No._____

IN THE SUPREME COURT OF THE UNITED STATES

GARNET SMALL,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), should be overruled.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

> *United States v. Garnet Small*, Third Circuit No. 22-1469, judgment entered July 7, 2023.
>
> *United States v. Garnet Small*, E.D. Pa. No. 2:16-cr-00381-MSG, judgment entered March 16, 2022.

There are no other proceedings related to this case under Rule 14.1(b)(iii).

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IN THE SUPREME COURT OF THE UNITED STATES

GARNET SMALL,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

Petitioner Garnet Small respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on July 7, 2023.

OPINION BELOW

The unpublished opinion of the court of appeals is available at 2023 WL 4399212 and reproduced at Appendix ("Pet. App.") A, 1a–24a. The transcript of the district court's oral ruling on petitioner's motion to suppress is at Pet. App. B, 25a–31a. The testimony at a hearing on the motion is at Pet. App. C, 32a–95a. The judgment is at Pet. App. D, 96a–102a.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution states:

> 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 searched, and persons or things to be seized.

STATEMENT

Petitioner Garnet Small was arrested and charged with a single count of possessing a firearm after conviction of a felony. He moved to suppress the gun as the tainted fruit of an unconstitutional seizure of his person. Following a hearing at which the two arresting officers testified, the district court denied the motion. Mr. Small thereafter pleaded guilty while preserving his Fourth Amendment challenge for appeal. The Third Circuit affirmed.

1. Petitioner was the sole passenger in a car driven by Dawud Robinson. Both Robinson and petitioner are Black men. The two were on a residential block in the Germantown section of Philadelphia at about 8:30 p.m. on a Wednesday evening. Pet. App. 35a. They had done nothing to attract suspicion and, so far as the record shows, no one in the vicinity was suspected of unlawful activity.

Philadelphia Police Officers David Dohan and Lucas Lesko, members of a "tactical vice squad," were nearby in a marked police unit. Pet. App. 34a. Upon observing Mr. Robinson pull his dark red BMW sports coupe from a parking spot into the roadway, the officers decided to make a traffic stop. In later testimony, Officer Dohan recalled the car having "very dark tint" on the windows—"illegal sunscreen" under Section 4524(e)(1) of the Pennsylvania Vehicle Code. Pet. App. 36a. Ordinarily, as members of a vice squad, Dohan and Lesko did not "issue very many written citations at all." Pet. App. 79a. But Lesko recalled the two having the same instinct

on sighting the BMW: testifying on cross-examination, he agreed that "out of the blue," they "simultaneously … said, let's pull that car over for the tint." Pet. App. 92a.

Before stopping the vehicle , the officers ran its tags through their mobile data terminal, which confirmed the registration was in order. With Officer Lesko driving, the police unit came up behind the car as it was stopped at a light. As the light turned green and the car began taking a left, Lesko activated the unit's lights and siren. Mr. Robinson promptly pulled over, and both he and petitioner Small, in the front passenger seat, lowered their windows as the officers approached on either side. Pet. App. 36a–38a, 65a, 85a, 87a.

Upon reaching the driver's-side window, Lesko asked Robinson for his license and registration. On the passenger side, Dohan asked petitioner whether he had a gun. In subsequent testimony, neither officer spoke of having told Robinson or petitioner the reason for the stop. *See* Pet. App. 43a, 88a–89a. Instead, Dohan quickly signaled Lesko that he wished to remove petitioner from the vehicle, prompting Lesko to get Robinson out first, frisk him, and put him in the patrol unit. Dohan proceeded to have petitioner step out, seized a backpack from where he had been sitting, and found a gun inside. Petitioner was arrested and, some months later, his case was federally adopted by an indictment charging unlawful possession of a firearm after conviction of a felony, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 46a, 49a–50a, 88a–89a.

Petitioner moved to suppress the gun, arguing police unconstitutionally stopped him in pulling over the car, and unconstitutionally searched his effects in inspecting the backpack. With respect to the stop, petitioner contended the facts known to the officers did not supply an objective basis for suspecting a motor vehicle violation or criminal activity. *See Kansas v. Glover*, 140 S. Ct. 1183, 1190 n.1 (2020) (vehicle stop requires "individualized suspicion"). As to the search, he contended it was unlawful because the officers lacked reasonable, articulable

suspicion he was armed and dangerous. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) (weapons frisk requires officers be "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion").

