No. 17-1349

In the Supreme Court of the United States

RANDY N. 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

BRIEF OF FOURTH AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Whren* v. *United States*, 517 U.S. 806 (1996), this Court held that the Fourth Amendment did not prohibit a pretextual traffic stop, as long as there was probable cause to believe that the driver had committed a moving violation. The majority explained that in that context, "[s]ubjective intentions play no role." *Id.* at 813. In this case, the Seventh Circuit extended *Whren* to allow a pretextual seizure based on probable cause to believe that there had been a civil parking infraction. This decision—which conflicts with state court decisions addressing similar infractions—threatens to undermine any "reasonableness" limitation on seizures and to create virtually unbridled police power to engage in racial profiling and interfere with the liberty of private citizens.

With this context, the question presented in this case is:

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

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

A bare majority of the *en banc* Seventh Circuit has held that the Fourth Amendment does not prohibit a dramatic and intrusive seizure of a passenger in a parked car as long as the objective circumstances enable the officer to rely on the pretext of a parking violation. *United States* v. *Johnson*, 874 F.3d 571 (7th Cir. 2017). This decision represents a significant extension of *Whren* v. *United States*, 517 U.S. 806 (1996), which permits a pretextual stop if the officer has probable cause to believe that the driver committed a *moving* violation. The Seventh Circuit's decision stands in conflict with state court decisions that have held that minor civil infractions require a different Fourth Amendment analysis. Indeed, the Seventh Circuit's approach threatens to remove any sense of "reasonableness" in Fourth Amendment analysis and poses a serious "risk of arbitrary control by the police." *Maryland* v. *Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting).

Amici are legal scholars with decades of experience studying the Fourth Amendment and its impact on American society. See Appendix (listing the scholars joining this brief). They respectfully submit this brief to alert the Court to the Seventh Circuit's problematic

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[*] Pursuant to Rule 37.2, counsel for amici provided ten days' notice of its intention to file this brief. All parties have consented, and letters evidencing that consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity has made a monetary contribution intended to fund the preparation or submission of this brief. See R. 37.6.

extension of *Whren*, and they urge this Court to grant review to resolve the conflict.

Amici further urge the Court to use this case as an opportunity to consider the issue of pretextual seizures more broadly, exploring when it may be appropriate to consider the officer's true motivation. At a minimum, when the only available basis for the seizure is a civil parking violation—which normally requires the officer to do nothing more than write out a parking citation and drop it on the windshield of an unoccupied vehicle—the fact that the officer acted pursuant to an ulterior motive must play some role in the analysis. To hold otherwise would be to sanction virtually unlimited police power to intrude on the civil liberties of private citizens.

STATEMENT

On a cold winter night in Milwaukee, five police officers in two police cars patrolled a neighborhood looking for small infractions in the hope of finding "bigger and better things." The officers came upon a vehicle parked within 15 feet of a crosswalk, apparently in violation of a civil parking restriction. The driver was not present.

Rather than simply noting the license number and writing a parking citation, the officers used their cars to box the vehicle in and turned on blinding spotlights. As the officers approached the car, one noticed a passenger moving in a manner suggesting that he was hiding something "such as alcohol, drugs, or a gun." The officers then removed the occupants from the vehicle and put them in handcuffs. The officers found a handgun in the vehicle and later charged the passenger, Randy N. Johnson, with possessing a firearm illegally. No parking citation was ever issued.

Johnson moved to suppress the evidence obtained during the search of the car. The district court denied the motion, holding that neither the initial seizure of the car and its occupants nor the subsequent seizures of the occupants themselves violated the Fourth Amendment. A divided Seventh Circuit, sitting *en banc*, affirmed the district court's decision, with the majority concluding that *Whren* applies to parking violations as well as moving violations.

REASONS FOR GRANTING THE PETITION

Virtually everyone has committed a parking violation at some point in time, knowingly or not. Usually, this results in nothing more than an orange ticket under the windshield wiper—often issued by a city employee rather than a police officer—and a civil fine. The person issuing the ticket need not do anything other than write out the citation (often from the comfort of his or her own vehicle) and put it on the offending car. There is no need to gather information about the driver or the car's occupants; the only relevant information is about the vehicle itself. No investigation or search is required, and no arrest is permitted.

