No.

IN THE
Supreme Court of the United States

RANDY JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Twenty-two years ago, the Court held in *Whren v. United States*, 517 U.S. 806 (1996), that police with probable cause to suspect a moving violation may stop and seize a motorist, even if the seizure is a pretext to search for evidence of other possible crimes. In this case, the en banc court of appeals held, over the dissent of three judges, that a mere *parking* infraction justifies a pretextual search.

The question presented is:

Whether the Fourth Amendment forbids a pretextual seizure of a motorist based solely on probable cause to suspect a civil parking infraction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Randy Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS BELOW

The Seventh Circuit's en banc opinion (Pet. App. 1a) is reported at 874 F.3d 571. Its panel decision is reported at 823 F.3d 408 (Pet. App. 21a). The district court's order (Pet. App. 38a) adopting the magistrate judge's recommendation (Pet. App. 39a) is not reported but is available at 2014 WL 12656902.

JURISDICTION

The en banc court of appeals entered judgment on October 27, 2017. Justice Kagan extended the time to file this petition to March 26, 2018. 17A716. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution 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."

INTRODUCTION

Not every trifling excuse for a pretextual seizure overcomes "[t]he right of the people to be secure in their persons, houses, papers, and effects." U.S. Const. amend IV. In this case, officers on the hunt for "bigger and better things" saw what they believed to be a civil parking infraction. Pet. App. 10a. They swerved to box in the car, pinned it under two sets of bright lights, and swarmed out to surround it. *Id.*

This is a rare case where the Court could decline to extend *Whren v. United States*, 517 U.S. 806 (1996), without overruling it. *Whren* and its progeny permit pretextual seizures for moving violations, but parking violations are different because they rarely create dangers or carry serious penalties. Courts are "divided," as a dissenting judge observed in this case, on whether *Whren* permits pretextual seizures predicated on mere parking violations. Pet. App. at 14a. That question was the subject of reasoned opinions and dissents in the proceedings below.

More fundamentally, this case is about whether there is *any* investigative interest so trivial that it does not justify a frightening seizure. *Whren* applies to "run-of the-mine" cases, 517 U.S. at 819, but this case, as the dissent stated, is "extraordinary," Pet. App. 27a. Police executed a "sudden, terrifying" seizure, to investigate a negligible infraction that had no connection to public safety and carried a fine of $20 to $40. Pet. App. 11a.

There must be a point at which a government interest becomes too trivial to justify a pretextual seizure. That point is this case.

STATEMENT OF THE CASE

1. *Factual Background.* On the night of January 8, 2014, five officers of the Milwaukee Police Department ("MPD") were on patrol, riding in two squad cars. Pet. App. 10a. The officers were part of the Street Crimes Unit of the MPD's Neighborhood Task Force. *Id*. They were operating in a community that is 94.1% African American.[1]

Officers assigned to the Street Crimes Unit are deployed to "hot spots." Pet. App. 10a. They are trained to "look for smaller infractions and hope that possibly they may lead to bigger and better things." *Id.*

One of these "smaller infractions," or at least a possible one, presented itself as the officers proceeded up a main avenue. *Id.* A Toyota Highlander was parked too close to an unmarked crosswalk. *Id*. In Wisconsin, parking too close to a crosswalk may be a civil offense, a "nonmoving traffic violation." Wis. Stat. Ann. § 345.28(1)(c). A nonmoving traffic violation is punishable by a "forfeiture," which carries a penalty of $20 to $40 for a first offense. Wis. Stat. Ann. § 346.56(1m).

The Toyota was parked in front of an open store. Pet. App. 18a. The car's engine was running. *Id*. at 10a.

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[1] The stop in this case occurred at the intersection of Atkinson Avenue and 11th Street in Milwaukee. Pet. App. 40a. That intersection is in the Arlington Heights neighborhood; according to U.S. Census data, 94.1% of the population of Arlington Heights is African American. *Race and Ethnicity in Arlington Heights*, STATISTICAL ATLAS, https://statisticalatlas.com/neighborhood/Wisconsin/Milwaukee/Arlington-Heights/Race-and-Ethnicity (last visited Mar. 21, 2018).

The driver's seat was empty because the driver had gone inside to make a purchase, leaving passengers waiting in the car. *Id.* at 5a–6a. Officer Navarette, who was driving one of the squad cars, noticed the Toyota stopped on a side street. *Id.* at 10a.

At this point, the officers executed the initial seizure. In a "split-second decision," Officer Navarette made an abrupt left turn and pulled up alongside and slightly in front of the Toyota. *Id.* The second squad car made the same turn and came to a halt directly behind the Toyota. *Id.* Both squad cars activated their spotlights, beaming them at the Toyota's passengers from two directions. *Id.* A "few seconds" after Officer Navarette first noticed the Toyota, it was hemmed in by police vehicles and pinned under multiple bright lights. *Id.* at 18a.

