No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

COURTNEY SAUNDERS,

Petitioner,

vs.

KYLE THIES, CLINT DEE, DANA WINGERT, AND CITY OF DES MOINES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an Equal Protection claim under the Fourteenth Amendment, based on an incident of discriminatory policing, requires a plaintiff to establish that the officer was motivated *solely* on the basis of race.

2. Whether evidence showing officers treated two Caucasian individuals more favorably in a traffic stop than several Black individuals in traffic stops is sufficient to generate a jury question on the officers' discriminatory intent and effect.

RELATED PROCEEDINGS

I. *Courtney Saunders v. Kyle Thies, et al.*, S.D. Iowa No. 4:19-cv-00191-JAJ-HCA; Judgment entered May 24, 2021.

II. *Courtney Saunders v. Kyle Thies, et al.*, Eighth Circuit Court of Appeals No. 21-2180; 38 F.4th 701, Judgment entered June 29, 2022.

III. *Courtney Saunders v. Kyle Thies, et al.*, Eighth Circuit Court of Appeals No. 21-2180; Petition for Panel Rehearing/Rehearing en Banc Denied September 12, 2022, with dissent.

IV. *Courtney Saunders v. Kyle Thies and Clint Dee*, In the Iowa District Court for Polk County, Iowa, No. LACL144718; pending (related state-law claims).

V. *State v. Courtney Davon Saunders*, In the Iowa District Court for Polk County, Iowa, No. STA0850795; underlying criminal case – found not guilty March 21, 2019.

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On June 28, 2022, the Eighth Circuit affirmed the district court for the Southern District of Iowa's order granting summary judgment to Defendants on Saunders' Fourteenth Amendment Claim. *Saunders v. Thies et al.,* 38 F.4th 701 (8th Cir. 2022). App. 47.[1] The petition for panel rehearing/rehearing en banc was denied on September 12, 2022. *Saunders v. Thies et al.*, No. 21-2180 (8th Cir. Sept. 12, 2022). App. 69.

JURISDICTION

Jurisdiction of the district court was pursuant to 18 U.S.C. §§ 1331, 1343(a)(3), and 1367. Jurisdiction of the Eighth Circuit was pursuant to 28 U.S.C. §1291. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

[1] "App.___" refers to the attached appendix. "S. App. __" refers to the attached sealed appendix.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the U.S. Constitution

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 particulalry describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment to the U.S. Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. The Traffic Stop

This case arises from a traffic stop that occurred the evening of July 8, 2018. Courtney Saunders, the individual stopped, is a Black man with long, dreadlocked hair. (S. App., Video 2 11:00). He held a valid gun permit and had no criminal history outside of traffic violations. (S. App. 146, 148, 151, 158). Kyle Thies and Clint Dee were law enforcement officers with the Des Moines Police Department (DMPD), who were assigned to drive a police transport vehicle (also known as a "paddy wagon"). (S. App. 80). On July 8, 2018, Thies was driving and Dee was in the passenger seat. (*Id.*).

Saunders was driving his sick niece to her parents' house when Thies and Dee began to follow him. The officers first encountered Saunders as he was driving North on 19th Street in Des Moines. (*Id.)*. Thies and Dee began following Saunders near the intersection of 19th Street and Clark Street. (S. App. 144).

Thies and Dee pulled up next to Saunders as he reached his turn. (S. App. Video 1 00:01). Immediately before Saunders turned, Thies made eye contact with him. (S. App. 148; Video 1 00:01-00:05). Saunders signaled his turn and made the turn at a safe, normal speed. (*Id.* 00:05-00:13). Thies abruptly braked in order to cross the left-hand lane of traffic and follow Saunders. (*Id.*). Thies later explained he did this because the way Saunders turned "didn't feel right," that "[i]t didn't feel like [Saunders] was intentionally turning there." (S. App. 37).

