No. 17-1349

In the Supreme Court of the United States

RANDY JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment entitled petitioner to suppression of evidence discovered after officers temporarily detained a car in which he was a passenger, where the seizure was objectively supported by probable cause that the car was violating a statute that prohibits parking in certain locations, but petitioner contends that the officers' subjective motivations rendered the seizure pretextual.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 874 F.3d 571. A prior opinion of the court of appeals (Pet. App. 21a-37a) is reported at 823 F.3d 408. The order of the district court (Pet. App. 38a-51a) is not published in the Federal Supplement but is available at 2014 WL 12656902.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2017. On January 5, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 26, 2018, and the petition was filed on March 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a. He was sentenced to 46 months of imprisonment, to be followed by three years of supervised release. Gov't C.A. Br. 7. A panel of the court of appeals affirmed. Pet. App. 21a-37a. The court of appeals then granted rehearing en banc, vacated the panel decision, and again affirmed. *Id.* at 1a-20a.

1. On the evening of January 8, 2014, five officers from the Milwaukee Police Department's Street Crimes Unit of the Neighborhood Task Force, were on patrol in two squad cars. Pet. App. 40a. The officers were assigned to areas identified as "hot spots" of recent violent crimes. *Ibid.* At 7:41 p.m., they saw a black Toyota Highlander SUV stopped 7 or 8 feet from a crosswalk, with the engine running, in apparent violation of a Wisconsin statute that makes it unlawful to stop or stand within 15 feet of a crosswalk unless the car is "actually engaged in loading or unloading or in receiving or discharging passengers." *Id.* at 1a-2a (quoting Wis. Stat. Ann. § 346.53 (West 2005)); see *id.* at 5a-6a, 40a.

One of the squad cars pulled alongside the SUV and the other stopped behind it. Pet. App. 1a. Both cars shined their spotlights into the SUV, and three officers exited and approached it to conduct a field interview for the parking violation. *Id.* at 40a. The driver's seat of the SUV was unoccupied. *Id.* at 5a. As Officer Christopher Conway approached, he observed a passenger in the driver's-side back seat holding an item that appeared to be a handgun; he then observed the passenger

attempt to conceal the item by placing it on the floorboard behind the driver's seat. *Id.* at 41a. Officer Conway opened the car door, ordered the passenger out of the car, and placed him in handcuffs. *Ibid.* As he did so, he found a firearm on the floor under the driver's seat, where the passenger would have placed it. *Ibid.* Officer Conway alerted the other officers to arrest everyone in the vehicle. *Ibid.* The passenger was later identified as petitioner. *Ibid.*

2. A federal grand jury in the Eastern District of Wisconsin charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 39a. Petitioner moved to suppress the gun. Following an evidentiary hearing, a magistrate judge recommended that the suppression motion be denied. *Id.* at 39a-51a.

The magistrate judge explained that the record established that the officers had probable cause to believe that the SUV was violating a traffic law, and that they were not required to observe the car for longer to determine whether a statutory exception to that law for loading or unloading applied. Pet. App. 42a-43a. The magistrate judge additionally found that the officers were justified in investigating further after Officer Conway observed petitioner appear to conceal a gun behind the driver's seat. *Id.* at 45a-47a. The magistrate judge then relied on circuit precedent "reject[ing] the notion that there is a distinction between traffic and parking infractions" under the Fourth Amendment. *Id.* at 48a (citing *United States* v. *Thornton*, 197 F.3d 241, 248 (7th Cir. 1999), cert. denied, 529 U.S. 1010, and 529 U.S. 1022 (2000)). The district court also rejected petitioner's challenge to the manner in which the seizure was effectuated. *Id.* at 49a-51a.

The district court adopted the magistrate judge's report and recommendation, "including the reasoning supporting the recommendation," and denied petitioner's motion to suppress the evidence. Pet. App. 38a.

Petitioner entered a conditional guilty plea, reserving the right to appeal the suppression ruling. Pet. App. 2a. The district court sentenced him to 46 months of imprisonment, to be followed by three years of supervised release. Gov't C.A. Br. 7.