All five officers immediately "swarmed" the Toyota. *Id.* at 7a. Officer Kaiser went directly to the driver's door and opened it. *Id.* at 49a. He shined a flashlight in the passengers' faces and ordered them to put their hands in the air. *Id.* at 10a, 49a.

Officer Conway approached the back door on the driver's side. *Id.* at 41a. Before opening the door, he saw a passenger moving in a way that suggested he was hiding something, "such as alcohol, drugs, or a gun." *Id.* at 2a.

The seizure then expanded. In this second phase of the seizure, Officer Conway opened the door and ordered the passenger in the backseat on the driver's side to get out, placing him in handcuffs. *Id.* at 41a. That passenger was Randy Johnson, the petitioner. *Id.* After handcuffing Johnson, Officer Conway peered beneath the driver's seat and discovered a handgun. *Id.* He

then called out a code—"C1"—indicating to the other officers that they should pull out and arrest everyone else in the vehicle. *Id.* The other officers did so, removing and handcuffing four other individuals. *Id.* at 7a.

2. *District court proceedings*. Johnson was indicted in the United States District Court for the Eastern District of Wisconsin for violating 18 U.S.C. § 922(g)(1), which forbids a person with a felony conviction from possessing a firearm. Pet. App. 2a, 39a. Johnson moved to suppress all evidence recovered by the officers during the search of the Toyota, including the firearm Officer Conway found. *Id.* Johnson asserted that the officers' few seconds of observation did not create probable cause or reasonable suspicion of a parking infraction because Wisconsin law permits a car to stand near an intersection while loading or unloading passengers. *Id.* at 42a; *see* Wis. Stat. Ann. § 346.53. Johnson also argued that that *Whren* does not authorize investigatory seizures based on parking violations. Pet. App. 42a–43a, 47a–48a. The district court denied the motion to suppress, adopting the recommendation of a magistrate judge. *Id.* at 38a.

The district court held that the initial seizure did not violate the Fourth Amendment because the vehicle was too close to the crosswalk and therefore "parked illegally." *Id.* at 45a–46a. The district court believed that probable cause to suspect a parking infraction sufficed to justify the initial seizure. *Id.* at 43a, 45a. The court "rejected the notion that there is a distinction between traffic and parking infractions." *Id.* at 48a (citing *United States v. Thornton*, 197 F.3d 241, 248 (7th Cir. 1999).

The district court also held that the second phase of the seizure, in which the officers handcuffed the occupants of the car, comported with the Fourth Amendment. Pet. App. 47a. That expansion of the seizure, the court reasoned, was justified by the movement in the vehicle that Officer Conway saw as the officers advanced to surround it. *Id.*

Following the denial of his motion to suppress, Johnson entered a conditional guilty plea, preserving his right to appeal the suppression ruling. Pet. App. 2a. He was sentenced to forty-six months' imprisonment. *Id.*

3. *Court of appeals*. Johnson appealed. Over a dissent by Judge Hamilton, a panel of the United States Court of Appeals for the Seventh Circuit affirmed the district court. *Id* at 21a, 27a. Johnson then sought and obtained rehearing en banc. *Id.* at 2a. The en banc court affirmed the district court by a vote of 5-3. *Id.* at 6a, 7a.[2]

Judge Easterbrook, writing for the majority, held that the initial seizure was justified. *Id.* at 4a–5a. Per the majority, the officers had probable cause to suspect that the Toyota was unlawfully parked when they executed the initial seizure by boxing in the car, spotlighting it, and moving in to surround it. *Id.* at 3a.

Having found probable cause, the majority opined that this Court's decision in *Whren* applies equally to moving traffic violations and non-moving parking violations. *Id.* at 4a–5a. Probable cause to suspect a

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[2] The original panel's majority and dissenting opinions are not discussed at length because the reasoning of both opinions is subsumed within the en banc majority and dissent.

parking violation therefore authorized the officers to seize the Toyota and its occupants. *Id.*

Judge Hamilton, joined by Judges Rovner and Williams, dissented, arguing that the majority erred by extending *Whren* to permit pretextual stops for mere parking violations. *Id.* at 7a. The dissent asserted that *Whren* is limited to moving violations, and that broadening *Whren*'s holding to parking violations "loses sight of reasonableness and proportion." *Id.* at 12a. The dissent observed that "[r]elevant case law" on pretextual seizures for parking violations "is both sparse and divided, perhaps because the notion of using such aggressive police tactics in response to parking violations seems so audacious." *Id.* at 14a–15a.