Petitioner did not contend the stop violated the Fourth Amendment because it was based on race or used as a pretext to hunt for evidence of crime. At a hearing on his motion, however, there emerged evidence that window tint was, in fact, a pretext to stop the BMW and see what turned up. In addition to the officers' testimony indicating that neither of them mentioned window tint before removing the driver and petitioner from the vehicle, there was the following exchange when defense counsel confronted Officer Dohan with photographs of the car, now parked in a lot, that pictured as well nearby vehicles with similar window tint:

> Q. Do you notice an appreciable difference between the BMW and the tinting of the window next to it?
>
> A No. It appears that they both have aftermarket tint on them.
>
> Q Okay.
>
> ***
>
> Q You see the vehicle in the street? I think—
>
> A Yes, ma'am.
>
> —it's in the driving lane.
>
> A Yes, ma'am. That also appears to have aftermarket tint. *It's a great reason to stop, because almost everybody in that area has window tint on their car.* Yes, ma'am.
>
> Q And when you say that area, what area do you mean?
>
> A Germantown, where we work, in the 14th District.

Pet. App. 66a–67a. Later, asked by counsel whether the Germantown area is "predominantly African American," Dohan responded that he "would say the vast majority of the residents that live in Germantown are African American." Pet. App. 70a.

Following the testimony, the district court heard argument from counsel and then ruled from the bench. It found that the officers observed excess window tint by the time Officer Lesko activated the lights and siren, supplying an objective basis for the stop. Pet. App. 26a–28a. With respect to the search of the backpack, the court held that Mr. Small relinquished Fourth Amendment "standing" by saying "this is not my backpack" in the exchange initiated by Officer Dohan. Pet. App. 28a. Small subsequently pleaded guilty pursuant to a plea agreement preserving his Fourth Amendment challenge for appeal. *See* Fed. R. Crim. P. 11(a)(2). After more than four years of delay, the district court sentenced him to 10 years of imprisonment for the gun violation.

2. In the court of appeals, petitioner did not challenge the district court's finding of probable cause to stop for window tint, but renewed his challenge to Officer Dohan's inspection of the backpack, contending the facts did not support any inference he presented a danger warranting a weapons frisk. As to standing to challenge the backpack search, petitioner argued that his immediate possession of the bag, which he did nothing to yield, established personal rights in the property protected by the Fourth Amendment.

Petitioner also asserted that the stop was unlawful for an additional reason: that the officers' purpose in making it was not to investigate window tinting but to look for evidence of criminal activity there was no reason to suspect was afoot. C. A. Appl't Br. 35-36 (ECF No. 26-1). He acknowledged that this Court, in *Whren v. United States*, 517 U.S. 806, 813 (1996), held the Fourth Amendment to tolerate pretextual stops provided there is probable cause of a traffic

violation. But he contended that in the years since *Whren* was decided, it has become evident that its rule "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." *District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in judgment in part).

The Third Circuit rejected petitioner's contentions. It affirmed the district court's conclusion that he lacked Fourth Amendment standing to challenge the search of the backpack because he "disclaimed ownership by stating 'this is not my backpack.'" Pet. App. 7a. The unpublished opinion did not comment on whether *Whren* should be overruled. It otherwise rejected a separate challenge Small raised to sentencing delay of such length it deprived him of due process, with Judge Roth dissenting on this point. This timely petition follows.

REASONS FOR GRANTING THE PETITION

In *Whren v. United States*, 517 U.S. 806 (1996), this Court adopted an unyielding rule that the Fourth Amendment affords no protection against pretextual traffic stops if police observe a motor vehicle violation. That rule was unsound when adopted, and more than 25 years of experience have made its infirmity pellucid. Due to the scope and complexity of motor vehicle codes, and the consequent inevitability of minor violations on the part of virtually any driver on virtually any trip, the rule effectively immunizes arbitrary police action of the kind the Fourth Amendment was adopted to prevent. Indeed, it positively invites such abuses, fostering racial discrimination in the exercise of stop-and-search authority and making courts appear to sign off on subterfuge and discrimination. *Whren* is egregiously wrong and should be overruled.