Thies followed as Saunders turned left onto the one-way Martin Luther King Jr. Parkway, then right onto Mondamin Avenue, where his brother and sister-in-law

lived. (S. App. Video 1 00:15-00:53; Video 3 12:40). Saunders pulled up next to the curb by his brother's home. (S. App. Video 1 at 00:30). He planned to reverse his vehicle and park, but did not do so because he noticed the paddy wagon slowly approaching behind him. (S. App. 90, 95-96; Video 1 00:30-00:50). He did not turn his vehicle off. (S. App. 95). Thies parked the paddy wagon in the middle of the road behind Saunders. (*Id.* at 25). Thies and Dee exited the van and approached Saunders on either side of his vehicle. (S. App., Video 1 01:10-01:25). The following police encounter was not consensual. (S. App. 178).

Thies claimed that his purpose in approaching Saunders' car was to investigate Saunders parking by a fire hydrant. (S. App. 43). Saunders had committed no other traffic violations justifying a stop. (S. App., Video 2). When he initiated contact with Saunders, Thies did not alert Saunders that he was parked in front of a fire hydrant, nor did he ask Saunders to move.

Neither Thies nor Dee contacted dispatch to report the stop as required by policy. (S. App. 46, 71-73). Further, DMPD trains its officers on a "set way" to speak with motorists at the outset of an encounter. (S. App. 179-80). Officers are trained to approach a motorist and say: "Hey, this is Officer Dee. I work for the Des Moines Police Department. I stopped you for such and such. Do you have your license, registration, and insurance?" (S. App. 180).

Rather than follow his training, Thies asked Saunders, "Are you home?" (S. App., Video 2 1:20). Saunders answered no before asking, "is there a problem?" (*Id.* 1:22). Thies did not identify any problem or mention the fire hydrant. Instead, he

asked: "What do you mean? Like, is there anything wrong, with what's going on right now? Is that what you're saying?" (*Id.* at 1:38-35). Saunders indicated he was picking someone up; he was speaking on the phone with someone. (*Id.* 1:35). Thies waited next to the car without speaking for 15 seconds. (*Id.* 1:39-54).

Then, Thies shined his flashlight into Saunders' backseat. (*Id.* 1:54). Saunders again asked if there was a problem. (*Id.* 1:55). Thies replied:

> Well other than the fact there's a kid in the back seat that probably should be in a booster seat that's not, and the open bottle of alcohol, and the fact that you're parked in front of a fire hydrant and you're not supposed to be.

(*Id.* 1:56-2:10). Saunders explained the car belonged to his girlfriend and he was dropping off the little girl because it was an emergency. (*Id.* 2:10-20). The bottle had been in the car for some period. (*Id.* 2:10). He did not know if he was supposed to drop the girl off or pick up her mother. He wouldn't know until her mother came outside. (*Id.* 2:35-3:20).

Finally, Thies asked for Saunders' identification. (*Id.* at 3:20-4:20). Saunders provided his identification and gun permit, and alerted Thies that he had a gun in the car. (*Id.* 4:25-30). Thies then asked if Saunders had been drinking. (*Id.* 4:35). Saunders stated he had not, and reiterated that the bottle of alcohol was not his. (*Id.* at 4:40). His eyes were not bloodshot. (*Id.* 4:45). His speech was not slurred and his behavior was not erratic. He was calm, though obviously frustrated, throughout the stop. (*See generally* S. App. Videos 2 and 3).

Thies then asked Saunders to exit the vehicle, explaining he was being detained because he was next to a fire hydrant, there was a child in the backseat who

should be in a booster seat, and there was an open container of alcohol in the backseat. (*Id.* 5:05-45). Saunders complied, and Thies patted him down. (*Id.* at 6:10). The girl's mother came outside, got the girl out of the vehicle, and explained that she was six years old. (*Id.* 6:35-50, S. App. 79). Accordingly, she did not need to be in a booster seat. Iowa Code § 321.446(1)(a).

Thies continued to question Saunders if he had been drinking. (S. App., Video 2 7:20). Thies and Dee did not smell marijuana on Saunders or in the vehicle. (S. App. 61, 74). An exasperated Saunders told Thies to "just test me and get it over with." (*Id.* 7:25). At this point, Thies returned to his vehicle to run Saunders' information. (*Id.* 7:50). Thies still had not contacted dispatch to report the stop.

Thies then attempted to initiate field sobriety tests, but Saunders requested to take a preliminary breath test (PBT). (*Id.* 10:50). Thies did not have a PBT device in his paddy wagon, but rather than requesting an officer with a PBT come to the scene, he searched Saunders' vehicle. (*Id.* 12:00-16:20). Saunders did not consent to this search. (S. App., Video 2 15:20).