In the view of the dissent, the "core Fourth Amendment standard of reasonableness" does not "tolerate[ ] such police tactics to address a suspected parking violation." *Id.* at 7a. To permit frightening seizures for matters so trivial as parking infractions would border on "the twentieth-century version of the general warrant." *Id.* at 7a (quoting Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616, 1669 (2016)).

The dissent warned that the majority's decision handed police the power to seize people for "parking while black." Pet. App. 8a. The majority's holding would harm low income communities the most because "[t]he police tactics here would never be tolerated in more affluent neighborhoods." *Id.*

4. This petition followed.

REASONS FOR GRANTING THE PETITION

The Fourth Amendment permits a pretextual stop of a motorist based on probable cause of a moving violation, *Whren*, 517 U.S. at 810, but the Court has never extended that precedent to a parked car—and with good reason. Moving violations have caused hundreds of thousands of deaths, but parked cars are generally no threat to public safety.

If there is any limitation on the triviality of the government interest that can justify a pretextual seizure, that limitation must apply in this case. After all, "what happened here was extraordinary." Pet. App. 27a (Hamilton, J., dissenting). The pretext was the most trifling of violations: a civil, non-arrestable infraction for parking too close to an unmarked crosswalk. And the seizure was terrifying. As five people sat in a stopped car, two cruisers suddenly roared up and blocked it in, bright spotlights glared through the windows, and five officers poured out and surrounded the car.

If triviality imposes no constraint whatsoever on the government's authority to make a pretextual search in a case like this, then the Fourth Amendment provides little protection against police dragnets. For an officer to seize an individual and search for evidence, any miniscule infraction will do. The proliferation of laws regulating the minutiae of human affairs make excuses easy to find. Freed from constitutional restraint, seizures will land the hardest on minorities, as in this case, where police scoured a segregated, minority community and descended on a parked car.

I. The Court should grant review to decide whether parking violations justify pretextual seizures.

This Court's precedent leaves open whether mere parking violations justify pretextual seizures, and that question divides lower courts. The issue is cleanly presented and outcome-determinative in this case. The Court should grant certiorari because the government interest in investigating a mere parking infraction is too trifling to justify the sort of frightening seizure that occurred in this case.

A. The Court has not considered whether probable cause to suspect a parking violation justifies a pretextual seizure.

In *Whren*, the Court held that the Fourth Amendment allows police to make a pretextual seizure of a vehicle and its occupants so long as there is probable cause to believe that the driver has committed a moving violation. 517 U.S. at 808. The Court has never extended that rule to a parking violation, or to the sort of seizure that occurred here.

1. The Court's prior decisions involving seizures of motorists for minor infractions do not encompass parking violations. In *Whren*, the Court granted certiorari to decide whether the police may execute a pretextual seizure of a motorist "who the police have probable cause to believe has committed a civil traffic violation." *Id.* at 808. In contrast to this case, *Whren* involved multiple moving violations (speeding and failure to signal), not a mere parking violation. 517 U.S. at 808. While the *Whren* Court refused to consider which state statutes "are sufficiently important to merit enforcement," it was not faced with

anything so trivial as a civil, non-arrestable parking violation. 517 U.S. at 818-19.

Like *Whren*, this Court's subsequent decisions in *Atwater v. County of Largo Vista,* 532 U.S. 318, 323–24 (2001), and *Virginia v. Moore*, 553 U.S. 164, 166–67 (2008), involved moving violations that created potential dangers. *See Atwater*, 532 U.S. at 323–24 (five-year-old and three-year-old children did not have seatbelts); *Moore*, 553 U.S. at 166–67 (driving with a suspended license); *see also Arkansas v. Sullivan*, 532 U.S. 769, 769 (2001) (speeding and improperly tinted windshield); *United States v. Robinson*, 414 U.S. 218, 220 (1973) (driving with a suspended permit). This case, however, is about a parked car.

2. By its own terms, *Whren* governs a "run-of-the-mine" case, *Whren*, 517 U.S. at 819, leaving open the possibility that its general rule may not extend to extreme circumstances. Under the Fourth Amendment, investigatory seizures must reflect a "balancing" of the "need" for a seizure against the "invasion" it entails. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534–35 (1967)). The balance in this case is one-sided. Both the trivial justification and the nature of the seizure are "extraordinary," Pet. App. 27, a far cry from the "run-of-the-mine" scenario contemplated in *Whren*, 517 U.S. at 819.