A. *Whren* has met with sharp criticism from numerous jurists.

The Fourth Amendment safeguards the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." At core, the

constitutional shield protects "the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Giving effect to that purpose, the Court has held random "spot checks" of vehicles for license and registration to be constitutionally unreasonable, concluding that "persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

Returning to the issue of traffic stops in *Whren*, the Court rejected the contention that the lawfulness of a traffic stop depends on whether a reasonable officer would have made it to enforce the motor vehicle regulation at issue. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," Justice Scalia wrote for a then-unanimous Court. 517 U.S. at 813. Instead, *Whren* held, a stop requires no more that probable cause to believe a driver has violated a vehicle code provision, even should addressing the violation be a pretext for investigating unfounded suspicions of criminal activity. *Id.* To the extent "the 'multitude of applicable traffic and equipment regulations' is so large and so difficult to obey perfectly" that police can "single out almost whomever they wish for a stop," the Court was "aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." *Id.* at 818. The Court noted petitioners' contention that reviewing strictly for probable cause left officers free as a practical matter to make stops based on "decidedly impermissible factors, such as the race of the car's occupants." *Id*. at 810. But in such cases, it instructed, resort would need be had to "the Equal Protection Clause, not the Fourth Amendment." *Id*. at 813.

Numerous jurists, including members of this Court, have recognized in the years since *Whren* that its analysis is insufficiently attentive to the realities of enforcement. Just eight months after the decision, Justice Kennedy observed in *Maryland v. Wilson*, 519 U.S. 408 (1997), which granted police categorical authority to order passengers out of a vehicle during a traffic stop, that "[w]hen *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police." 519 U.S. at 423 (Kennedy, J., dissenting). The danger owed to *Whren*'s "practical effect" of allowing "the police to stop vehicles in almost countless circumstances." *Id.*

In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), Justice Ginsburg added her own concerns in a concurring opinion joined by Justice Stevens, Justice O'Connor, and Justice Breyer. There the Arkansas Supreme Court had "declined to follow *Whren* on the ground that 'much of it is *dicta*.'" 532 U.S. at 771. This Court summarily reversed, describing the state court's ruling as "flatly contrary" to its "controlling precedent." *Id.* The concurring justices agreed with that reading of "current case law," but paused to note reservations arising from *Whren* and *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), which held the Fourth Amendment not to prohibit arrest for misdemeanor offenses punishable only by a fine. Acknowledging the state supreme court's concern not to "accord police officers disturbing discretion to intrude on individuals' liberty and privacy," Justice Ginsburg anticipated revisiting *Whren* should experience demonstrate more widespread abuses than the Court had at the time discerned. 532 U.S. at 773.

Years later, Justice Ginsburg suggested that experience had come to demonstrate exactly that. In *District of Columbia v. Wesby*, 583 U.S. 48 (2018), the respondents had prevailed in the lower courts on a Section 1983 claim for false arrest. This Court reversed, holding there was no Fourth Amendment violation because the facts known to the arresting officers supplied probable

cause to believe the plaintiffs were committing an offense under District of Columbia law. 583 U.S. at 62 & n.6; *see also Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (holding that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause"). The Court further held the officers entitled to qualified immunity. Concurring in part solely on the latter ground, Justice Ginsburg noted sustained scholarly criticism of *Whren* and "follow-on opinions" like *Devenpeck*. 583 U.S. at 594. She added her own concern that the "Court's jurisprudence … sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." *Id.* Justice Ginsburg therefore proposed to "leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry." *Id*.

Most recently, criticism of *Whren* has sharpened further. Of particular note is the *en banc* decision in *United States v. Weaver*, 9 F.4th 129 (2d Cir. 2021), where five judges suggested revisiting *Whren*. Judge Pooler, in dissent, stressed that because "state traffic laws prohibit many innocuous activities, such as hanging air freshener from a rearview mirror or having a loud exhaust, 'probable cause as to a minor traffic violation can be so easily come by that its existence provides no general assurance against arbitrary police action.'" 9 F.4th at 171 (quoting Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 1, § 1.4(f) (6th ed. 2020)). Given that reality, along with empirical studies demonstrating a disproportionate impact on communities of color, she urged "[i]t is time that we stop ignoring the tragic ramifications of *Whren*." *Id*. at 172. "It is our responsibility to safeguard against overbearing or harassing police conduct that does not meet the requisite objective evidentiary justification." *Id.* Judge Calabresi, likewise dissenting, observed that *Whren* "permits pretextual stops, and—as such—it inevitably

encourages stereotyping." *Id*. at 176. A third dissent, from Judge Chin, also recognized the "troubling concerns" that are "the legacy of *Whren*." *Id.* at 185.