Thies finally notified dispatch of the stop after thirteen minutes. (S. App., Video 2 13:10). He requested a PBT, and a squad car arrived shortly thereafter with a PBT. (*Id.* 13:15, 17:40). Saunders blew zeros on the PBT. (S. App., Video 3 17:10). Thies concluded the interaction by issuing a citation for Open Container in violation of Iowa Code § 321.284. (*Id.* 20:50-59). He did not write Saunders a citation for parking by a fire hydrant or child out of booster seat. (S. App. 75). Neither Thies nor Dee asked Saunders to move his vehicle before they left. (S. App. 75, 181). Thies did

not return Saunders' gun permit or license; Saunders had to call dispatch and ask to have Thies return them. (S. App. 91). Neither Thies nor Dee ticketed the vehicle parked illegally in front of Saunders. (S. App. 181). Thies does not know how many other cars on the block were parked illegally, and did nothing to investigate those vehicles. (S. App. 258).

2. The State Criminal Case

Saunders contested the open container ticket by filing a Motion to Suppress. (S. App. 6). A joint trial and suppression hearing was held before a Magistrate Judge. (*Id.*). Thies, Dee, and Saunders all testified. (S. App. 12-13, 57-58).

The Court "found Officer Dee's testimony as to why they followed [Saunders] and approached his vehicle vague and evasive." (S .App. 9). The Court "did not find Officer Thies' testimony credible and numerous times during his testimony the Court observed that he appeared to be smirking." (*Id.*). The Court concluded, "Based upon the totality of the circumstances, as well as the officers' evasive, vague, and incredible testimony, there are no specific and articulable facts from which the Court could conclude there was probable cause or a reasonable suspicion for the officers to stop the Defendant." (*Id.*).

Accordingly, on March 21, 2019, the Court granted Saunders' Motion to Suppress and found him Not Guilty. (*Id.*).

3. The Civil Proceedings

a. District Court

Saunders initially filed a petition at law and jury demand in the Iowa District

Court in and for Polk County, Iowa, Case No. LACL144718. (R. Doc. 1).[2] The defendants removed the matter to the U.S. District Court for the Southern District of Iowa on June 26, 2019. (*Id.*). Saunders raised the following claims under 42 U.S.C. § 1983 and Iowa law:

1. Unreasonable Search & Seizure – violation of 4th Amendment of the U.S. Constitution – against Defendants Thies and Dee;

2. Unreasonable Search & Seizure – violation of article I, § 8 of the Iowa Constitution – against Defendants Thies and Dee;

3. Unreasonable Extension of Stop – violation of 4th Amendment to the U.S. Constitution – against Defendant Thies and Dee;

4. Unreasonable Extension of Stop – violation of article I, § 8 of the Iowa Constitution – against Defendants Thies and Dee;

5. Pretextual Stop – violation of article I, § 8 of the Iowa Constitution – against Defendants Thies and Dee;

6. Racially Biased Policing – violation of 14th Amendment to the U.S. Constitution – against Defendants Thies and Dee;

7. Racially Biased Policing – violation of article I, § 6 of the Iowa Constitution – against Defendants Thies and Dee;

8. Conspiracy – violation of 4th, 5th, and 14th Amendments to the U.S. Constitution – against Defendants Thies and Dee;

9. Deliberately Indifferent Policies, Practices, Customs, Training, and Supervision – violation of 4th, 5th, and 14th Amendments to the U.S. Constitution – against Defendants Wingert and City of Des Moines;

10. Deliberately Indifferent Policies, Practices, Customs, Training, and Supervision – violation of article I, §§ 6 and 8 of the Iowa Constitution – against Defendants Wingert and City of Des Moines.

(*Id.*).

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[2] Citations to "R. Doc. __" refer to the docketed electronic filings in *Saunders v. Theis et al.*, 4:19-cv-00191-JAJ-HCA.