3. The court of appeals affirmed. Pet. App. 21a-26a. The court held that the police had probable cause to issue a ticket and that they were not required to reject all possible defenses or exceptions to the Wisconsin statute at issue before approaching the SUV. *Id.* at 22a-23a. The court further explained that the manner of the seizure, here, "the show of force through the use of two cars and bright lights," "d[id] not matter," and therefore was "not a basis for suppressing evidence," because the "discovery [of the evidence] would have occurred anyway." *Id.* at 24a. "It was the fact that the police approached the car that enabled them to see the gun. Everything else followed naturally (and legally)." *Ibid.*

Judge Hamilton dissented. Pet. App. 27a-37a. He would have suppressed the firearm on the theory that the particular statutory violation at issue did not justify the temporary seizure of the SUV. *Id.* at 30a-32a.

4. The court of appeals granted rehearing en banc and affirmed the district court's judgment. Pet. App. 1a-6a.

The court of appeals determined that the police had probable cause to issue a citation for the SUV's illegal location and "were entitled to approach the car before resolving" whether it fell within the scope of the statutory exception for receiving or discharging cargo or

passengers. Pet. App. 2a-3a. The court also rejected petitioner's argument that *Whren* v. *United States*, 517 U.S. 806 (1996), under which an officer's subjective motivations are irrelevant to the lawfulness of a seizure objectively supported by probable cause, is limited to moving offenses. Pet. App. 4a. The court explained that "*Whren* applies to parked as well as moving vehicles, and to parking violations as well as moving violations." *Ibid.* The court observed that "[t]he two doctrines that underlie *Whren*'s holding—(1) that probable cause justifies stops and arrests, even for fine-only offenses, and (2) that analysis of search-and-seizure issues disregards the officers' thoughts—are of general application." *Ibid.* The court additionally reasoned that "it would be easier to deem 'reasonable' (the constitutional standard) an officer's approach to a car already stopped than the halting of a car in motion." *Id.* at 5a; see *ibid.* ("The stop of a moving vehicle is more intrusive than approaching a parked car.").

The court of appeals acknowledged that "the police did more than just stroll up" to the parked car here; "two squad cars, which bathed the parked car in bright light, implied that the occupants were not free to drive away." Pet. App. 5a. The court observed, however, that "issuing a ticket always entails a brief seizure," noting petitioner's concession that "the driver of a car approached with probable cause to investigate a parking offense is not entitled to leave." *Ibid.* And the court determined that "both as a matter of the suspects' legal entitlements and as a matter of brute fact, it did not make any difference whether the police approached with two cars rather than one, or whether the cars' spotlights were on." *Id.* at 6a. The court observed that "no

one was in the driver's seat" when the officers approached, and that the SUV "was not going anywhere." *Id.* at 5a-6a.

The court of appeals also found no clear error in the district court's finding that "the way in which the stop was conducted was not responsible for the gun's discovery." Pet. App. 6a. The court of appeals therefore declined to consider whether the officers' show of force was excessive under the circumstances. *Ibid.* And because petitioner had not contended that the police had considered racial criteria in deciding to approach the car or choosing the manner in which they did so, the court "d[id] not consider whether, and if so when, using racial criteria to select among potential targets of investigation would require the suppression of evidence." *Ibid.*

Judge Hamilton, joined by two other judges, dissented. Pet. App. 7a-20a. In his view, "the doctrines allowing pretextual traffic stops" under *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Whren*, *supra*, should not apply to "mere parking violations." Pet. App. 11a. He also believed that the officers did not have a reasonable basis for suspecting that the vehicle was illegally parked before they seized it. *Id.* at 18a.

ARGUMENT

Petitioner contends (Pet. 8-26) that it violates the Fourth Amendment for police officers to approach and temporarily detain a car and its occupants where they have probable cause of a violation of a statute making it illegal to park in certain locations, if the officers' subjective intent in doing so incorporated a more generalized interest in obtaining evidence of crimes. He urges this Court to grant review and hold that the objective inquiry required under *Whren* v. *United States*,

517 U.S. 806 (1996), does not apply when police temporarily detain already-stopped cars for parking violations. The court of appeals correctly rejected petitioner's Fourth Amendment claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. The court of appeals correctly affirmed the district court's denial of petitioner's motion to suppress.

a. This Court has repeatedly made clear that the validity of searches and seizures under the Fourth Amendment must be determined under "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Scott* v. *United States*, 436 U.S. 128, 138 (1978). And "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810 (citing *Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979), and *Pennsylvania* v. *Mimms,* 434 U.S. 106, 109 (1977) (per curiam)). In *Whren*, the Court applied those principles to hold that the detention of a motorist based on probable cause to believe that he has violated the traffic laws was reasonable, despite the existence of an ulterior investigatory motive. The Court explained that "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis." *Id.* at 813. Rather, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814.