Judge Lohier meanwhile concurred in the result but, writing for himself and Judge Carney, "join[ed] the chorus of voices who say that *Whren* 'sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment.'" 9 F.4th at 160. "As a practical matter," he wrote, "*Whren* and later cases have unfortunately given police officers a green light to make pretextual stops based on racial profiling." *Id*. at 158-59. "Criminal defendants must be able to raise the issue of selective enforcement where the presence of racial bias is unmistakable, and they should not have to do so in a separate civil proceeding." *Id*. at 159.

Shortly after the Second Circuit's decision in *Weaver*, three Seventh Circuit judges expressed similar views in another *en banc* case. *See United States v. Cole*, 21 F.4th 421 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1420 (2022). Judge Hamilton, joined by Judge Rovner and Judge Wood, dissented from the majority's conclusion that during a traffic stop officers may question a driver at some length about travel plans. *See* 21 F.4th at 431. The dissenting judges took the view that approving this tactic would aggravate what experience has shown to be the exploitation of *Whren* by "intrusive and humiliating police tactics [that] are used disproportionately on Black and Hispanic drivers, the vast majority of whom are not trafficking drugs[.]" *Id.* at 437.

B. The rule adopted in *Whren* invites arbitrary police interference with personal security and enables racial bias in the selection of motorists to stop.

Discontent with *Whren* has grown for good reason. To start, *Whren*'s analysis gave unreasonably short shrift to the contention that because "the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation." 517 U.S. at 810. As the dissenting judges in the Second and Seventh Circuits correctly

recognized, the breadth and intricacy of motor vehicle codes vest officers with a level of discretion tantamount to random-stop authority. Not only are regulations great in number, but many leave a great deal to subjective interpretation: in *Whren*, for example, one of the violations was speeding off from a stop sign at an "unreasonable" speed. 517 U.S. at 808; *see Cole*, 21 F.4th at 436 (Hamilton, J., dissenting). And beyond that, officers need not correctly interpret a provision's language or scope should they rely instead on a "reasonable mistake of law." *Heien v. North Carolina*, 574 U.S. 54, 61 (2014).

Due to vehicle codes' prolixity and language, "very few drivers can traverse any appreciable distance without violating some traffic regulation." Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish*, 102 Mich. L. Rev. 1843, 1853 (2004) (internal quotation marks and citation omitted). In practice, therefore, police can stop virtually anyone in a vehicle at any time. *See* Sarah A. Seo, *The New Public*, 125 Yale L. J. 1616, 1668-69 (2016) (authority to enforce motor vehicle code "has essentially become a general warrant … in light of the reality that at some point, all drivers violate traffic laws"). Given the sweep of this authority, *Whren*'s "apparent assumption" that "no significant problem of police arbitrariness can exist as to actions taken with probable cause blinks at reality." LaFave, *Search and Seizure*, Vol. 1, § 1.4(f), p. 186 (5th ed. 2012); *see also* LaFave, *Routine Traffic Stop*, 102 Mich. L. Rev. at 1859 (describing "totality of Court's analysis in *Whren*" as having "trivialize[d] what in fact is an exceedingly important issue regarding a pervasive law-enforcement practice").

Many have also faulted *Whren* for turning a blind eye to racial bias in the exercise of stop authority. *See*, *e.g.*, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 Harv. C.R.–C.L. L. Rev. 1, 33-34 (2011) (describing *Whren* as having "essentially green-lighted the police practice of singling out minorities for pretextual traffic stops

in the hope of discovering contraband"); 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, 885 (2015) ("*Whren*'s gratuitous endorsement of racial profiling has been very influential: since it was decided, many courts have upheld stops in the face of substantial evidence of racial discrimination."); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Cal. L. Rev. 125, 128, 152-56 (2017) (reviewing *Whren* in context of "direct relationship between the scope of ordinary police authority, on the one hand, and African American vulnerability to extraordinary police violence, on the other").

Empirical studies bear out these criticisms. In the aftermath of *Whren*, despite few police forces maintaining the relevant data, scholars compiled evidence that Black or Hispanic motorists were stopped at higher rates than others by state police forces or units in Illinois, Ohio, North Carolina, New Jersey, and Maryland, as well as police departments in New York City, Philadelphia, Boston, and other municipalities. *See* Tracy Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 331, 344-354 (1998); David A. Harris, *The Stories, the Statistics, and the Law: Why Driving While Black Matters*, 84 Minn. L. Rev. 265, 277–288 (1999); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. Pa. J. Const. L. 296, 299–306 (2001).