During the course of discovery, Saunders uncovered five incidents where Thies stopped a Black driver under similarly concerning circumstances. (S. App. 119-20; Video 4; Video 5; Video 6; Video 7; Video 8; Video 9; Video 10; Video 11). On one of these occasions, Thies was disciplined for his unprofessional conduct in connection with the stop. (S. App. 217-219). These videos demonstrate that Thies had a pattern in his approach to Black drivers. Thies followed the Black drivers for several minutes, regardless of any traffic violations. There was no justification for stopping the Black drivers. But after stopping the Black drivers, Thies often concocted reasons for searching the vehicle and its occupants. Thies did not follow the DMPD script for traffic stops when interacting with the Black drivers.

Saunders also discovered evidence of how Thies treats white drivers who *have* violated a traffic law more favorably. On July 15, 2018, at 7:44 pm, Thies and another officer stopped a white man with a white female passenger. Thies followed the DMPD script: he immediately asked for the driver's license, registration, and proof of insurance. (S. App. Video 13 1:20). Thies immediately stated the reason for the stop: they were driving the wrong way down a one-way road. (*Id.* 1:38-50).

Both of the Caucasian individuals were on probation: theft for the man and methamphetamine for the woman. (*Id.* 4:10-4:44, 6:40). Nevertheless, Thies did not accuse them of having drugs. He did not ask them about or accuse them of having weapons. He did not ask them to exit the vehicle. He did not search the vehicle. He did not test for impairment. (*See generally* Video 13). Thies stated, "I would guess that if I would like fully investigate this traffic stop, somebody might get in trouble."

(*Id.* 9:40-50). The man started to respond, but Thies stopped him, saying "I'm gonna get in my car, and I'm gonna leave now. Hey, bye guys, be safe." (*Id.*). Thies then muted his camera and continued to speak with the driver before leaving without issuing a ticket.

This stop of the two Caucasian individuals occurred little over an hour before Thies made an unjustified stop of a Black motorist and his Black passenger. Thies falsely accused the young Black men of smelling like marijuana. (S. App. Video 10 2:20–2:40). This also falsely accused the passenger of "giving him the idea that maybe he has a gun." (*Id.* 2:20–2:40). Thies handcuffed the driver and repeatedly attempted to convince the driver to admit to at least being around someone who had been smoking marijuana. (*Id.* at 9:15-10:25). Thies ultimately released the men with no charges.

Thies was disciplined by the DMPD for his actions in that stop. In the disciplinary proceedings, Thies falsely claimed that the vehicle did not make a complete stop and that the men were in a park after-hours, explanations that were rejected by his supervisor as untrue. (S. App. 219). Thies' supervisor further noted: "I find no reason why Officer Thies . . . would believe [the passenger] had a firearm." (S. App. 220). The supervisor doubted Theis' claim there was marijuana "shake" in the vehicle, (S. App. 217), and described Theis' behavior as "inappropriate and unprofessional." (S. App. 220).

The discovery process also revealed that Thies had been dishonest in other disciplinary proceedings. On one occasion, a supervisor rejected Thies' explanation of

a use-of-force incident because the supervisor "felt Thies was attempting to not accurately report what occurred." (S. App. 240). Thies had to submit his report three times before his supervisor "felt it accurately reflected what force was used by Thies." (*Id.*). In a separate use-of-force disciplinary proceeding, Thies' supervisor noted:

> I am also concerned with Officer Thies description of events being in a light most favorable to the justification of his actions despite evidence on his body worn camera showing a similar but conflicting version of events.

(S. App. 250).

After discovery, the Defendants moved for summary judgment. (R. Docs. 17, 22). Saunders resisted as to all counts except for Count 5. (R. Doc. 33). While summary judgment motions were pending, Saunders requested that the District Court certify two questions to the Iowa Supreme Court relating to his state-constitution Equal Protection claim (Count 7).

