No. 20-5074

IN THE
Supreme Court of the United States

ROBERT BANKS, III,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CENTER ON RACE, INEQUALITY, AND THE LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Center on Race, Inequality, and the Law at New York University School of Law ("Center") was created to confront laws, policies and practices that lead to the oppression and marginalization of people of color. Among the Center's priorities is reform of the criminal legal system in areas infected by racial bias and plagued by inequality. The Center fulfills its mission through public education, research, advocacy and litigation aimed at reforming policies and practices in the legal system that perpetuate racial injustice and inequitable outcomes. No part of this brief purports to represent the views of New York University School of Law or New York University.

The Center has an interest in this case because the rule that the Court announced in *Whren v. United States*, 517 U.S. 806 (1996), facilitates racial profiling of Black motorists across the country. Such profiling unduly burdens and humiliates people of color and creates distrust in the legal system.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* certify that *Amicus* and its counsel authored this brief in its entirety, and no party or its counsel, nor any person or entity other than *Amicus* or its counsel, made a monetary contribution to this brief's preparation or submission. All parties have provided written consent to the filing of this brief.

SUMMARY OF ARGUMENT

The first question presented for review implicates a serious problem that people of color face every time they drive. Twenty-four years ago, in *Whren v. United States*, 517 U.S. 806, 813 (1996), this Court held that a pretextual traffic stop does not violate the Fourth Amendment so long as the police have probable cause to believe a traffic violation has occurred. Due to the breadth of traffic regulations, *Whren* gives the police unfettered discretion to single out almost whomever they wish for a stop. Consequently, many members of this Court have expressed concern that *Whren* might turn out to facilitate racial profiling in traffic stops. (*Infra* Part I.)

The concerns that this Court expressed about the implementation of *Whren* have come to pass. Numerous studies conducted since *Whren* have found that *Whren* facilitates the widespread and unchecked racial profiling of Black motorists throughout the country. (*Infra* Part II.A.) Such racial profiling unduly burdens and humiliates the motorists who are pretextually stopped and breeds resentment, distrust and hostility between people of color and the police. Further, as recent events have shown, what begins as a stop may swiftly escalate and result in the use of physical—even deadly—force. (*Infra* Part II.B.)

The Petition presents a compelling opportunity for the Court to reconsider its holding in *Whren* due to the objective evidence in the record that the stop was pretextual. Petitioner, a Black driver, was subject to a pretextual traffic stop, purportedly for an unsafe lane change, by special weapons and tactics (SWAT) and vice officers tasked with suppressing crime in the

area. The lane change was a pretext for a stop to investigate Petitioner for involvement in prostitution. Neither officer issued a ticket or citation for any traffic violation, and the officer who testified at the suppression hearing admitted that he did not write many traffic citations because that was not his primary duty. The vice officer's presence indicates that prostitution was the officers' real interest all along. These troubling facts led two judges on the panel to recommend that the Ninth Circuit rehear the case *en banc*. Accordingly, for these and other reasons detailed in this *amicus* brief, the Court should grant *certiorari*, overrule *Whren* and hold that pretextual traffic stops are unreasonable and hence unconstitutional under the Fourth Amendment. (*Infra* Part III.)

ARGUMENT

I. THIS COURT HAS EXPRESSED CONCERN THAT *WHREN* MIGHT FACILITATE RACIAL PROFILING.

At issue in *Whren* was "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws". *Whren*, 517 U.S. at 808. The Court held in the negative, finding that so long as the police officers had probable cause to believe that a traffic violation occurred, they could stop the vehicle without running afoul of the Fourth Amendment. *Id.* at 819. The Court held that "[s]ubjective intentions play no role in ordinary,

probable-cause Fourth Amendment analysis". *Id.* at 813.

While declining to consider the police officers' "actual motivations" in assessing the reasonableness of a traffic stop, the Court acknowledged that "the Constitution prohibits selective enforcement of the law based on considerations such as race". *Id.* It ruled, however, that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment". *Id.* But, in subsequent Fourth Amendment cases, many members of this Court—including six of the nine Justices who joined the majority opinion in *Whren*—have expressed concern that *Whren* and related cases have shifted the balance too far in favor of police unaccountability.