In the Seventh Circuit, however, officers now also have the power to use a parking violation as a pretext to obstruct the car, force any occupants out of the vehicle, and look for evidence that something "bigger and better" is going on. This opens the door for abuse, allowing a parking violation to serve as a cover for racial profiling and other biases. The cost to civil liberties is dramatic.

The Seventh Circuit's decision conflicts with governing authority in at least three states, and this Court should grant a writ of certiorari to resolve the conflict. The issue is a critical one, as it implicates the

"'epidemic of unnecessary minor-offense arrests'" that erode the core of the Fourth Amendment and undermine the pillars of a free society. See *Arkansas* v. *Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) (quoting *Atwater* v. *Lago Vista*, 532 U.S. 318, 353 (2001)).

In addition, this case gives the Court the opportunity to "reexamin[e]" the "path charted in *Whren*" and clarify "whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry." *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part). At a minimum, the "reasonableness" and "balance" embodied in the Fourth Amendment require considering whether the officer acted on an ulterior motive when he conducted an intrusive seizure based on a mere parking violation.

I. This Court should grant review to resolve a disagreement about what officers may or may not do based on a minor, non-moving civil infraction.

This Court has held that an officer's true motivations for making a traffic stop are irrelevant, as long as he had probable cause to believe that the driver had committed a moving violation. *Whren*, 517 U.S. at 808. Courts disagree about whether this rule extends to minor civil infractions, like parking violations. This Court should grant certiorari to resolve that conflict—and to avoid the extraordinary expansion of police power that the Seventh Circuit's approach represents.

A. Courts disagree about whether officers can conduct a seizure and attendant search based on a minor, non-moving civil infraction.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court authorized investigatory stops without a warrant when the police officer has a reasonable suspicion that a person is engaged or is about to engage in a crime. In *Whren*, this Court extended *Terry* to permit intrusive traffic stops based on the pretext of investigating a moving violation.

As Judge Hamilton noted in his dissent below, "[t]his combination of constitutional decisions already enables a host of aggressive and intrusive police tactics." *Johnson*, 874 F.3d at 577. For example:

> Officers who have probable cause for a trivial traffic violation can stop the car under *Whren* and then order all occupants out of the car, *Maryland* v. *Wilson*, 519 U.S. 408 (1997), often frisk them, *Arizona* v. *Johnson*, 555 U.S. 323 (2009), question them in an intimidating way, visually inspect the interior of the car, *Colorado* v. *Bannister*, 449 U.S. 1, 4 & n.3 (1980), often search at least portions of the vehicle's interior, *Arizona* v. *Gant*, 556 U.S. 332 (2009); *Michigan* v. *Long*, 463 U.S. 1032 (1983), and hold the driver and passengers while a drug-detection dog inspects the vehicle, *Illinois* v. *Caballes*, 543 U.S. 405, 406–08 (2005).

Id. at 577–78. In addition, *Terry* and *Whren* permit a pretextual seizure even when the pretext is based on

an officer's mistake of law or fact. *Heien* v. *North Carolina*, 135 S.Ct. 530, 536 (2014). The traffic stop has thus effectively become "'the twentieth-century version of the general warrant.'" *Johnson*, 874 F.3d at 575 (quoting Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616, 1669 (2016)).

By extending *Whren* to a minor parking violation, the Seventh Circuit has dramatically expanded these already broad police powers. Now, in the Seventh Circuit, the occupant of a car who is digging around for coins to feed an expired parking meter could be seized and searched, facing potential prosecution based on anything the search uncovers. Other circuits have applied a similar analysis, holding that in the case of a parking violation, if the driver chooses to leave the scene, he can be chased, seized, and searched, and the proceeds of that search may be used against him. See *Flores* v. *Palacios*, 381 F.3d 391, 402–03 (5th Cir. 2004); *United States* v. *Copeland*, 321 F.3d 582, 594 (6th Cir. 2003); *United States* v. *Choudhry*, 461 F.3d 1097, 1101 (9th Cir. 2006). These decisions further illustrate the dangers of allowing *Whren* to stand without clarification.