The District Court issued an order on September 8, 2020, granting summary judgment to Defendants on all claims except for two state-constitution claims: Count 4 (illegal extension of the stop) and Count 9 (conspiracy). (App. 43,). The District Court denied Saunders' motion to certify questions to the Iowa Supreme Court. (*Id.*). Saunders moved to reconsider the District Court's denial of his Equal Protection claims (Counts 6 and 7) and his motion to certify questions to the Iowa Supreme Court on his state-constitution Equal Protection claim. (R. Doc. 49). The District Court denied the motion to reconsider. (R. Doc. 51). The District Court remanded the surviving state constitutional claims to the Iowa District Court in and for Polk County. (R. Doc. 65).

b. Eighth Circuit

Saunders filed a timely notice of appeal. (R. Doc. 67, 67-1). As relevant to his Equal Protection claim, Saunders pointed out the District Court's first and most important error: it held Saunders must show Thies and Dee investigated and ticketed him *solely* based on race.[3] The 8th Circuit did not see this as the most important error, finding that "[b]ecause Saunders has failed to show that the officers were motivated in any part by Saunders' race, we need not conclusively resolve" the issue of which standard applies. (App. 62); *Saunders*, 38 F.4th at 715.

c. Petition for panel rehearing and/or rehearing en banc

Saunders filed a timely petition for panel rehearing en banc pursuant to Fed. R. Civ. P. 35(a). The 8th Circuit Court of Appeals denied the petition on September 12, 2022. (App. 69). However, four Judges of the Court indicated their desired to grant the petition for rehearing *en banc*. Judge Grasz wrote a dissent from the denial, which was joined by Judge Smith, specifically indicating his interest in the proper standard to be applied to an Equal Protection claim in the context of racially discriminatory policing:

> One issue is the applicable standard for equal protection claims alleging selective enforcement based on race. When the district court granted summary judgment to the defendants on the plaintiff's equal protection claims alleging racially discriminatory law enforcement it did so by relying on and applying a test that requires the challenged enforcement action to have been undertaken "solely on the basis of race." I question whether this is an erroneous standard. . . .
>
> The formulation of the applicable standard is of material

[3] The second error was the district court's erroneous conclusion that the officers did not observe Saunders' race before the interaction began, and the third was the district court's failure to construe the evidence in the light most favorable to Saunders.

> importance to claimants. The difference between "solely on the basis of race" and "motivated by" race could be game-changing. . . . If race must be the "sole" basis of allegedly discriminatory law enforcement, an equal protection claim will rarely ever succeed. As in a Fourth Amendment unreasonable seizure claim, all that a rogue officer motivated by race would need to do is identify some other objectively sufficient justification for a stop – perhaps a small crack in a windshield or a defective license plate light bulb. . . .
>
> . . . Our court should give no credence to the notion that—however rare—selective enforcement of the law for "driving while black" is in any way tolerated or systematically protected by qualified immunity.

(App. 69-70).

REASONS FOR GRANTING THE PETITION

Judge Grasz was right. The difference between "solely based on race" and "motivated by race" is critical—not only to Saunders, but to every person of color living under the jurisdiction of the Eighth Circuit. It is impossible to deny that "driving while black" is a real phenomenon, and one with devastating consequences to the integrity of the judicial system. In all but the Eighth Circuit, this discriminatory practice can be waived off by a thin allegation of reasonable suspicion. This is wrong. The Court should grant this petition for writ of certiorari to resolve the circuit split and elucidate the proper standards to be applied on an Equal Protection claim based on racially discriminatory policing.

A United States Court of Appeals has entered a decision conflicting with decisions of other United States Courts of Appeals.

In recent years, the Eighth Circuit has adopted the position that

> [t]o prove an equal protection claim in the context of a police interaction, [the plaintiff] must prove that the officer exercised his discretion to enforce a law solely on the basis of race. *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003). This requires a showing of both discriminatory purpose and discriminatory effect. *Id.* (citing *United*

> *States v. Armstrong*, 517 U.S. 456, 465 (1996). "[E]ncounters with officers may violate the Equal Protection Clause when initiated solely based on racial considerations." *United States v. Frazier*, 408 F.3d 1102, 1108 (8th Cir. 2005) (citing *United States v. Woods*, 213 F.3d 1021, 1022-23 (8th Cir. 2000)).

Clark v. Clark, 926 F.3d 972, 980 (8th Cir.), *cert denied*, 140 S. Ct. 628 (2019); *accord Gilani v. Matthews*, 843 F.3d 342, 348 (8th Cir. 2016). This "solely on the basis of race" language is significant, because if there is another colorable basis for the stop, the claim cannot proceed.