Application of those principles establishes the propriety of the officer's initial approach to and temporary seizure of the vehicle here and the incidental seizure of

its occupants. As both courts below recognized, the officers had probable cause to believe that the vehicle was parked illegally, which justified their approaching the vehicle to temporarily prevent the vehicle from leaving. Pet. App. 2a, 43a. Petitioner "concede[d]" below "that the driver of a car approached with probable cause to investigate a parking offense is not entitled to leave." *Id.* at 5a. And he no longer disputes that such probable cause existed here. Pet. 12.

The court of appeals correctly found no basis for distinguishing violations of statutes relating to moving violations from violations of statutes relating to parking violations, for purposes of assessing the validity of a temporary seizure based on probable cause. See Pet. App. 4a-6a. As the court of appeals recognized, "*Whren* did not create a special rule for moving offenses." *Id.* at 4a. The basic principles underlying *Whren*—(1) "that probable cause justifies stops and arrests, even for fine-only offenses"; and (2) "that analysis of search-and-seizure issues disregards the officers' thoughts"—"are of general application." *Ibid.* If anything, approaching a stopped car for a possible parking violation and temporarily preventing it and its occupants from leaving is *less* intrusive than stopping a moving car for a traffic violation, for the simple reason that a parked car is already stopped. See *id.* at 5a. Accordingly, regardless of any inquiry into the officers' subjective investigative motives, it was consistent with the Fourth Amendment for the officers here to initially approach and detain the vehicle and its occupants for a possible parking violation.

b. Petitioner argues that, in determining whether the seizure for a parking violation was reasonable within the meaning of the Fourth Amendment, the court of

appeals should have balanced "the 'need' for a seizure against the 'invasion' it entails." Pet. 10 (quoting *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968)). But as this Court held in *Whren*, "[w]ith rare exceptions not applicable here," case-by-case balancing is not required when police perform a stop on the basis of probable cause. 517 U.S. at 817; cf. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001) (confirming that "the standard of probable cause 'applie[s] to all arrests, without the need to balance the interests and circumstances involved in particular situations'") (quoting *Dunaway* v. *New York*, 442 U.S. 200, 208 (1979)) (brackets in original). And here, it is undisputed that the police had probable cause when they initially approached and detained the SUV.

Petitioner also contends (Pet. 9-10) that the police interest in enforcing parking violations is less significant than the interest in enforcing moving violations. But the Court in *Whren* itself rejected a similar argument, explaining that it "d[id] not know by what standard (or what right) [it] would decide, as [the petitioners there] would have [it] do, which particular provisions are sufficiently important to merit enforcement." 517 U.S. at 818-819. Petitioner's proposed dichotomy between different types of traffic laws is unsound. It makes little sense that, say, an expired tag would justify the seizure of a moving car but not a nonmoving one, or that the lawfulness of seizing a nonmoving car would depend on whether a violation were related to parking. Any distinction between a parking and moving violation is particularly illusory on the facts of this case, where the car was occupied and the motor was running. See Pet. App. 40a.

The Court has also considered—and rejected—petitioner's contention (Pet. 17-18) that pretextual seizures "threaten to swallow the protections of the Fourth

Amendment" because "there is no shortage of minor offenses." See *Whren*, 517 U.S. at 818 (stating that the Court was "aware of no principle that would allow [it] 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"). Petitioner's argument thus ultimately takes issue with the decisions by States and localities to designate such conduct as enforceable infractions, a matter best entrusted to "the good sense (and failing that, the political accountability)" of local lawmakers. *Atwater*, 532 U.S. at 353.

c. Petitioner emphasizes "the police tactics used to seize" him, which he describes as "'sudden' and 'terrifying.'" Pet. 10 (citation omitted). But the unusual manner of the seizure is not the proper subject of this particular suppression motion.