One year after *Whren*, the Court considered whether the rule "that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, extends to passengers as well". *Maryland v. Wilson*, 519 U.S. 408, 410 (1997). The Court held that it does. *Id.* at 413-15. In his dissent, Justice Kennedy noted that "[t]he practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police." *Id.* at 423 (Kennedy, J., dissenting).

Several years later, the Court expanded the rule in *Whren* in ruling, in a 5–4 opinion, that the Fourth Amendment permits a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt

violation punishable only by a fine. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001). The Court explained that "the standard of probable cause 'applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations'". *Id.* at 354 (citation omitted). Justice O'Connor, in a dissent joined by Justices Stevens, Ginsburg and Breyer, observed that the "unbounded discretion" that the majority's opinion affords law enforcement "carries with it grave potential for abuse". *Id.* at 372 (O'Connor, J., dissenting). "Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual." *Id.* The majority's response—that the dissent's claims were "speculative" and have not "ripened into a reality", *id.* at 353 n.25—is now contradicted by empirical data and common experience, as discussed in Part II.

A month after the *Atwater* decision, the Court issued a *per curiam* opinion reversing the judgment of the Arkansas Supreme Court in *Arkansas v. Sullivan*, 532 U.S. 769 (2001). In that case, the Arkansas Supreme Court had declined to follow *Whren* on the ground that "much of it is *dicta*" and affirmed the suppression of evidence obtained after a pretextual arrest. *Id.* at 771. Justice Ginsburg, in a concurrence joined by Justices Stevens, O'Connor and Breyer, sympathized with the Arkansas Supreme Court, which "was moved by a concern rooted in the Fourth Amendment", and expressed concern that, following *Whren* and *Atwater*, "such exercises of official discretion are unlimited by the Fourth Amendment". *Id.* at 772-73. (Ginsburg, J., concurring). Justice

Ginsburg noted that the Court has "departed from *stare decisis* when necessary 'to bring its opinions into agreement with experience and with facts newly ascertained'", and urged the Court to do so "if experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests'". *Id.* at 773 (citations omitted).

Later that year, the Court in *United States v. Knights*, 534 U.S. 112, 116 (2001), considered whether a search pursuant to a condition of a probation order, supported by reasonable suspicion, satisfies the Fourth Amendment. The Court found that it does. *Id.* at 119-21. Separately concurring, Justice Souter wrote that he would "reserve the question whether *Whren*'s holding, that '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,' should extend to searches based only upon reasonable suspicion". *Id.* at 122-23 (Souter, J., concurring) (citing *Whren*, 517 U.S. at 813).

Most recently, in *District of Columbia v. Wesby*, 138 S. Ct. 577, 585 (2018), the Court considered whether officers have probable cause to arrest for unlawful entry despite a claim of good-faith entry, and whether they are entitled to qualified immunity. The Court answered both questions affirmatively, holding that, "[v]iewing these circumstances as a whole, a reasonable officer could conclude that there was probable cause to believe the partygoers knew they did not have permission to be in the house". *Id.* at 588. And, even if the officers lacked probable cause to arrest the partygoers, "a reasonable officer, looking at the entire legal landscape at the time of the arrests, could have interpreted the law as permitting the arrests". *Id.* at 593. Concurring in the judgment in

part, Justice Ginsburg noted that the facts in *Wesby* "lead[] [her] to question whether this Court, in assessing probable cause, should continue to ignore why the police in fact acted". *Id.* (Ginsburg, J., concurring in judgment in part). More broadly, Justice Ginsburg expressed concern that "[t]he Court's jurisprudence . . . sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection". *Id.* Noting that "[a] number of commentators have criticized the path we charted in *Whren* and follow-on opinions", Justice Ginsburg wrote that she "would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry". *Id.* at 594 (citation omitted).

Thus, since this Court decided *Whren*, six of the nine Justices who joined the opinion have expressed some measure of discontentment with the rule it established. All of these Justices have either explicitly voiced concern that *Whren* facilitates arbitrary searches and seizures by police officers, or implicitly suggested this concern by demanding that probable cause be met before a court ignores police officers' subjective intentions. Further, four of these Justices have objected to *Whren*'s perpetuation of abusive racial profiling practices. *See Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

II. THE COURT'S PREDICTION HAS BEEN CONFIRMED AS EMPIRICAL DATA AND COMMON EXPERIENCE DEMONSTRATE THAT RACIAL PROFILING IN WARRANTLESS TRAFFIC STOPS IS WIDESPREAD AND HAS HARMFUL CONSEQUENCES.