In years past, however, the Eighth Circuit correctly stated the standard as partially based on race, rather than solely. *See United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) ("[T]he claimant must show the official's decision to enforce the law was at least partially based on race."); *United States v. Brown*, 9 F.3d 1374, 1376 (8th Cir. 1993) (citing *Arlington Heights* and stating standard as "based at least in part on his race"); *Johnson v. Crooks*, 326 F.3d 995 (8th Cir. 2003) (recognizing that selective enforcement claim "does not require proof that Ms. Johnson was stopped without probable cause or reasonable suspicion to believe she committed a traffic violation").

Tracking the origin of "solely based on race" standard in the Eighth Circuit, it seems to have derived from the Sixth Circuit. *See Frazier*, 408 F.3d at 1108 (citing *United States v. Avery*, 137 F.3d 343, 353 (6th Cir. 1997)); *United States v. Woods*, 213 F.3d 1021, 1023 (8th Cir. 2000) (citing *United States v. Travis*, 62 F.3d 170, 175 (6th Cir. 1995)). *Travis* and *Avery* were both criminal cases that relied upon the Supreme Court's Fourth Amendment jurisprudence in *United States v. Brignoni-Ponce*, 422 U.S. 873, 882, 844 (1975) (under the Fourth Amendment, the government

may consider a person's Mexican appearance, *among other factors*, when making an immigration enforcement stop near the border.).

But even the Sixth Circuit has recognized that "*Travis* is in fact inconsistent with the Supreme Court's approach in *Mt. Healthy* and other multiple-motive cases involving equal protection issues" and therefore declined to apply it in discriminatory policing cases. *Farm Lab. Organizing Comm. v. Ohio State Hwy. Patrol*, 308 F.3d 523, 538 (6th Cir. 2002) (analyzing standard in light of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)). The "motivated by race" standard is in line with additional precedent of this Court, including *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252 (1977), *Wayte v. United States*, 470 U.S. 598, 608 (1985), *Whren v. United States*, 517 U.S. 806, 812-13 (1996), and *United States v. Armstrong*, 517 U.S. 456 (1996).

Likewise, other Courts of Appeals uniformly apply a "motivated by race," rather than a "solely motivated by race," standard. *See Flowers v. Fiore*, 359 F.3d 24, 35 (1st Cir. 2004); *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974); *Carrasca v. Pomeroy*, 313 F.3d 828, 834-36 (3d Cir. 2002); *United States v. Mason*, 774 F.3d 824, 832 (4th Cir. 2014); *Jackson v. City of Hearne, Texas*, 959 F.3d 194, 201 (5th Cir. 2020); *Chavez v. Illinois State Police*, 251 F.3d 612, 635, 645 (7th Cir. 2001); *Lacey v. Maricopa County*, 693 F.3d 896, 920 (9th Cir. 2012); *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157 (10th Cir. 2003); *Draper v. Reynolds*, 369 F.3d 1270, 1278 n.14 (11th Cir. 2004).

The result of this circuit split is that in Iowa, Saunders cannot pursue a claim

for discriminatory policing where there was reasonable suspicion of a law violation, but elsewhere, Saunders can proceed if he shows that law enforcement was motivated by his race despite other additional considerations.

1. The "solely on the basis of race" test unnecessarily conflates Fourth and Fourteenth Amendment principles.

Racially biased law enforcement violates the Equal Protection Clause of the U.S. Constitution. *Whren*, 517 U.S. at 812. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Discriminatory policing "demeans the dignity and worth of a person." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). As a result, when the target of such treatment raises a claim of biased policing or biased prosecution, the Courts routinely have not required the individual to prove their innocence. *Armstrong*, 517 U.S. at 465. Instead, the key evidence will be the officer's subjective intent. *See Johnson*, 326 F.3d at 999-1000.

By contrast, the Fourth Amendment is explicitly unconcerned with an officer's subjective intent. *Whren*, 517 U.S. at 813 (contrasting Equal Protection analysis with Fourth Amendment analysis and noting "[s]ubjective intentions play no role in ordinary, probable-cause Fourth amendment analysis"). This is because the principal concern of the Fourth Amendment is that individuals are not subjected to *unreasonable* searches and seizures. U.S. Const. amend. IV. This Court's Fourth Amendment jurisprudence has focused on whether an *objectively* reasonable basis exists. *Id.* at 817. These rules of general applicability, along with the "reasonableness" requirement of the Fourth Amendment, strike an appropriate balance

> between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendant are acquitted or convicted on the basis of all the evidence which exposes the truth.