The courts of several states have interpreted the Fourth Amendment differently, holding that the "reasonableness" inherent in the Fourth Amendment would not permit a seizure based on probable cause to believe the individual committed a minor civil infraction. In *State* v. *Holmes*, for example, the Supreme Court of Minnesota concluded that police officers may not seize an individual merely because he had parked illegally. 569 N.W.2d 181, 184 (Minn. 1997). In *Holmes*, a parking monitor discovered a car parked without a permit and, after learning that the car had several unpaid parking tickets, called a tow truck. *Id.*

at 182. When the driver returned to the car, the monitor called for assistance and an officer arrived on the scene. *Id.* at 182–83. The officer detained the driver, obtained his keys, and found a handgun in the locked glove compartment. *Id.* at 183–84. He then arrested the driver on a charge of unlawfully possessing a gun. *Id.* at 184. The court held "that the police officer's seizure of [the driver] was unreasonable and therefore unconstitutional" and therefore "[affirmed] the trial court's order suppressing all the evidence that came as a result of the subsequent frisk and interrogation." *Id.* at 185–86.

Notably, the court in *Holmes* ultimately concluded that, because this Court limited seizures under *Terry* "to those situations where the suspected violation is serious," "a police officer who merely has reasonable suspicion that a parking violation has occurred cannot seize an individual for the purpose of investigation." *Id.* at 185. In such a case, the Fourth Amendment analysis must take account of whether the officer was acting with an ulterior motive. As the *Holmes* court explained,

> A police officer who has probable cause to believe that a person has committed a parking violation can stop the person only if the stop is necessary to enforce the violation, for example, if a person is attempting to drive off with an illegally parked car before the officer can issue the ticket. We conclude, as did the trial court, that the officer did not stop Holmes for the purpose of enforcing the known violation. Not only do police officers typically enforce parking violations by applying a ticket to the parked car, the facts show

> that the parking monitor on the scene already had enforced the violation by issuing the ticket and ordering the tow.

Ibid. Central to the Court's reasoning was the fact that parking violations are inherently different from the moving violations at issue in *Whren* and therefore require a different analysis under the Fourth Amendment. *Ibid.* ("Although there has been much debate over what types of violations are serious enough to merit a *Terry* stop, there can be no debate that a parking violation is not among them.").

Other states have conducted a similar analysis for minor civil infractions outside the context of parking. In *State* v. *Duncan*, the Supreme Court of Washington found that the Fourth Amendment did not permit an officer to seize an individual to investigate the suspected possession of an open container of alcohol in public. 43 P.3d 513 (Wash. 2002). The court recognized that *Terry* applies to traffic violations, but it concluded that such an extension would "not be appropriate for other civil infractions." *Id.* at 517. And in *In re Calvin S.*, the Maryland Court of Special Appeals similarly concluded that *Terry* did not allow a seizure based on suspicion that an individual was using tobacco as a minor. 930 A.2d 1099, 1102, 1107 (Md. Ct. Spec. App. 2007). According to the court, a "confrontation between an officer and a person who is subject to being issued a citation for a civil offense does not meet the standard for a *Terry* stop absent some other basis to suspect that criminal activity is afoot." *Ibid.*

These decisions reflect a fundamentally different approach to the Fourth Amendment than the one adopted by the Seventh Circuit in this case. There is

no reason to believe that the conflict will resolve itself; this Court will need to address it.

B. The issue underlying the conflict implicates concerns already identified by members of this Court.

Since *Whren* was decided, members of this Court have cautioned that there must be limits on *Whren*'s scope and that Fourth Amendment analysis must maintain some semblance of balance to protect civil liberties.

In *Maryland* v. *Wilson*, for example, this Court held that an "officer making a traffic stop may order passengers to get out of the car pending completion of the stop." 519 U.S. 408, 415 (1997). The dissent argued that this holding, coupled with *Whren*, put "tens of millions of passengers at risk of arbitrary control by the police" in a manner that could leave the Fourth Amendment "diminished in a most public way." *Id.* at 423 (Kennedy, J., dissenting).

In *Arkansas* v. *Sullivan*, the Court reiterated the central holding of *Whren*—that the "'[s]ubjective intentions [of an officer who seizes an individual] play no role in ordinary, probable-cause Fourth Amendment analysis.'" 532 U.S. 769, 772 (2001) (quoting *Whren*, 517 U.S. at 813). Yet the dissent warned that if an "epidemic of unnecessary minor-offense arrests" were to arise, *Whren* and its progeny may need to be "reconsider[ed]," given the Fourth Amendment implications. *Id.* at 773 (Ginsburg, J., dissenting).