Findings of racial disparity remain depressingly persistent. To take one large-scale study, Black drivers were found 63 percent more likely to be stopped than white drivers in North Carolina over the period 2002 to 2016. Frank R. Baumgartner, Derek A. Epp & Kelsey Shoub, *Suspect Citizens* 76 (2018). A still broader study, based on data from 95 million traffic stops by some 56 police agencies and departments, found that Black drivers were on average stopped at

higher rates than white ones nationwide. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Human Behavior 736, 737 (2020). The nationwide study also found disparity to increase during daytime hours, when a driver's race was more likely to be detected. *Id*. at 737-740. The same pattern of heightened daytime disparity has also been found in studies of 3.4 million stops in California, *see* Magnus Lofstrom et al., *Racial Disparities in Traffic Stops* 14 (Public Policy Inst. of California 2022), and 8.25 million stops in Washington State, *see* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 692-93 (2021).

Federal court proceedings have meanwhile surfaced evidence of racial bias in stops of pedestrians by two major metropolitan police departments. In *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), the court found from evidence documenting 4.4 million stops that the NYPD's stop-and-frisk policy resulted in stops of Black and Hispanic pedestrians "who would not have been stopped if they were white." 959 F. Supp. 2d at 603. In *Bailey v. City of Philadelphia*, E.D. Pa. Civil No. 10-5952, the plaintiffs have reported that for a six-month period in 2019, Philadelphia Police Department data collected under an earlier settlement showed Black pedestrians 50 percent more likely to be stopped without reasonable suspicion than white pedestrians. Plaintiffs' Tenth Report to Court on Stop and Frisk Practices: Fourteenth Amendment, ECF No. 106, at 2 (filed Apr. 24, 2020). In response, the principal defendant allowed it was "difficult to dispute" that "Black Detainees are significantly more likely to be subjected to 'unreasonable' stops and frisks." Defendant City of Philadelphia's Tenth Report to Court: Fourteenth Amendment Issues, ECF No. 112-1, at 15-16 (filed June 17, 2020).

Scholars have corroborated racial bias in several fine-grained studies. Based on the *Floyd* data, Professor Fagan found that Black and Hispanic pedestrians were "stopped far more per

capita than other groups" yet less likely to be in possession of contraband. Jeffrey A. Fagan, *No Runs, Few Hits, and Many Errors: Street Stops, Bias and Proactive Policing*, 68 UCLA L. Rev. 1585, 1639 (2022); *id*. at 1666. The data showed as well that police more commonly identified certain subjective factors, including 'furtive movements' and 'crime location,' as their reasons for stopping Black and Hispanic pedestrians. *Id*. at 1645. Professors Rushin and Edwards found that racial disparity in stop rates increased in Washington State after officers were afforded greater license to make pretextual stops by a 2012 state court decision narrowing an earlier one that had proscribed pretextual stops on state constitutional grounds. *See Empirical Assessment of Pretextual Stops*, 73 Stan. L. Rev. at 683-690 (reviewing rate of disparity before and after *State v. Arreola*, 290 P.3d 983 (Wash. 2012)).

C. *Whren* should be overruled by holding that traffic stops made on the basis of race or as a pretext for searching out crimes violate the Fourth Amendment.

These considerations call for overruling *Whren* so as to permit Fourth Amendment cognizance of pretext and racial bias as unreasonable grounds for the exercise of stop authority. In the context of a motion to suppress, it is fair to require police officers to articulate why the totality of circumstances led them to believe a stop was warranted in the interest of enforcing the motor vehicle code. Passable reasons might include: the officer was assigned traffic duty; the stop reflected a departmental enforcement initiative (or for that matter, a personal one); the violation appeared to present special concern for safety; there was no other matter occupying the officer's attention at the time; the violation was pronounced or sustained; and doubtless innumerable others. It would not be the court's task to assess whether an officer's reasons are good ones from the perspective of traffic enforcement. Rather, its familiar task would be to assess the veracity of the officer's account to determine not only probable cause, but also whether the stop was based on race or used as a pretext to investigate suspicions lacking any

objective basis. In this way, the inquiry would supplement rather than supplant "ordinary, probable-cause Fourth amendment analysis." *Whren*, 517 U.S. at 813.