The concerns that this Court expressed about the implementation of *Whren* have come to pass. Empirical data and experience at the national level, and in Los Angeles where Mr. Banks was stopped, confirm that Black drivers are more likely than white drivers to be stopped by law enforcement. This demonstrable racial disparity imposes an undue burden on people of color, breeds distrust of the justice system and undermines the fair administration of justice for all.

A. Empirical Data Confirm the Prevalence of Racial Profiling in Warrantless Traffic Stops Nationwide and in Los Angeles, Where Mr. Banks Was Stopped.

A 2013 special report published by the Department of Justice's (DOJ) Bureau of Justice Statistics found that, nationwide, Black drivers are stopped, ticketed and searched at higher rates than white drivers. Lynn Langton & Matthew Durose, Bureau of Just. Stat., Police Behavior During Traffic and Street Stops, 2011, at 1 (Sept. 2013). This is consistent with data that the DOJ collected in investigating civil rights issues within police departments across the country. In 2014, the DOJ concluded that "[a]pproximately 80% of . . . stops and arrests" in Newark, New Jersey "involved black individuals", whereas only 53.9% of Newark's

population is Black. C. R. Div., DOJ, Investigation of the Newark Police Department 16 (2014). Similarly, in 2015, the DOJ found that "85% of vehicle stops, 90% of citations, and 93% of arrests" in Ferguson, Missouri, involved Black people although "only 67% of Ferguson's population" is Black. C. R. Div., DOJ, Investigation of the Ferguson Police Department 4 (2015) (hereinafter "Ferguson Investigation"). In 2016, the DOJ concluded that although Baltimore's driving age population is only 60% Black and the metropolitan area's driving age population is only 27% Black, 82% of vehicle stops were of Black individuals. C. R. Div., DOJ, Investigation of the Baltimore City Police Department 7 (2016) (hereinafter "Baltimore Investigation").

Data at the state and city level without DOJ involvement corroborate these findings. A Nebraska commission concluded that in the two most populous counties, "Black drivers are stopped almost twice as frequently as compared to the population estimated numbers". Neb. Comm'n on L. Enf't & Crim. Just., Traffic Stops in Nebraska: A Report to the Governor and the Legislature on Data Submitted by Law Enforcement 4, 16-17 (2014). Maryland and Minnesota commissions have reported similar concerns. *See* Md. Just. Analysis Ctr., Report to the State of Maryland on Law Eligible Traffic Stops 8-9 (2004); Inst. on Race & Poverty and Council on Crime & Just., Minnesota Statewide Racial Profiling Report: All Participating Jurisdictions 1 (2003).

At the same time, there is no evidence that Black drivers are more likely to commit traffic offenses; in fact there is evidence that stopped Black drivers are *less* likely than stopped white drivers to possess

evidence of criminal activity. *See* Ferguson Investigation, *supra*, at 4 (finding that Black drivers searched by Ferguson police were "found in possession of contraband 26% less often than white drivers"); Baltimore Investigation, *supra* at 7 (finding that Black drivers searched by Baltimore police were found to possess contraband half as often as white drivers); Emma Pierson, *et al.*, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736, 738-39 (2020) (concluding that, across eight states and six municipalities, stopped white motorists were more likely to possess contraband than stopped Black or Latinx motorists).

Empirical data support the conclusion that Black drivers are stopped more frequently due to racial biases. Aggregated data of 95 million traffic stops across 56 police departments from 2011 to 2018 reveal that Black drivers were consistently stopped at higher rates than white drivers, but were less likely to be stopped after sunset, when a driver's race is less easily detected. Pierson *et al.*, *supra*, at 737-40. Minneapolis data similarly show that Black individuals are nearly nine times more likely than white individuals to be arrested for traffic violations during afternoon hours. By contrast, during late evening and early morning, when race is less easily observed, Black drivers are only twice as likely as white drivers to be arrested for traffic violations. Minn. Advisory Comm. to the U.S. Comm'n on C.R., Civil Rights and Policing Practices in Minnesota 9 (2018).