In addition to the minimal government interest at stake, the police tactics used to seize Johnson were far more "sudden" and "terrifying" than the norm. Pet. App. 11a. To investigate a mere parking violation, the officers in this case motored in and cut off the Toyota, lit up the occupants with spotlights from two directions, and stormed out of two squad cars to

surround the vehicle. *Id. at* 10a. Compared to *Whren*, the seizure here is far more frightening and the justification far less substantial.

Over the course of a normal, law-abiding life, most drivers expect to be pulled over at some point in the type of "normal traffic stop" that *Whren* authorizes. 517 U.S. at 809. Sitting peaceably in a parked car one moment, then being surrounded by officers and spotlights the next is a completely different experience than being pulled over for speeding or forgetting to signal. If deployed broadly, as the decision below permits, this tactic would needlessly terrorize the public.

B. This case is the ideal vehicle to consider the question.

This case cleanly presents the question whether probable cause to suspect a parking infraction provided an adequate justification for the pretextual seizure of Johnson.

The relevant facts are simple and undisputed: the parties, the Seventh Circuit majority, and the dissent all agree that the initial seizure occurred when the officers spotlighted the car and boxed it in with their cruisers. Pet. App. 7a, 10a–11a. Five officers immediately poured out to surround the car. *Id.* They had no idea at that time that anyone might have a gun. *Id.*

This petition relates only to the reasonableness of that initial seizure. The legality of the initial seizure will determine the outcome of this case. The government has never disputed that if the initial seizure is unlawful, the gun must be suppressed. If

the gun must be suppressed, then Johnson's conditional guilty plea will be dissolved.

The government offers only one legal justification for the initial seizure: since the car was parked about eight feet from an unmarked crosswalk, the police had probable cause to believe the car was violating Wisconsin Statute § 346.53(5). At this stage, Johnson disputes neither the existence of probable cause nor the location of the car.

In short, the entire case now depends on a single issue of law: Did probable cause to suspect a parking violation justify the initial seizure?

C. Courts are divided on the question.

The decision below conflicts with the law in the Supreme Court of Minnesota, which mirrors the reasoning of Judge Hamilton's dissent. In *State v. Holmes*, the Supreme Court of Minnesota held that for Fourth Amendment purposes, a parking violation is distinct from a traffic violation. 569 N.W.2d 181, 185 (Minn. 1997). Distinguishing *Whren*, the court reasoned that "a parking violation is not as serious as a traffic violation." *Id.* "[T]here can be no debate," the court stated, "that a parking violation is not among" the types of violations that permit an investigative seizure. *Id.* The court concluded that when a police officer "has probable cause to believe that a person has committed a parking violation," the officer "can stop the person *only if* the stop is necessary to enforce the violation, for example, if [the] person is attempting to drive off with an illegally parked car before the officer can issue the ticket." *Id.* (emphasis supplied).

This case also would have been decided differently by the Maryland Court of Special Appeals. That court

held that even when an officer has probable cause to believe that a person is committing a citable civil offense, "a confrontation" between the officer and the offender should generally be avoided. *In re Calvin S.*, 175 Md. App. 516, 531 (2007). Such an encounter "does not meet the standard for a *Terry* stop absent some other basis to suspect that criminal activity is afoot." *Id.*[3]

In contrast, the federal appellate courts that have decided the question hold that trivial infractions, including parking violations, justify investigative seizures. *See United States v. Choudhry*, 461 F.3d 1097, 1104 (9th Cir. 2006); *Flores v. City of Palacios*, 381 F.3d 391, 402–03 (5th Cir. 2004); *United States v. Copeland*, 321 F.3d 582, 593–94 (6th Cir. 2003).

D. Parking violations are among the most trivial infractions and generally can be enforced without seizures.

The law enforcement interest in investigating a parking violation by seizing a vehicle and its occupants is *de minimis*. Moving violations can be deadly, but parked cars are innocuous. The penalties

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[3] The Supreme Court of Washington has adopted a similar rule, albeit under State constitutional law. In *State v. Day*, 161 Wash. 2d 889, 897 (2007), the court stated that "if and when probable cause exists to believe that a crime is being committed, the general rule is that government agents must seek a warrant" before making a seizure. *Terry* stops constitute a "carefully tailored exception" to that rule. *Id.* Although *Terry* stops are permitted for civil traffic violations, the reasons underlying that extension "simply lose force in the parking context." *Id.* at 897. Accordingly, in Washington, *Terry* stops are not permitted on the basis of parking violations.

for parking violations are minimal, and seizures are rarely necessary to investigate such infractions.