In assessing veracity, courts would consult the usual reference points, such as an officer's demeanor, his or her other testimony, and the record as a whole. Various factors could be relevant. For example, officers' questions of vehicle occupants during the stop would likely bear on whether the stop's purpose was to address the traffic violation. So too might the time of day or night, the nature of the violation, traffic conditions, the point in the encounter when officers first identified a motor vehicle violation, and officers' speed or sluggishness in ticketing the violation or issuing a warning. *Cf. Nieves v. Bartlett*, 139 S. Ct. 1715, 1732 (2019) (Gorsuch, J., concurring in part and dissenting in part) (reasoning that inference of retaliatory arrest might find support in evidence an "officer couldn't identify a crime for which probable cause existed until well after the arrest," or fact that offense was for "a minor infraction of the sort that wouldn't normally trigger an arrest in the circumstances"). The driver's or occupants' race might also bear on the inquiry, particularly in view of the empirical studies reviewed above. Physical appearance might also be a factor.

At the same time, the doctrinal refinement urged here would continue largely to eschew subjective inquiry. It would not be germane that an officer's decision to stop was influenced by mood, workload, or doubtful reasoning—indeed, by any motive apart from a wish to look for hidden crime based on a motorist's race or the officer's mere hunch. *Cf. Weaver*, 9 F.4th at 160 (Lohier, J., concurring in judgment) ("While *Whren* states an important and correct general rule that removes an officer's subjective intentions from Fourth Amendment scrutiny (and the reach of the exclusionary rule), there must be an exception for clear cases of racial bias."). The only determination for the court would be whether the stop was based on race or made to investigate

crime rather than ticket a motor vehicle violation. Provided it was not, a stop supported by probable cause would be held to abide the Fourth Amendment.

Overruling *Whren* would harmonize with the rule more recently expounded in *Rodriguez v. United States*, 575 U.S. 348 (2015). There, the Court held that a stop may not be prolonged beyond the time necessary to complete its "traffic mission" of addressing the violation and attending to related safety concerns. 575 U.S. at 356. The Court rejected the proposition that the Fourth Amendment permits motorists to be detained for even a *de minimis* further period to facilitate investigation of criminal activity *Id.* at 356-57. Just as a stop should conclude once its traffic mission is complete, it should commence no sooner than one exists.

Refining *Whren*'s rule would also accord with the typical Fourth Amendment requirement that an officer articulate reasons for a warrantless search or seizure. Specifically, to justify an investigative stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *see United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). The inquiry proposed here is of the same form: the officer must be able to point to facts that warranted selection of a particular violation for enforcement of the motor vehicle laws. That rule well accords with *Terry*'s familiar framework.

In several other areas of Fourth Amendment doctrine, moreover, the Court has treated pretext as bearing on the lawfulness of an intrusion. First is the law of inventory searches, meaning searches of the contents of an automobile, luggage, or other property of which police take custody in order to deter theft, ensure safe handling of potentially hazardous items, and deter false claims of loss or damage. *See Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). To ensure that inventory searches "not be a ruse for a general rummaging in order to discover

incriminating evidence," the Court has required they be conducted in accordance with standardized departmental policy or routine. *Florida v. Wells*, 495 U.S. 1, 4 (1990); *see also Colorado v. Bertine*, 479 U.S. 367, 372 (1987). Likewise as to "administrative" searches made to enforce broad regulatory schemes, such as periodic, delimited inspections of vehicle dismantling operations to prevent facilitation of auto theft. *See Burger v. New York*, 482 U.S. 691, 702-03 (1987). To pass constitutional muster, an administrative search must not function as a "'pretext' to enable law enforcement authorities to gather evidence of penal law violations." 482 U.S. at 716 n.27.

The Court has not categorically rejected Fourth Amendment inquiry into officers' subjective aims in the years since *Whren*, either. To the contrary, it has newly ordained subjective inquiry in at least one context: checkpoints at which vehicles are subject to inspection. In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court held unconstitutional a checkpoint set up by police to interdict drugs. Citing *Whren*, the Court reiterated that "reasonableness under the Fourth Amendment is predominantly an objective inquiry." *Id*. at 47. But it noted that is not always the case: "purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue." *Id*. Holding the drug checkpoints unconstitutional because their "primary purpose was to detect evidence of ordinary criminal wrongdoing," *id*. at 41, the Court refused to "sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime," *id*. at 44. That is the only justification there could be, of course, for pretextual traffic stops made in hopes of turning up evidence of something other than a traffic violation.