In this case, police officers stopped Mr. Banks on March 31, 2001 in Los Angeles, where police misconduct was rampant at that time. Many officers in the Los Angeles Police Department (LAPD) were

engaging in misconduct, notably surrounding the Rampart corruption scandal. *See* Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 549 (2001) ("Rampart is the worst scandal in the history of Los Angeles."). In 2000, the DOJ determined that the LAPD had been engaging in a pattern or practice of "improper seizures of persons, including making police stops not based on reasonable suspicion and making arrests without probable cause". Letter from Bill Lann Lee, DOJ, to James Hahn, L.A. City Attorney, LAPD Notice of Investigation Letter (May 8, 2000), https://www.justice.gov/crt/lapd-notice-investigation-letter.

Unfortunately, there are no data regarding traffic stops at the time of Mr. Banks's encounter with the LAPD. But Los Angeles stop data from July 2018 onwards show that 27% of those stopped by LAPD are Black, whereas only 9% of Los Angeles's population is Black. *See* Ben Poston & Cindy Chang, *LAPD Searches Blacks and Latinos More. But They're Less Likely to Have Contraband Than Whites*, L.A. Times (Oct. 8, 2019). The data also show that equipment violations, such as broken taillights, were the stated reasons for more than 20% of vehicle stops involving people of color, but only 11% of stops involving whites. *Id.* Further, according to the data, a Black person in a vehicle is four times more likely than a white person to be searched. *Id.* Finally, the data show that contraband was found in a higher proportion of searches of white people than those of people of color. *Id.*

These data, comprising millions of stops across the country spanning decades, confirm both that "people of color are disproportionate victims of [police] scrutiny", *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting), and that "conscious and unconscious prejudice persists in our society", *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring). It is no surprise that one of the ways in which this prejudice manifests itself is the racial profiling of people of color in warrantless traffic stops that *Whren* facilitates.

B. Racial Profiling in Warrantless Traffic Stops Unduly Burdens and Humiliates People of Color.

While the empirical data are important to confirm racial profiling in traffic stops throughout the country, the practices sanctioned by *Whren* impose a very real cost, borne disproportionately by people of color through humiliation, distrust of the justice system and the risk of violent encounters with the police. *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 312 n.196. These impacts are felt by people of color regardless of their station in life or standing in the community.

Many people of color have shared personal anecdotes of the burden and humiliation they regularly experience. Retired General Colin Powell has stated that he has been racially profiled "many times": "You just suck it up. What are you going to do? . . . [T]here is no African-American in this country who has not been exposed to this kind of situation." Rachel Weiner, *Powell On Gates: I've Been Racially*

Profiled 'Many Times', Huffington Post (Aug. 28, 2009). Former President Barack Obama has similarly stated, "[m]ost of the time I got a ticket, I deserved it. I knew why I was pulled over. . . . But there were times when I didn't. . . . [W]hen you aggregate all the cases and you look at it, you've gotta say that there's some racial bias in the system." Jennifer Bendery, *Obama On Racial Profiling: I've Been Pulled Over for No Reason, Too*, Huffington Post (Oct. 27, 2015). Senator Tim Scott has recounted how the Capitol Police pulled him over seven times in one year: "I have felt the anger, the frustration, the sadness and the humiliation that comes with feeling like you're being targeted for nothing more than being just yourself." Louis Nelson, *Sen. Tim Scott Reveals Incidents of Being Targeted by Capitol Police*, Politico (July 13, 2016). Robert Wilkins, now a D.C. Circuit judge, was stopped by police officers who did not explain the basis for the traffic stop and searched his car with a drug-sniffing dog even after he denied consent. David A. Harris, *Racial Profiling: Past, Present, and Future?*, ABA Crim. Just. Mag., Jan. 2020, at 11-13. And many well-known Black athletes and actors have been subject to racial profiling in traffic stops in Los Angeles. *See Washington v. Lambert*, 98 F.3d 1181, 1182 n.1 (9th Cir. 1996).[2]

Additionally, police encounters involving people of color all too often lead to the use of physical or deadly force. On April 4, 2015, an officer stopped Walter Scott for an alleged taillight violation. When

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[2] *See also* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 U. Minn. L. Rev. 265, 269-75 (1999) (describing the pain, humiliation and anguish racial profiling inflicts on individual people of color).