As discussed in more detail below, extending *Whren* to parking violations would only exacerbate these concerns. This case provides an opportunity to address this broad and serious issue and to prevent the undermining of Fourth Amendment protections. As

this Court has noted, "fidelity" to the Fourth Amendment is not "achieved [ ] * * * by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities." *Illinois* v. *Gates*, 462 U.S. 213, 241 (1983). "The task of this Court, as of other courts, is to 'hold the balance true.'" *Ibid.*

II. This case provides the Court with an excellent vehicle to consider the circumstances under which an officer's subjective motivation should play a role in the analysis.

Granting a writ of certiorari in this case would give the Court an opportunity to revisit the question of pretextual seizures more broadly—and, specifically, the circumstances under which a Fourth Amendment analysis should take the officer's subjective motivation (and any mismatch with the pretext) into account. The concurrence in *Wesby* was justifiably "concerned" that "the path [ ] charted in *Whren*" "set[ ] the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." 138 S. Ct. at 594. That concurrence urged the Court to "reexamin[e]" the "path charted in *Whren*" and clarify "whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry." *Ibid.* At a minimum, such circumstances should include seizures for which the pretext is a common civil parking infraction.

A decade before *Whren*, this Court recognized that an evaluation of a *Terry* stop must "balance[ ] the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Hensley*, 469 U.S. 221, 228 (1985). *Whren* itself echoed this principle, explaining that "every Fourth

Amendment case * * * turns upon a 'reasonableness' determination" and "involves a balancing of all relevant factors." 517 U.S. at 817.

Even when the question before the court is "whether the officer's conduct was [ ] *objectively* reasonable," it is proper—at least in some instances—to examine whether the officer's "behavior objectively reveals a purpose to conduct a search, which [ ] not [ ] anyone would think he had license to do." *Florida* v. *Jardines*, 569 U.S. 1, 10 (2013) (emphasis added). And *Whren* itself recognizes the danger of "police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas." 517 U.S. at 811. Here, the minor nature of the parking violation and the unnecessarily dramatic nature of the stop objectively reveal a purpose to conduct a search for something "bigger and better" than a parking violation—a search that no one would think the officers had license to conduct. And the testimony of the officers confirms that this was, in fact, their true intent.

The Seventh Circuit's decision illustrates how far *Whren*'s progeny have strayed from this principle of balance and reasonableness. According to the Seventh Circuit, *Whren* prescribes a black-and-white rule that makes ulterior motives irrelevant and that applies in all cases involving some kind of "violation" without distinction, because the principles that underlie *Whren* "are of general application." *Johnson*, 874. F.3d at 574 (citations omitted). That cannot be the law. Again, a Fourth Amendment analysis must "balance[ ] the nature and quality of the intrusion * * * against the importance of the governmental interests alleged to justify the intrusion." *Hensley*, 469 U.S. at 228. Where

the "governmental interests alleged to justify the intrusion" have to do with civil parking regulations, it should matter that the officer had an ulterior motive.

There are critical differences between a moving violation and a parking violation. The most obvious difference is logistical: If an officer is going to issue a citation for a moving violation, *he must first stop the car*. By definition, a parking violation involves a vehicle that is already stopped. All that is required is for the officer to write a citation and put it on the car. In many jurisdictions, in fact, this function is not carried out by police officers at all; it is carried out by parking enforcement officials who have no badge, no handcuffs, no weapon, and no power to detain.

As this Court held just two years ago, a seizure for a particular violation "justifies a police investigation *of that violation*" and nothing more. See *Rodriguez* v. *United States*, 135 S. Ct. 1609, 1614 (2015) (emphasis added). As a result, a court must evaluate the reasonableness of the officer's conduct in the context of the officer's "mission" to investigate that particular violation. "On-scene investigation into other [violations] * * * detours from th[e] mission. So too do safety precautions taken in order to facilitate such detours." *Id.* at 1616. The officer's task is simply to "address[] the infraction" at hand. *Id.* at 1614 (citation omitted).

For moving violations, it may well be that this limitation is more honored in the breach. As one scholar has observed, "[m]any of the investigative tactics that can quickly transform a non-criminal traffic stop into a criminal one do not directly further the interest of traffic safety." Jordan B. Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 749 (2015).