As *Edmond* suggests, *Whren* is not compelling in its portrayal of subjective intentions as entirely alien to Fourth Amendment analysis. Justice Scalia distinguished the Court's inventory

and administrative search precedents by reading them to implicate pretext only because officers need not have probable cause to believe such inspections will turn up evidence of a crime. 517 U.S. at 811-12. But that is a "distinction without a difference," given the "catalogue of traffic code regulations in any given city" making it "virtually impossible to drive a car without committing some infraction." Jonathan Feingold & Devon Carbado, *Rewriting Whren v. United States*, 68 UCLA L. Rev. 1678, 1695 (2022). As a result, *Whren*'s unadorned probable-cause requirement "likely … provides considerably less protection against arbitrariness than do the 'standardized procedures' and 'reasonable legislative or administrative standards' requirements for inventories and administrative inspections, respectively." LaFave, *Routine Traffic Stop*, 102 Mich. L. Rev. at 1854. Whereas inventories and inspections dispense with any requirement of individualized suspicion "in a *de jure* sense," traffic stops do so "in a *de facto* sense (the formal probable cause requirement does not, in practice, constrain an officer's authority to conduct a traffic stop)." *Rewriting Whren*, 68 UCLA L. Rev. at 1696. In the interests of harmonizing the law of traffic stops with precedents governing these materially analogous domains and building upon the framework supplied by *Rodriguez* and *Terry*, the decision in *Whren* should be overruled.

This case is a fit vehicle for doing so because the record demonstrates that the purpose of the stop was not to address excess window tint, but to see what an encounter with the BMW's occupants might turn up. In engaging the driver and petitioner, the officers said nothing about window tint until after the driver was secured in their patrol unit and petitioner was under arrest. Officer Dohan later testified that window tint is a "great reason to stop because almost everybody in that area has window tint on their car." Pet. App. 67a. His meaning was not that he and Officer Lesko had decided to ramp up enforcement of an equipment regulation they see

violated every shift. Rather, the two were members of a "tactical vice squad" who hardly ever cited motor vehicle violations. Pet. App. 34a, 79a. Yet somehow on this occasion they "simultaneously" decided to make a stop for window tint of the kind appearing on most all vehicles driving the streets of their district. Pet. App. 92a.

All of this not only demonstrates the stop's pretextual character, but also makes out a prima facie showing of racial profiling. *See* Randall Kennedy, *Suspect Policy*, The New Republic, Sept. 13, 1999 ("Properly understood, … racial profiling occurs whenever police routinely use race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion."). Though the officers testified they were unable to see the race of the vehicle's occupants, they did know the relatively expensive car had been parked in (not passing through) a neighborhood populated by predominantly Black residents. *See* Pet. App. 70a, 85a. The officers could readily infer a likelihood the car's occupants were among them.

Because the stop was a pretext for taking a look inside the vehicle and gauging its occupants' reaction to police, the absence of any objective basis for suspicion made the seizure unreasonable under the Fourth Amendment. Probable cause to believe the BMW sported "illegal sunscreen" should not be pretended to shield the stop's arbitrary character from view.

D. The principle of *stare decisis* should yield in light of what experience has taught is the legacy of *Whren*.

As Justice Ginsburg observed in the context of *Whren*, the principle of *stare decisis* must yield when "necessary 'to bring [the Court's] opinions into agreement with experience and with facts newly ascertained.'" *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) (citations omitted). Experience over the last three decades has taught that condoning pretextual stops forsakes an important means of confronting persistent racial disparities in criminal law enforcement. By needlessly swearing off concern with whether a traffic stop was a

subterfuge for skirting Fourth Amendment limitations, *Whren* "creates unfortunate incentives for the police—indeed, practically invites" police to exploit voluminous traffic codes as a means of predicating criminal law enforcement on idiosyncratic hunches or worse. *Utah v. Strieff*, 579 U.S. 232, 259 (2016) (Kagan, J., dissenting) (discussing majority's application of Fourth Amendment "attenuation" doctrine); *see State v. Ochoa*, 206 P.3d 143, 151 (N.M. Ct. App. 2008) (*Whren* "not only refuses to condemn this bad police conduct, it rewards pretextual stops by permitting prosecution with the evidentiary fruits of the stop").