Scott attempted to flee, the officer shot him five times including three times in his back, killing him at the scene. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. Times (Apr. 7, 2015). Several months later, an officer stopped Sandra Bland for an improper lane change. She was arrested for assaulting the officer and died in jail three days later. *See* Ben Mathis-Lilley & Elliott Hannon, *A Black Woman Named Sandra Bland Got Pulled Over in Texas and Died in Jail Three Days Later. Why?*, Slate (July 17, 2015). On July 6, 2016, an officer stopped Philando Castile to check his identification because his "wide-set nose" reminded the officer of someone involved in a robbery. When asked, Castile informed the officer that he had a weapon. Seconds later, the officer shot and killed Castile thinking he was reaching for his weapon, even though his girlfriend stated that Castile was reaching for his identification. Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged With Manslaughter*, N.Y. Times (Nov. 16, 2016).

Unfortunately, deadly encounters between police and people of color continue to occur. George Floyd was recently killed in an encounter with police that began when he allegedly passed a counterfeit $20 bill. Evan Hill *et al.*, *How George Floyd Was Killed in Police Custody*, N.Y. Times (May 31, 2020). Floyd died after an officer knelt on his neck for more than 8 minutes, despite his calls that he could not breathe. *Id.* Floyd's was one of many deadly encounters between police and people of color this year. *See* Richard Fausset & Shaila Dewan, *Outrage Prompts New Scrutiny of Police Killings*, N.Y. Times (June 21,

2020). These tragedies sparked a significant movement centered on racial disparities and police misconduct. Larry Buchanan, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020). Now is an opportune time for the Court to reassess the constitutional standard applicable to one of the most common encounters people have with the police—traffic stops.

III. THIS COURT SHOULD OVERRULE *WHREN* AND HOLD THAT PRETEXTUAL TRAFFIC STOPS VIOLATE THE FOURTH AMENDMENT.

A. This Court Should Adopt a Rule Against Pretextual Traffic Stops.

In view of the dangers that *Whren* presents, the Court should overrule *Whren* and adopt a rule that prohibits pretextual traffic stops. This rule is in keeping with the Court's observation that the "basic purpose" of the Fourth Amendment, "as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials". *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967).

Since *Whren*, three state courts have adopted or expressed support for such a rule under their state constitutions. In *State v. Ladson*, the Washington Supreme Court ruled that Washington citizens have "a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant

requirement". 979 P.2d 833, 842 (Wash. 1999). Similarly, in *State v. Ochoa*, the New Mexico Court of Appeals held that "pretextual traffic stops are not constitutionally reasonable". 206 P.3d 143, 155 (N.M. Ct. App. 2008).[3] Finally, while Alaska courts have not squarely decided the question, the Alaska Court of Appeals has recognized that "a traffic stop is a 'pretext' only if the defendant proves that, because of this ulterior motive, the officer departed from reasonable police practices by making the stop". *Chase v. State*, 243 P.3d 1014, 1019 (Alaska Ct. App. 2010) (citations omitted).

This Court should adopt an objective test that inquires whether a reasonable police officer, given the same circumstances, would have made the traffic stop absent the pretext. *See Scott v. United States*, 436 U.S. 128, 137 (1978) ("[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.").

An important factor in the objective test should be whether police officers are abiding by their own enforcement policies. Before *Whren*, this Court repeatedly inquired into whether standard police procedures were followed, and when the Court upheld police actions, it stressed the absence of evidence of bad faith. *See Colorado v. Bertine*, 479 U.S. 367, 372-73 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976); *Cady v. Dombrowski*, 413 U.S. 433, 443,

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[3] The New Mexico Supreme Court has recognized *Ochoa* as the law. *See State v. Gonzales*, 257 P.3d 894, 897-99 (N.M. 2011).

447 (1973). "When the police consistently choose to enforce the law—here, the traffic code—by using standards different from those written into the code, then the appropriate baseline for assessing the reasonableness of police conduct is by evaluating that conduct against the police department's own chosen enforcement practices and policies." Jonathan Witmer-Rich, *Arbitrary Law Enforcement Is Unreasonable: Whren's Failure To Hold Police Accountable for Traffic Enforcement Policies*, 66 Case W. Res. L. Rev. 1059, 1062 (2016). Indeed, "the proper basis of concern is not with *why* the officer deviated from the usual practice in this case but simply that he *did* deviate. It is the *fact* of the departure from the accepted way of handling such cases that makes the officer's conduct arbitrary, and it is the arbitrariness that in this context constitutes the Fourth Amendment violation." Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.4(e) (5th ed. 2012).