1. Compared to moving violations, parking infractions have very little impact on public safety. According to the National Transportation Safety Board, between 2005 and 2014, speed was a factor in 112,580 traffic deaths in the United States.[4] The NTSB reported that "the relationship between speed and injury severity is consistent and direct. Higher vehicle speeds lead to larger changes in velocity in a crash, and these velocity changes are closely linked to injury severity."[5] Because "[s]peed limits must be enforced to be effective," traffic stops are necessary to curb traffic deaths.[6] As the NTSB Chairman puts it, "Speed kills."[7] Stopped cars do not kill.

2. Parking violations almost never carry serious penalties. "[T]he penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984); *see also United States v. Hensley*, 469 U.S. 221, 229 (1985) (stating that it is unclear "whether *Terry*

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[4] National Transportation Safety Board, *Reducing Speeding-Related Crashes Involving Passenger Vehicles* 1 (2017), *available at* http://bit.ly/2IvP5tk.

[5] *Id.* at 2.

[6] *Id.*

[7] National Transportation Safety Board Office of Public Affairs, *NTSP Aims to Reduce Speeding-Related Crashes*, NATIONAL TRANSPORTATION SAFETY BOARD (July 25, 2017), https://www.ntsb.gov/news/press-releases/Pages/PR20170725b.aspx.

stops to investigate all past crimes, however serious, are permitted").

In Wisconsin, parking too close to a crosswalk is punishable by a fine of $20 to $40. Wis. Stat. Ann. § 346.56.[8] The infraction is both civil and non-arrestable under State law.[9] While minimal penalties alone do not negate a governmental interest, *Moore*, 553 U.S. at 175, surely they provide some evidence of the limited significance the State attaches to parking violations.

3. When police find it necessary to investigate a potential parking violation, they have many tools short of a seizure, such as safe observation and voluntary conversation. This reality (1) further distinguishes parking violations from moving violations and (2) diminishes the government's interest in executing seizures to investigate parking violations.

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[8] The actual fine for parking too close to a crosswalk in Milwaukee is $30. *Types and Costs of Parking Citations*, OFFICIAL WEBSITE OF THE CITY OF MILWAUKEE, http://city.milwaukee.gov/ParkingServices/ParkingCitations/Parking-Citation-Types.htm (last visited Mar. 21, 2018).

[9] Wisconsin law permits warrantless arrests for some traffic violations, but *not* for *nonmoving* traffic violations, such as parking violations. *See* Wis. Stat. Ann. § 345.22 ("A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a *traffic regulation*." (emphasis supplied)); § 345.20(1)(b) ("Except as otherwise specifically provided, 'traffic regulation' does not include a nonmoving traffic violation . . . ."); § 345.28 ("'Nonmoving traffic violation' is any parking of a vehicle in violation of a statute, an ordinance, a rule . . . or a resolution . . . .").

In this case, for example, the officers had ample time to observe the vehicle, which was parked in front of an open store with its motor running. Pet. App. 18a. If the officers had watched the car for a minute or two, they could have determined whether it was loading or unloading passengers, and thus parked legally. *See* Wis. Stat. Ann. § 346.53. There was no reason to swoop in immediately.

This sort of safe observation is rarely available for moving violations: an officer investigating a moving violation may have limited time to observe the car before it passes out of view. Seizing a car is therefore crucial to investigating many moving violations, but rarely crucial with parking violations.

A voluntary conversation may provide yet another alternative to a seizure when an officer is investigating a parking violation. Even without any articulable suspicion, officers can start voluntary conversations with people in parked cars. In contrast, conversation is not possible when the driver is speeding by in a moving car. *See generally* Tonja Jacobi, *The Future of Terry in the Car Context*, 15 OHIO ST. J. CRIM. L. 89, 92 (2017).

In general, parking violations are not only much less dangerous than moving violations, but much easier to investigate without a seizure.

4. If an officer decides to issue a parking citation, it is rarely necessary to seize either car or occupant. *See Martinez v. Carr*, 479 F.3d 1292, 1293 (10th Cir. 2007) (Gorsuch, J.) (merely issuing a citation is not a Fourth Amendment seizure); *Burg v. Gosselin*, 591 F.3d 95, 98 (2d Cir. 2010). In fact, parking violations are routinely enforced without even an *encounter*:

most commonly, a driver returns to her car and finds a ticket on the windshield.

II. Seizures for trifling violations are an issue of national importance.

The decision below licenses the police to conduct frightening seizures based on trivial infractions. Combined with other lower court decisions reaching the same result, that holding has serious consequences for the nation as a whole.[10]

If there is no limit to the triviality of a government interest that permits a pretextual seizure, police will enjoy sweeping discretion to round people up for investigation. There is no shortage of minor offenses, and they are multiplying every day. Police officers are often trained to exploit such offenses as an excuse to execute pretextual seizures. If any miniscule offense will do, the public will be vulnerable to investigatory seizures unsupported by any serious government interest. Minority communities will bear the brunt of these aggressive police tactics.

