 U. S. 808, 828 (1991)). When it revisits precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Id.* (quoting *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485, 1499 (2019)). Here, each factor favors overturning *Whren*. As discussed above, the rule in *Whren* was not compelled by prior Fourth Amendment cases, and the decision has been extensively questioned over the last twenty-five years. Moreover, few reliance interests exist as changing course from *Whren* would not upend the Fourth Amendment analysis, but,

[4] Additionally, in *Colorado v. Bannister*, 449 U.S. 1, 4 n.4 (1980), the Court also had indicated pre-*Whren* that "[t]here was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants" of the car, language *Whren* disregarded as dicta.

rather, mean only that pretextual reasons are not categorically *excluded* from consideration in the Fourth Amendment analysis. Courts are well versed in balancing such totality of the circumstances, particularly on issues of Fourth Amendment reasonableness.

3. And third, this question is important and recurring. By authorizing pretextual stops whenever a police officer has probable cause to believe a traffic violation has occurred, *Whren* gives enormous discretion to law enforcement officers to stop anyone driving a car at nearly any time, as even the most careful drivers occasionally run afoul of the multitude of traffic laws, briefly crossing the fog line or driving slightly above the speed limit, for example. *See* Rushin & Edwards, *supra*, at 1 (noting that "any citizen fair game for a traffic stop almost anytime, anywhere, virtually at the whim of police") (quoting David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544, 545 (1997)). And far from incidental or innocuous, traffic stops entail significant intrusions on liberty. A vehicle can be detained for meaningful amounts of time while an officer investigates the traffic violation and makes related inquiries. *Rodriquez v. United States*, 575 U.S. 348 (2015). Drivers and passengers can be ordered out of car, *Maryland v. Wilson*, 519 U.S. 408, 410 (1997), and subject to warrantless arrest for minor offenses, *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

Moreover, the impacts of ignoring pretext are not borne evenly across the population, but, rather fall on 'high-crime' communities that feature a greater police presence, and, recent studies have shown, "may contribute to a statistically significant increase in racial profiling of minority drivers." *See See* Rushin & Edwards, *supra*, at 6; *United States v. Gross*, 784 F.3d 784, 789-90 (D.C. Cir. 2015) (Brown, J., concurring) (describing how unacceptable "a rolling roadblock" in high-crime D.C. neighborhoods would be if put in place in Georgetown).

The scope and impact of such arbitrary enforcement favors revisiting *Whren*, and this case present a good vehicle to do so. The issue is preserved, and the district court made a clear finding that the traffic stop here *was* pretextual, but that *Whren* barred consideration of that fact in the Fourth Amendment analysis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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