The "green light" *Whren* has given to racial profiling promotes discriminatory law enforcement. *Weaver*, 9 F.4th at 159 (Lohier, J., concurring). It not only "creates an incentive for police officers to engage in pretextual stops," but also "legalizes those stops, which helps make them an institutional practice." Carbado, *From Stopping to Killing*, 105 Cal. L. Rev. at 156. Because approving pretextual stops enables racial bias, *Whren* is among the reasons why, though anyone can suffer the anxiety and indignity of a pretextual stop, it is today "no secret that people of color are disproportionate victims of this type of scrutiny." *Strieff*, 579 U.S. at 254 (Sotomayor, J., dissenting). *Whren* has likely contributed as well to "more and more adversarial interactions between law enforcement and the citizenry, which may in turn add to increased dangers to both groups." *Snyder v. State*, 2023 WL 1497289, at *9 (App. Ct. Md. 2023) (Friedman, J., concurring) (unreported).

At the same time, *Whren* has had the effect of hollowing out the 'reasonable suspicion' standard, providing further support for overruling it. The distortion arises by virtue of the perceptions to be expected of officers and motorists alike in a pretextual stop. On the one hand, the officer is already acting on a hunch or stereotype, and consequently more likely to perceive a subject's words and actions, whatever they may be, as suggestive of criminal activity and

dangerousness. *See Weaver*, 9 F.4th at 181-82 (Calabresi, J., dissenting). On the other, a pretextually stopped motorist is less likely to amiably engage with an officer he perceives to have singled him out for investigation. With officers more prone to apprehend signs of criminal activity and motorists more prone to exhibit discomfort with the encounter, all manner of quotidian facts have come to carry extraordinary significance in the law of reasonable suspicion, often on an officer's say-so.

For example, in one stop of two Black motorists, the court found reasonable suspicion based on an expired rental agreement, the absence of rental company bar code stickers, travel from New York City to Hagerstown, Maryland, air fresheners in the dashboard's vents, and the fact that a driver "seemed extremely nervous." *United States v. Garner*, 961 F.3d 264, 271-72 (3d Cir. 2020). That is a far cry from the facts held to satisfy the reasonable-suspicion standard when *Terry* adopted it: there, the investigative subjects had been observed casing a jewelry store in apparent preparation for a robbery. So today it has become difficult at times to credit *Terry*'s assurance that its standard would preserve courts' "traditional responsibility to guard against police conduct which is over-bearing or harassing." *Terry*, 392 U.S. at 15. *Cf. Weaver*, 9 F.4th at 176 (Calabresi, J., dissenting) (associating *Whren* with broader deterioration of Fourth Amendment standards driven by judicial "desire to avoid excluding determinative evidence").

Finally, experience has taught that civil actions do not supply an effective means of combating racial bias in the exercise of stop authority. When a racially discriminatory stop turns up evidence of a crime that is in turn held admissible under *Whren*, as a practical matter the defendant has no prospect of winning a substantial damages award for the violation of his right to equal protection. For that matter, experience offers little if any sign that motorists who have not committed any crime enjoy any such prospect either. *See generally State v. Brown*, 930

N.W.2d 840, 865 (Iowa 2019) (Cady, C.J., dissenting) ("The majority's suggestion that the proper constitutional basis for a discrimination claim is the Equal Protection Clause neglects the significant difficulties in bringing a successful equal protection claim.").

For all of these reasons, the principle of *stare decisis* should yield, and *Whren* should be overruled. Requiring that traffic stops be for the purpose of enforcing motor vehicle laws, not arbitrarily singling out motorists for investigation, may fail to root out pretext and bias entirely. But it will at least strip duplicitous and discriminatory stops of the judicial imprimatur they presently bear, much to the courts' and our common disadvantage. *See* Kennedy, *Suspect Policy*, *supra* ("Even if a new rule against racial profiling would, to some degree, be made to be broken, it would still be worth having—for it would at least help set a new standard for legitimate government.").

As this case suggests, there are times when a stop's rooting in pretext or bias is unmistakable. When judges bound by *Whren* must close their eyes to it, the courts begin to appear complicit in police subterfuge to skirt the Fourth Amendment, sometimes by officers indulging or succumbing to racial bias. *Whren* having fostered—indeed, commanded—this appearance for nearly three decades, the time has come to expunge its taint from this nation's judicial proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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