This objective test is not novel. A number of circuits applied this test before *Whren*. *See United States v. Cannon*, 29 F.3d 472, 475-76 (9th Cir. 1994); *United States v. Hawkins*, 811 F.2d 211, 213-14 (3d Cir. 1987); *United States v. Smith*, 799 F.2d 704, 710-11 (11th Cir. 1986). The Court itself applied essentially the same standard in the landmark case of *Terry v. Ohio*. There the Court held that the test for assessing the constitutionality of a stop and frisk is objective, asking whether "the facts available to the officer at the moment of the seizure or the search [would] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate". *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). The objective test is

also used in other areas of criminal procedure and substantive law. *See* Diana Roberto Donahoe, *"Could Have," "Would Have": What the Supreme Court Should Have Decided in Whren v. United States*, 34 Am. Crim. L. Rev. 1193, 1203-04, 1209 (1997).

Of course, the use of an objective standard does not require courts to blind themselves to subjective evidence of race-based traffic enforcement, where available. Courts can and should consider that evidence as part of the totality of the circumstances. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (holding that "reasonableness . . . is measured in objective terms by examining the totality of the circumstances" and noting that "we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"). And "history seems to suggest that intentions matter—at least to the extent to which officers mask their intent to target disfavored groups". Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 1005 (1999).

The Court should give Mr. Banks an opportunity on remand to show that his stop was pretextual and hence unconstitutional. The objective facts of record strongly suggest that the police made a pretextual stop. The two officers who stopped Mr. Banks were working on a "crime suppression detail" in Los Angeles. Appellant's Excerpts of Record at 104, *United States v. Banks*, No. 17-50103 (9th Cir.), Dkt. No. 34 (hereinafter "AER"). One officer worked in LAPD's SWAT division, and the other worked on LAPD's vice squad. *Id.* at 103-04. At the suppression hearing, the SWAT officer testified that he didn't "write a lot of [traffic] citations . . . because that's not

[his] primary duty, for traffic enforcement". *Id*. at 111-12. And he was unaware that California law prohibits the type of arrest he ultimately made. *See id*. at 122; *see also* Cal. Veh. Code § 12801.5(f).

Nevertheless, the officers stopped Mr. Banks, allegedly for an unsafe lane change. AER at 105, 112-13. Mr. Banks and the three passengers who were in his car are Black, and the traffic stop occurred during the daytime. *Id.* at 106-108, 115; *see* Pierson *et al.*, *supra*, at 737-39 (finding that time of day affects the likelihood that Black drivers are stopped, as their race is more easily detected before sunset). Despite the officers' purported reason for stopping Mr. Banks, neither officer issued a ticket or citation for any traffic infraction. *See* AER at 122. The officers ordered Mr. Banks out of his car, patted him down and found no weapons or contraband. *Id.* at 116. They could have issued a traffic ticket or citation after the stop or the frisk and sent Mr. Banks on his way, but they did not. Instead, they arrested Mr. Banks—in violation of California law prohibiting such an arrest—handcuffed him in the police car and detained him and the passengers in his car for 30 minutes. *Id.* at 123. During that 30-minute period, the officers continued their investigation by questioning the passengers in the car. *Id.* at 118. It strains credulity to believe that the vice officer's presence in this interrogation about prostitution was the coincidental result of an unlawful lane change. From these objective facts, the district court could conclude that the stop of Mr. Banks was pretextual.

B. *Whren* Was Wrongly Decided, and Its Result Is Not Compelled by This Court's Fourth Amendment Precedents.

The Court should also reconsider *Whren* because the rule it established was not compelled by this Court's precedent. None of the eight cases that the Court analyzed in *Whren* to reach its conclusion prevented the Court from adopting a rule against pretextual stops.

In *Whren*, the petitioner relied on four cases to argue that the Court should consider the police officer's purpose in conducting a traffic stop. In these cases, the Court had stated that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence", *Florida v. Wells*, 495 U.S. 1, 4 (1990); that it was significant that there had been "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation", *Colorado v. Bertrine*, 479 U.S. 367, 372 (1987); that an upheld warrantless administrative inspection did not appear to be "a 'pretext' for obtaining evidence of . . . violation of the penal laws", *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987); and that "[t]here was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants" of the car, *Colorado v. Bannister*, 449 U.S. 1, 4 n.4 (1980). These pre-*Whren* precedents all suggest that pretextual searches are problematic under the Fourth Amendment.