United States v. Leon, 468 U.S. 897, 901 (1984) (citation omitted).

The different interests protected by the Equal Protection Clause requires a different test. Fortunately for individuals in Saunders' position, the differing tests are compatible. Applying the Fourth Amendment, this Court has found good reason to allow evidence to be used in a criminal prosecution despite an officer's subjectively biased motives. However, defendants who are the victim of racist policing are not without recourse under the Fourteenth Amendment and 42 U.S.C. § 1983. *See, e.g. Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause."); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1731 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("[A] detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment's Equal Protection Clause.").

2. The "solely on the basis of race" test encourages racial profiling and perpetuates "driving while Black."

Racial discrimination in policing is contrary to the principles of the Fourteenth Amendment. As Justice Sotomayor has written:

> [I]t is no secret that people of color are disproportionate victims of this type of scrutiny. For 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.

Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (citing M.

Alexander, *The New Jim Crow* 95-136 (2010); W.E.B. Du Bois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015)). Justice Sotomayor's recognition and criticism of the phenomenon has been echoed by many jurists, including Judges Pooler, Calabresi, and Chin in the Second Circuit; Judge Moore in the Sixth Circuit; Judges Hamilton, Rovner, and Williams in the Seventh Circuit; *United States v. Weaver*, 9 F.4th 129 (2d Cir. 2021) (Pooler, J., dissenting, joined by Calabresi, J., and Chin, J.); *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006) (Moore, J., dissenting); *United States v. Johnson*, 874 F.3d 571 (7th Cir. 20178) (Hamilton, J., dissenting, joined by Rovner, J., and Williams, J.).

These references are supported by decades of statistical analysis. "Beginning in the late 1930s and with increasing frequency each decade, [Black motorists] wrote to the NAACP about traffic stops for minor or fabricated charges that left them terrified." Sarah A. Seo, *Policing the Open Road: How Cars Transformed American Freedom* 58 (2019). In a New Jersey study conducted between 1988 and 1991, 35% of those stopped for traffic violations, and 73.2% of those stopped and arrested, were Black. David A. Harris, 84 Minn. L.R. 265, 277-78 (1999). Only 13.5% of the cars on the road had a Black driver or passenger. *Id.* The study was replicated with similar results in Maryland. *Id.* at 280-81. Most people, if they come into contact with law enforcement at all, do so through a traffic stop. Elizabeth Davis et al., U.S. Dep't Just., *Special Report: Contacts Between Police and the Public*, 2015, at 1, 4 (2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf [https://perma.cc/J5CE-4WCX]. Even

today, Black people are stopped more frequently than white people—in fact, Black people who are parked are more likely to be stopped than white people. *Id.*

Allowing this sort of racial profiling to occur under the Fourteenth Amendment so long as law enforcement has not violated the Fourth Amendment explicitly sanctions the use of race in law enforcement decision-making. An officer inclined to target Black drivers can always find the justification to do so without consequences. "If an officer follows any motorist long enough, the motorist will eventually violate *some* traffic law, making any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police." Stephen Rushin et al., *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stn. L.R. 637, 641 (2021). The Fourth Amendment "reasonableness" bar is not strong enough to free Black drivers from the racial discrimination that was the core target of the Fourteenth Amendment. *See, e.g. Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."). If racially biased policing is to be stopped, the Fourteenth Amendment standard must not mirror the Fourth Amendment standard.

The appropriate standards to be applied in Equal Protection case based on racially discriminatory policing are of national importance and should be addressed by this Court.

The Eighth Circuit held Saunders' comparators—five stops of Black individuals and one stop of two Caucasian individuals—were not "similarly situated to Saunders in all relevant respects" and thus did not generate a jury question on discriminatory effect and purpose. (App. 62). To dismiss Saunders' Equal Protection

claims, the Eighth Circuit applied an unachievable level of specificity in identifying comparators and turned a blind eye to the patently pretextual nature of this encounter. This does not comport with the ordinary Equal Protection and summary judgment standards that should apply in biased-enforcement cases.