A. Police will have an end run around the Fourth Amendment if the most trivial infractions excuse pretextual seizures.

1. If the triviality of the investigative interest imposes no constraint whatsoever on the authority to seize an individual, police will have license to execute

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[10] *See supra* p. 13; *see also, e.g., United States v. McFadden*, 238 F.3d 198, 203 (2d Cir. 2001) (riding a bicycle on the sidewalk permits a seizure); *People v. McKay*, 41 P.3d 59, 63–64 (2002) (riding a bicycle in the wrong direction down a residential street permits a seizure).

seizures premised on a wide range of trifling infractions. They will be empowered to seize "random joggers, dog walkers, and lemonade vendors," *Utah v. Strieff*, 136 S. Ct. 2056, 2067 (2016) (Sotomayor, J., dissenting), whenever a pedestrian crosses against a traffic light,[11] a dog owner strays onto the Supreme Court plaza with a Chihuahua on a five-foot leash,[12] or a child selling lemonade fails to secure a permit for the stand.[13]

If any ordinance at all will do, then viable pretexts are virtually limitless and threaten to swallow the protections of the Fourth Amendment. In various municipalities across the United States, it is illegal to wear saggy pants,[14] to cross a street while viewing a

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[11] Philip Jankowski, *Two in Jaywalking Arrest Caught on Video Sue Austin Police*, STATESMAN (Feb. 15, 2016), https://www.statesman.com/news/crime--law/two-jaywalking-arrest-caught-video-sue-austin-police/hLksbh2BJLuQ27In4vZ6PN/; *see also* Matt Ford, *The Case Against Jaywalking Laws*, THE NEW REPUBLIC (Mar. 12, 2018), https://newrepublic.com/article/147396/case-jaywalking-laws.

[12] *Building Regulations*, *Regulation Four,* SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/buildingregulations.aspx (last accessed Mar. 17, 2018) (specifying four-foot maximum leash length on Supreme Court grounds).

[13] Mark Carlson, *Coralville Police Shut Down Lemonade Stands During RAGBRAI*, THE GAZETTE (Aug. 2, 2011), http://www.thegazette.com/2011/08/02/coralville-police-shut-down-lemonade-stands-during-ragbrai.

[14] Abbeville, Louisiana Code of Ordinances § 13-25, *available at* https://library.municode.com/la/abbeville/codes/code_of_ordinances?nodeId=PTIITHCOOR_CH13OFIS_ARTIIOFAGPU_S13-25EXUNWOUNPASKPR ("It shall be unlawful for any person in a public place or in view of the public to wear pants or a skirt in

cell phone,[15] and to have a barbecue in one's front yard.[16]

2. The rapid growth of regulation will furnish the police with an ever-growing arsenal of pretexts to seize citizens. According to the Heritage Foundation, 452 new federal offenses were created between 2000 and 2007 alone.[17] One typical post on the Twitter handle @CrimeADay, which tweets an odd federal offense every day, notes that it is unlawful to cross between North and South Carolina while bearing a cabbage with loose leaves.[18] At the state level too,

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such a manner as to expose their underlying garments."); *see also* William C. Vandivort, Note, *I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws*, 75 BROOK L. REV. 667, 673 (2009) (cataloging similar saggy pants ordinances across the country).

[15] Revised Ordinances of Honolulu § 15-24.23, *available at* http://www4.honolulu.gov/docushare/dsweb/Get/Document-196183/DOC007%20(14).PDF ("No pedestrian shall cross a street or highway while viewing a mobile electronic device.").

[16] Berkeley, Missouri Code of Ordinances § 210.2250, *available at* https://ecode360.com/31778191 ("Subject to certain exceptions mentioned hereinbelow, no person shall be permitted to barbecue or conduct outdoor cooking in front of the building line of any single-family dwelling, multi-family dwelling or commercial structure."); *see also* Pagedale, Missouri Code of Ordinances § 210.750(A), *available at* https://ecode360.com/29518548.

[17] JOHN BAKER, THE HERITAGE FOUNDATION, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 1 (2008), *available at* https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes.