The Court distinguished the first three cases as inventory and administrative-inspection cases in which the Court was "addressing the validity of a

search conducted in the *absence* of probable cause". *Whren*, 517 U.S. at 811. The Court failed, however, to explain *why* pretext matters only for inventories and administrative inspections. Indeed, there is a stronger argument that pretext should matter in the traffic stop context: In view of the ease with which police officers can find that any motorist has violated a traffic law, the probable cause requirement for minor traffic offenses provides less protection against arbitrariness than do the requirements to which inventories and administrative inspections are subject. *See* LaFave, *supra*, § 1.4(f). Finally, unable to distinguish *Bannister* on the same ground, the Court found that the language in *Bannister* regarding pretext was "dictum". *Whren*, 517 U.S. at 812.

None of the four cases on which the *Whren* Court relied compel the opposite result. In *United States v. Villamonte-Marquez*, the Court made an uncontroversial observation that the Coast Guard's power to stop vessels without suspicion may also be used against vessels suspected of involvement with smuggling. 462 U.S. 579, 584 n.3, 592-93 (1983). The *Whren* Court misread the next precedent: What the Court claimed was the holding in *United States v. Robinson* was in reality a paraphrase of the respondent's factual argument in the lower court. 414 U.S. 218, 221 n.1 (1973). The lower court rejected the respondent's argument because it found the search to be unconstitutional for other reasons. *Id.* Whether the arrest was pretextual was not a question before the Court in *Robinson*. Rather, the Court assumed a lawful arrest and pronounced a bright-line rule that police officers may search a person incident to a lawful custodial arrest based on probable cause. *Id.* at 236.

The same is true of *Gustafson v. Florida*, where "the petitioner ha[d] fully conceded the constitutional validity of his custodial arrest". 414 U.S. 260, 267 (1973) (Stewart, J., concurring). Finally, *Scott v. United States* is not a pretext case, and its observation that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional" is beside the point. 436 U.S. 128, 136 (1978). Neither the petitioner in *Whren* nor *Amicus* in this case are advocating for a test based on the officer's subjective intent. (*Supra* Part III.A.)

For these reasons, the Court's precedent did not "foreclose" the Court in *Whren* from adopting a rule against pretextual traffic stops. *Whren*, 517 U.S. at 813. Although the Court did not adopt such a rule then, it should do so now.

C. *Whren* Should Be Overruled for Other Reasons Fundamental to the Fourth Amendment.

Finally, the Court should overrule *Whren* because it is inconsistent with the historical understanding and purpose of the Fourth Amendment. The Founders adopted the Fourth Amendment because they were concerned with the arbitrary and indiscriminate nature of the law enforcement tools of general warrants and writs of assistance. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 254-58 (1989); s*ee also Payton v. New York*, 445 U.S. 573, 583-85 & n.21 (1980). The same concerns that alarmed the Founders about

indiscriminate and arbitrary power of government officials are present in pretextual traffic stops.

Whren's refusal to consider police manuals and procedures in determining whether a stop is reasonable also conflicts with the Fourth Amendment's purpose to protect against indiscriminate and arbitrary exercises of government power. While the Court admitted that "police manuals and standard procedures may sometimes provide objective assistance", it went on to say that "police enforcement practices . . . vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Whren*, 517 U.S. at 815-16 (citations omitted). But these so-called trivialities are critical for evaluating whether police officers exercised their powers arbitrarily. A practice that is contrary to California law or to LAPD guidelines may be evidence that the search was pretextual, when the same search in a different location at a different time may not be pretextual. Disregarding "place" and "time" undermines the Fourth Amendment's guarantee against arbitrary use of government power.

Moreover, the *Whren* rule undermines the legitimacy of the law by encouraging untruths regarding the real reasons for police actions and thereby builds distrust among people of color. *See generally* Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case W. Res. L. Rev. 931 (2016). *Cf. United States v. Gross*, 784 F.3d 784, 789-90 (D.C. Cir. 2015) (Brown, J., concurring) (describing how unacceptable "a rolling roadblock" in high-crime D.C. neighborhoods would be

if put in place in Georgetown). Eliminating pretextual traffic stops will help to restore confidence in the police and legal system.

CONCLUSION

For the reasons stated, *Amicus* respectfully requests that the Court grant Petitioner's request for a writ of certiorari.

Respectfully submitted,

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