For a parking violation, however, the officer's "mission" in addressing the violation is even more straightforward: write a citation and put it on the car. This "mission" does not require any interaction with anyone who happens to be in the vehicle. It does not include the "'ordinary inquiries incident to [a traffic] stop'"—like "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez*, 135 S. Ct. at 1615 (citations omitted). In addition, issuing a parking ticket generally does not align with the typical types of encounters so "'especially fraught with danger to police officers'" that "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at 1616 (citation omitted).[1] In most cases, in fact, the vehicle will have no one inside. And if the facts in a particular case show a basis for concluding that the officer was actually in danger, a more case-specific balancing inquiry can take those facts into account.

Moving and parking violations also differ significantly in terms of the gravity of the matter to be regulated. In general, laws relating to moving vehicles (civil or not) are likely to focus on public *safety*—for example, preventing unsafe speeds near schools or on highways, avoiding accidents at intersections, and discouraging texting while driving. Parking regulations,

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[1] See also *Knowles* v. *Iowa*, 525 U.S. 113, 117 (1998) (noting that even for a moving violation, "[t]he threat to officer safety * * * is a good deal less than in the case of a custodial arrest" because of "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station").

on the other hand, are likely to focus on public *convenience*—for example, allowing sufficient access for local residents, businesses, snow plows, and street cleaners (and, of course, providing fee revenue to the city or town, see *infra* at 17). The degree of intrusion justified by the parking violation should be correspondingly minor—and certainly should not involve two police cruisers, multiple officers, and bright searchlights.

In this sense, a parking violation is more like an administrative inspection, to which this Court has applied a different analysis. In such cases—involving random traffic stops and checkpoints, for example—the Court's "reasonableness" analysis has included an examination of the officer's actual purpose in making the search. See *Whren*, 517 U.S. at 812 (in the context of "administrative inspection," the Court has found on several occasions that "an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment," and collecting cases). It has followed this approach even when the authorities conclude that such stops would serve roadway safety. As the Court has explained, "[t]he marginal contribution to roadway safety possibly resulting from [a random checkpoint stop] cannot justify subjecting every occupant of every vehicle on the roads to a seizure * * * at the unbridled discretion of law enforcement officials." *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979).

To be sure, the Court in *Whren* distinguished these cases from a traffic stop based on a moving violation, because the analysis requiring "probable cause" to believe there was a violation "afford[s] the 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained." 517 U.S. at 817–18 (quoting *Prouse*, 440 U.S. at 654–55). This

analysis—even when applied to civil moving violations—has had concerning effects, as discussed below. But civil *parking* violations are different both in gravity and in the level of intrusion required for enforcement. Applied to civil parking violations, the analysis in *Whren* becomes divorced from any concept of balance or "reasonableness."

As Justice Scalia once observed, some law enforcement activities—including such important activities as solving unsolved crimes— "occup[y] a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches." *Maryland* v. *King*, 569 U.S. 435, 481 (2013) (Scalia, J., dissenting). This is precisely why a Fourth Amendment balancing analysis must take into account the nature of the law enforcement activity used to justify the intrusion—in all cases, and particularly in cases involving parking violations. "Without drawing the line at [police conduct] designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42 (2000).

This case presents an ideal vehicle for revisiting the broader question of pretextual stops, as the facts are stark. The violation was truly minor and posed no imminent risk to public safety. Despite this, the officers approached the car aggressively, boxing it in with their own vehicles and shining bright lights into the eyes of anyone who happened to be inside. The nature of this approach provides objective evidence of the officers' true ulterior motive; indeed, one of the officers openly admitted that they were "look[ing] for smaller infractions and hop[ing] that possibly they may lead to

bigger and better things." *Johnson*, 874 F.3d at 577. Thus the officers admittedly took advantage of a common parking violation—which required nothing more than writing out a citation and placing it on the windshield—to conduct an intrusive (and terrifying) seizure and search on the chance that they might find something more. A meaningful Fourth Amendment analysis requires considering all of these facts.

III. If allowed to stand, the Seventh Circuit's extension of *Whren* will exacerbate the ill effects that *Whren* has already created.

Whren has already had a detrimental impact on civil liberties in this country, and the Seventh Circuit's decision will make this situation far worse. As Judge Hamilton noted, "[p]olice officers are trained to exploit" the powers that *Whren* allows in the hope that seizures for "smaller infractions * * * may lead to bigger and better things." *Johnson*, 874 F.3d at 577. If *Whren* applies in the same manner to seizures based on probable cause relating to minor civil infractions, it would allow police virtually unbridled discretion.