[18] *See* @CrimeADay, TWITTER (Feb. 28, 2018, 6:06 PM), (https://twitter.com/CrimeADay/status/969031112776409088; 7 U.S.C. § 7734(a)(1)(B); 7 C.F.R. § 301.80(a) (quarantining North and South Carolina); 7 C.F.R. § 301.80(b) (prohibiting any

"this state of affairs is growing worse: legislatures regularly add to criminal codes, but rarely subtract from them." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001). The Manhattan Institute reports that several states each create scores of new offenses each year.[19]

Regulations have multiplied at the municipal level as well. In Ferguson, Missouri, for example, the Department of Justice found that "Ferguson's municipal code addresses nearly every aspect of civic life for those who live in Ferguson, and regulates the conduct of all who work, travel through, or otherwise visit the City."[20] Ferguson's municipal code prohibits "High Grass and Weeds[,]" requires "permits to rent an apartment or use the City's trash service," includes an offense called "Barking Dog and Dog Running at Large," and lays down a rule titled "Manner of Walking in Roadway."[21]

"person" from leaving any "quarantined State" bearing "[c]abbage, except firm heads with loose outer leaves removed").

[19] James R. Copland & Isaac Gorodetski, Manhattan Institute, Overcriminalizing the Palmetto State 6 (2016), *available at* https://www.manhattan-institute.org/sites/default/files/ib-JC-0116.pdf; James R. Copland & Isaac Gorodetski, Manhattan Institute, North Carolina Overcriminalization: Update 2017, at 2–3 (2017); *available at* https://www.manhattan-institute.org/html/north-carolina-overcriminalization-update-2017-10505.html; James R. Copland & Isaac Gorodetski, Manhattan Institute, Michigan Overcriminalization: Update 2017, at 3 (2017), *available at* https://www.manhattan-institute.org/html/michigan-overcriminalization-update-2017-10151.html.

[20] U.S. Dep't of Just., Investigation of the Ferguson City Police Department 7 (2015), *available at* http://bit.ly/2FGzNAa.

[21] *Id.*

3. Police have every incentive to use insignificant offenses as an excuse to seize people. They are often encouraged to do so, just as the officers in this case were trained to "look for smaller infractions and hope that possibly they may lead to bigger and better things." Pet. App. 10a. If there is no triviality limitation on the pretexts police can invoke, those incentives could unleash upon the public a wide range of pretextual seizures premised on very thin government interests.

Police trainings encourage officers to make pretextual stops based on minor infractions. In Philadelphia, for example, "supervisors . . . encourage officers to be clever and resourceful about using even minor infractions—something as routine as spitting, littering, loitering, or holding an open container of alcohol—as a rationale to stop a suspect person and conduct a legal frisk."[22]

In Baltimore, the Department of Justice found that officers sought to boost their rates of drug and gun arrests by making frequent stops and searches predicated on low-level offenses, such as loitering.[23] In New Orleans, officers were under "strong and

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[22] David Keenan & Tina M. Thomas, Note, *An Offense-Severity Model for Stop-and-Frisks*, 123 YALE L.J. 1448, 1461 (2014) (quoting Andrew Maykuth, *Phila. Police Look for Right Touch: With Stop-and-Frisk Beginning Soon, Officers Are Getting Some Coaching*, PHILA. INQUIRER (Apr. 14, 2008)); see also Wayne R. LaFave, *The "Routine Traffic Stop" From Start To Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1845 (2004).

[23] U.S. Dep't of Just., Investigation of the Baltimore City Police Department 42 (2016), *available at* http://bit.ly/2staAmu.

unyielding pressure" to meet statistical benchmarks for stops and arrests, which "encourage[d] aggressive enforcement of low-level infractions."[24] In Ferguson, officers were incentivized to aggressively enforce minor infractions because their "evaluations and promotions depend[ed] to an inordinate degree on 'productivity,' meaning the number of citations issued."[25]

B. Minorities will suffer the most if miniscule offenses justify pretextual seizures.

The combination of minor infractions and pretextual searches has its greatest effect on minority communities. "[I]t is no secret that people of color are disproportionate victims of [police] scrutiny." *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) (citing MICHELLE ALEXANDER, THE NEW JIM CROW 95–136 (2010)). In the police seizure context, "unbounded discretion carries with it grave potential for abuse," which can translate into "racial profiling." *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

The discretion to stop anyone on suspicion of anything will hit minorities the hardest. In Newark, the Department of Justice found that "[b]lack residents . . . [were] at least 2.5 times more likely to be subjected to a pedestrian stop or arrested than

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[24] U.S. Dep't of Just., Investigation of the New Orleans Police Department viii, 29 (2011), available at http://bit.ly/2DpqiTW.