The Court should grant this petition in order to provide guidance regarding what constitutes a similarly-situated comparator in the discriminatory policing context. The policy considerations at issue in Equal Protection racially discriminatory policing claims are distinct from those in criminal selective enforcement claims or Equal Protection discriminatory prosecution claims, but this Court has yet to consider a § 1983 discriminatory policing claim head-on. The too-rigid "similarly situated" standard often applied by the circuits, including the Eighth Circuit, gives officers cover to continue discriminatory policing and deprives jurors of the right to use their own common sense in evaluating claims of discriminatory policing.

The purpose of summary judgment is to "dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Given the probative evidence adduced by Saunders, that purpose was not served here. The evidence Saunders submitted at summary judgment—including not only the comparator evidence, but also the circumstances of the stop itself and Thies' lack of credibility—was sufficient to create a jury question under the proper "motivated by race" standard. Thies and Dee claimed to believe that Saunders was illegally parked in front of a fire hydrant, that the girl in the back seat should have been in a booster, and that Saunders was committing an open bottle violation. If their testimony is to

be believed, they had arguable probable cause to investigate these violations. But under the proper "motivated by race" standard, *arguable probable cause does not matter*. What matters is whether there is evidence from which a reasonable jury could prove that their actions were motivated by Saunders race. There is.

First, the jury could consider the lack of explanation for why Thies and Dee were following Saunders to begin with. Thies and Dee saw Saunders driving, pulled up next to him and made eye contact, and then followed him through two more turns despite not seeing any traffic violations. They did this even though they were driving a paddy wagon, and not a normal police cruiser. Enforcing traffic laws is not the primary responsibility of officers driving the transport van; their primary responsibility is to transport arrestees to jail. (S. App. 34-35, 68-69). A reasonable jury could conclude from these facts that Thies and Dee observed Saunders' race and went out of their way to find a reason to stop Saunders and investigate him.

Second, a jury could infer bias from the odd way that Thies and Dee conducted the stop. Thies and Dee did not follow policy by notifying dispatch of the stop and following the standard script for the stop. Thies testified that his purpose when he approached Saunders was to "investigate" Saunders' parking by a fire hydrant. (S. App. 43). Yet neither officer mentioned to Saunders that he was stopped in a no-parking area when they approached him. One can hardly think of a less serious or more easily-remedied violation. The fact that the officers never asked Saunders to move his vehicle and never ticketed him for that violation is strong evidence that the parking violation was not the true reason for the stop. A jury could conclude that the

pretextual reason given for approaching Saunders was a cover for racial motivation. The decision to ask vague questions, investigate additional matters, and conduct baseless sobriety tests suggests a fishing expedition. A reasonable jury observing these facts could find there was no justification for the fishing expedition beyond Saunders' race.

Third, there is ample evidence in the record establishing that Thies is prone to misrepresenting the facts in traffic stops of Black individuals, including this one. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134 (2000). Once a defendant's explanation is eliminated, "discrimination may well be the most likely alternative explanation." *Id.*; *accord Marshall*, 345 F.3d 1168.

Fourth, the jury could consider Thies' pattern of problematic encounters with Black citizens. *See Arlington Heights*, 429 U.S. at 266 (considering whether evidence shows a "clear pattern, unexplainable on grounds other than race").

Finally, there is the comparator evidence. Saunders adduced evidence showing Thies had a pattern of stopping Black individuals without cause, harassing those individuals, extending those stops, and searching those individuals with no justification. In sharp contrast, Saunders submitted evidence that Thies treated white motorists more favorably: declining to conduct further investigation or charge a warranted traffic violation.

The District Court did not give all this evidence its due weight in the summary

judgment analysis because it required an unreasonable degree of similarity between the comparators and applied the incorrect "solely based on race" standard. (App. 35). The issue is not whether there was *any* reason to investigate Saunders or whether he was similarly situated in *all* ways to his comparators. The issue is whether Thies and Dee were motivated, even in part, to investigate Saunders because he is Black. A reasonable jury could have answered that question in the affirmative. The District Court and the Eighth Circuit's reliance on the wrong tests prevented Saunders from having his day in court and will stymie legitimate discriminatory policing claims in the future. This Court should grant the petition and adopt standards for discriminatory policing claims that will effectuate the purpose of the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: November 29, 2022