Even *Whren* itself creates the possibility of significant abuse, given that "full compliance with the traffic laws is impossible." David A. Harris, "*Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 582 (1997); see also Robert H. Jackson, THE FEDERAL PROSECUTOR, ADDRESS DELIVERED AT THE SECOND ANNUAL CONFERENCE OF UNITED STATES ATTORNEYS (Apr. 1, 1940), available at https://goo.gl/DWnkJ4 ("We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning.").

Since this Court's conclusion in *Whren* that the Fourth Amendment permits pretextual traffic stops, such stops have become a matter of official police policy in departments across the country. See *Utah* v. *Strieff*, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting); David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 384 (2001) ("By all indications, pretextual traffic stops have increased markedly all over the country since the *Whren* decision.").

Extending *Whren* to parking violations would make matters far worse, given the ubiquity of these violations and the abuses that already occur. In the first half of 2017 alone, the City of Chicago issued *1.1 million* parking tickets. See John Byrne, *Emanuel wants more weekend parking tickets*, CHICAGO TRIBUNE, Oct. 24, 2017; see also *How Does Chicago Make $200 Million A Year on Parking Tickets? By Bankrupting Thousands of Drivers*, MOTHER JONES, Feb. 27, 2018 (reporting that annually, the City issues *more than 3 million* tickets for parking, vehicle compliance, and automated traffic camera violations).

More broadly, in its investigation of police departments nationwide, the U.S. Department of Justice found that police already have incentives to seize individuals for trivial reasons. In Baltimore, for example, officers attempted to avoid discipline and boost their number of stops and arrests by engaging in "blanket enforcement of low level offenses." U.S. Dep't of Just., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 42 (2016), available at http://bit.ly/2staAmu. And in its investigation in Ferguson, Missouri, the Department of Justice found that "[p]atrol assignments and schedules are geared

toward aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation." U.S. Dep't of Just., INVESTIGATION OF THE FERGUSON CITY POLICE DEPARTMENT 7 (2015), available at http://bit.ly/2FGzNAa. Even in this case, an officer testified that "part of our initiative is to look for smaller infractions and hope that possibly they may lead to bigger and better things." *Johnson*, 874 F.3d at 576. Thus, police and municipalities are already using low-level infractions to meet their goals, budgets, and broader aims of finding evidence of crime. Adding parking violations into the mix not only sanctions this practice but risks its escalation.

Permitting pretextual seizures based on parking violations and other minor civil infractions would also undermine the relationship of trust between the citizenry and the police. Much of the criticism of *Whren* and its progeny has focused on the way pretextual stops for minor traffic infractions "undermine the perceptions of legitimacy of law enforcement." Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RES. L. REV. 931, 932 (2016). This is especially true when minor infractions are enforced arbitrarily and discriminatorily. See 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 (2016). This lack of trust and legitimacy would undermine police safety as well, if citizens have reason to fear that a police encounter over even the most trivial infraction could lead to an intrusive seizure.

It is unfortunately easy to see how one thing can lead to another. As Judge Hamilton recognized, if the police have the power to seize a person based on the pretext of a parking violation—no matter their true intent—then they also have the power "to require the subject to submit to the stop, and to use reasonable force in doing so." *Johnson*, 874 F.3d at 578 (citing *Hensley*, 469 U.S. at 235). And if in the process the officer misperceives the danger to himself—because of implicit bias, explicit bias, or simple mistake—what began as a harmless parking violation could well end in tragedy. See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (reviewing effects of the extension of *Terry* to *Whren*); Seth W. Stoughton, *Principled Policing: Warrior Cops & Guardian Officers*, 51 WAKE FOREST L. REV. 611, 652–58 (2016) (explaining how an aggressive approach to police-civilian encounters can put both officers and civilians at risk).

By allowing pretextual stops in increasingly trivial circumstances, the Seventh Circuit's approach would increase the incentives and risks of discriminatory enforcement, undermine trust between police and the citizenry, raise the danger level in urban communities, and threaten the civil liberties of all. This is a critical issue, and this Court should intervene to address it.

CONCLUSION

For all of these reasons, and for those stated by the petitioner and the forceful dissent below, this Court should grant the writ of certiorari.

Respectfully submitted.

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