[25] U.S. Dep't of Just., Investigation of the Ferguson City Police Department 2 (2015), *available at* http://bit.ly/2FGzNAa.

white individuals."[26] In Baltimore, the police department "encouraged officers to make frequent stops, searches, and arrests for misdemeanor offenses. This strategy overwhelmingly impacted the City's African-American residents and predominantly African-American neighborhoods."[27]

Abandoning any triviality limitation on pretextual seizures will only exacerbate these disparities, empowering the police to seize people for "parking while black." Pet. App. 8a. People of color living in low-income communities are especially likely to be targeted. As Judge Hamilton pointed out, "[t]he police tactics here would never be tolerated in more affluent neighborhoods." *Id.*

C. This case perfectly illustrates the danger of pretextual seizures based on trivialities.

This case encapsulates everything that is wrong with pretextual searches bottomed on piddling infractions. If the police can seize people for civil, non-arrestable parking violations, they can seize almost anyone, whenever it suits them. This February, Milwaukee officers handed out 4,368 parking citations *in a single night*.[28] Under the decision below, the police could have seized any or all of the offending

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[26] U.S. Dep't of Just., Investigation of the Newark Police Department 16 (2014), *available at* http://bit.ly/28Z3g78.

[27] U.S. Dep't of Just., Investigation of the Baltimore City Police Department 47 (2016), *available at* http://bit.ly/2staAmu.

[28] *Parking profits: Milwaukee Issues More Than 4,000 Parking Tickets During Overnight Snow Removal*, TMJ4 (Feb. 4, 2018), http://bit.ly/2GEOl4s.

vehicles by aggressively boxing them in, training spotlights on their windows, and rushing out to surround them. In fact, the yearly number of parking citations in Milwaukee exceeds the city's population.[29] Given that comparison, it is not much of an exaggeration to say that over the course of an average year, the decision below authorizes the Milwaukee Police Department to seize the whole city.

But of course, the police don't do that. Instead, aggressive tactics disproportionately affect minorities. According to a draft of a Department of Justice report made public in August 2017, the Milwaukee Police Department's "traffic stop practices have a disparate impact on the African-American community[,]" with African Americans stopped three times as often as whites.[30] As for pedestrian stops, "it is apparent that the African-American population is disproportionately impacted and much more likely to

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[29] Dave Begel, *Parking Tickets Are a Nightmare of Epic Proportions*, ON MILWAUKEE (Aug. 29, 2014), https://onmilwaukee.com/buzz/articles/parkingticketnightmare.html (reporting 770,430 parking citations issued in 2013); *Quick Facts: Milwaukee city, Wisconsin*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/milwaukeecitywisconsin (last visited Mar. 22, 2018) (estimating Milwaukee's population at 595,047 as of July 1, 2016).

[30] COLLABORATIVE REFORM INITIATIVE, MILWAUKEE POLICE DEPARTMENT ASSESSMENT REPORT 94 (2017), *available at* http://bit.ly/2G135x0. The federal review of the Milwaukee Police Department has since been halted. Ashley Luthern, *U.S. Department of Justice Halts Ongoing Review of Milwaukee Police Department*, MILWAUKEE J. SENTINEL (Sept. 17, 2017), http://bit.ly/2HHlk7z.

be searched, despite the fact that contraband [is] less likely to be found."[31]

In a pending class action lawsuit against the City of Milwaukee,[32] one expert found that "MPD officers face significant pressure from supervisors and command staff to conduct large numbers of traffic and pedestrian stops and that, over time, this pressure has developed into an informal quota system."[33] Another expert reported that, "[a]fter controlling for non-racial and non-ethnic factors . . . the traffic stop rate for Black drivers in Milwaukee is higher than the traffic stop rate for white drivers by well over 500 percent."[34] Black residents of Milwaukee "who are subjected to traffic stops are about 50 [percent] . . . more likely . . . to be searched than white people who are subjected to traffic stops." *Id.* at 5.

So the seizure in this case was no isolated event. *See Strieff*, 136 S. Ct. at 2071 (Sotomayor, J., dissenting) ("We must not pretend that the countless people who are routinely targeted by police are 'isolated.'"). Here, the police were out on a dragnet, caravanning through a minority neighborhood, looking for "smaller infractions" that might "lead to bigger and better things." Pet. App. 10a. There is no telling how many innocent people have been accosted by such patrols, rolling through communities night

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[31] *Id.* at 95.

[32] *Collins v. City of Milwaukee*, No. 2:17-cv-00234 (E.D. Wis. Feb. 21, 2017).

[33] Report of Margo L. Frasier, J.D., at 32 (Feb. 20, 2018), *available at* http://bit.ly/2FPzEui.

[34] Report of David Abrams, Ph.D., at 4 (Feb. 20, 2018), *available at* http://bit.ly/2pl8Afj.

after night, searching for bodies to seize and excuses to seize them. This Court can draw a fair and reasonable line in this case, where the government interest was minute and the seizure was frightening. It will find no better vehicle to do so, and should take this opportunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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