This Court has explained that "but-for causality is * * * a necessary * * * condition for suppression." *Hudson* v. *Michigan*, 547 U.S. 586, 592 (2006). And here, the court of appeals stated that it found no clear error in a finding by the district court that "the way in which the stop was conducted was not responsible for the gun's discovery." Pet. App. 6a. "[I]t did not make any difference whether the police approached with two cars rather than one, or whether the cars' spotlights were on," the court of appeals explained, because "no one was in the driver's seat" when the officers approached and therefore the "car was not going anywhere" regardless of how they approached. *Id.* at 5a-6a. Accordingly, in reviewing the district court's denial of petitioner's motion to suppress, the court had no occasion to address "whether the officers' show of force

was excessive under the circumstances." *Id.* at 6a. Petitioner's suppression motion instead hinged upon the lawfulness under the Fourth Amendment of simply approaching the SUV and preventing it and its passengers from leaving, where the officers had probable cause to believe that a statutory violation was occurring. And for the reasons set forth above, the Fourth Amendment permits such a temporary investigative seizure based on probable cause.

2. Contrary to petitioner's contention (Pet. 12-13), no conflict exists warranting this Court's review. As petitioner recognizes (Pet. 13), every court of appeals to have considered the issue has held that a parking violation, even if punishable only as a civil infraction, constitutes a traffic violation governed by *Whren*. See *United States* v. *Choudhry*, 461 F.3d 1097, 1103-1104 (9th Cir. 2006), cert. denied, 549 U.S. 1236 (2007); *Flores* v. *City of Palacios*, 381 F.3d 391, 402-403 & n.9 (5th Cir. 2004); *United States* v. *Copeland*, 321 F.3d 582, 593 (6th Cir. 2002); see also *United States* v. *Spinner*, 475 F.3d 356, 358 (D.C. Cir. 2007) (noting that the circuits "have found no legally meaningful distinction between a parking and a moving violation" for *Terry* stop purposes, but finding it unnecessary to resolve the question).

In claiming a conflict, petitioner relies (Pet. 12) on a single case from one state court of last resort. *State* v. *Holmes*, 569 N.W.2d 181 (Minn. 1997). But the decision below does not conflict with *Holmes*. In *Holmes*, the Supreme Court of Minnesota determined that reasonable suspicion of a parking violation did not justify the seizure of the defendant, after a parking monitor "already had *enforced*" the parking violation "by issuing [a] ticket and ordering [a] tow." *Id.* at 185. That case involved a circumstance in which a parking monitor had

approached an unoccupied car, issued a ticket, ordered a tow, and positioned her vehicle so that the car could not leave, before the defendant arrived on the scene. *Id.* at 182-183. When the defendant did arrive, an officer seized his person at that point. *Ibid.* This case, by contrast, concerns the propriety of approaching and temporarily detaining the car and its occupants in order to enforce the parking laws in the first instance. Indeed, *Holmes* itself recognized that police may stop a person for a parking violation, on probable cause, "if the stop is necessary to enforce the violation." *Id.* at 185. Petitioner thus cannot show that he would prevail if this case arose in the Minnesota courts.[*]

Petitioner also relies (Pet. 12-13) on a decision of an intermediate state appellate court, the Maryland Special Court of Appeals. See Md. Code Ann., Cts. & Jud. Proc. § 1-401 (West 2013) ("The Court of Special Appeals * * * is an intermediate court of appeal"). But any conflict between that decision and the decision below would provide no basis for further review by this Court. See Sup. Ct. R. 10. In any event, the case that petitioner cites, *In re Calvin S.*, 930 A.2d 1099 (Md. Ct. Spec. App. 2007), considered the distinct question whether the police unlawfully searched a minor's person after they observed him committing the civil violation of underage smoking. See *id.* at 1102. Accordingly, the decision below is correct and does not conflict with

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[*] Some language in *Holmes* suggests that the Supreme Court of Minnesota understood *Whren* to be limited to "serious" offenses. 569 N.W.2d at 185. But *Holmes* was decided before *Atwater*, which held that *Whren*'s probable-cause rule applies to all arrests, including a "very minor criminal offense" punishable only by a fine. *Atwater*, 532 U.S. at 354. In any event, there is no conflict between *Holmes* and the decision below.

any decision of this Court, another court of appeals, or any state court of last resort. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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