No. 17-1349

IN THE
Supreme Court of the United States

RANDY JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY FOR PETITIONER

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The fundamental question in this case is purely legal: is there any infraction so trivial that the government cannot make a pretextual seizure, despite the existence of probable cause? In *Whren v. United States*, the Court restricted its decision to "the run-of-the-mine case," suggesting that there must be a limit to the general rule that the Fourth Amendment permits pretextual seizures. 517 U.S. 806, 819 (1996).

If any limitation exists, this is the perfect opportunity to say so. First, this case is the antithesis of "run-of-the-mine." *Id.* It concerns a parking violation—an extreme example of a miniscule offense. The infraction is civil, non-arrestable, and can be sanctioned with only a small fine. Second, this case is the ideal vehicle to announce a limit. The officers' pretextual motivation is uncontroverted and, indeed, all the facts are simple and agreed upon. Thus, the question presented determines the outcome of the suppression issue, and that question divided the en banc court of appeals five to three.

1. The government's central argument—that the rule of *Whren* controls even in the case of a civil, non-arrestable parking violation sanctioned by a minimal fine—simply ignores *Whren*'s limitation to "run-of-the-mine" cases. *Id.* The government assumes that there is no limitation, period.

That view would strip *Whren* of all constraints, transforming a rule for "the run-of-the-mine case," *id.*, into an absolute rule for every case, even in the "extraordinary" circumstances present here, Pet. App. 27a (Hamilton, J., dissenting). On the government's theory, it does not matter that parking violations do

not threaten public safety, whereas the moving violations considered in *Whren* and its progeny often result in death and serious bodily injury. *See* Pet. 9–10; 14–15. From the government's standpoint, it is irrelevant that the parking violation in this case is civil, non-arrestable, and punishable only by a forfeiture of $20 to $40 for a first offense. Wis. Stat. Ann. § 346.56. Nor does it matter that seizures are generally unnecessary to enforce parking laws, in contrast to moving violations. *See* Pet. 13–17. And it is insignificant, according to the government's theory, that the officers had zero interest in the potential parking infraction, except as a pretext to storm out of their cruisers and seize the Toyota and its occupants. It follows from the government's position that these factors are irrelevant, even when they are all combined in a single case, rendering the government's interest negligible and its pretext manifest.

2. Review is appropriate here because there are strong reasons to question whether the unrestrained approach championed by the government and licensed by many lower courts is sound under the Fourth Amendment. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part) ("I 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.")

a. Law-abiding citizens often commit petty infractions. Viable pretexts are therefore almost limitless and would eviscerate the protections of the Fourth Amendment, effectively resurrecting the general warrant, *see* Amicus Br. of Cato Institute 3–

10, and leaving "the liberty of every man in the hands of every petty officer," James Otis, John Adams's Reconstruction of Otis's Speech in the Writs of Assistance Case, *in* THE COLLECTED POLITICAL WRITINGS OF JAMES OTIS 11, 12 (Richard Samuelson ed. (2015). The absolute rule implicit in the government's position strips reasonableness out of the Fourth Amendment.

b. In a city like Milwaukee, where this case arose and where the number of parking citations issued in a year exceeds the population, the government's unrestrained rule would allow the seizure of almost anyone. *See* Pet. 23–24. In practical effect, that rule would encourage police in low-income and minority communities to use tactics that "would never be tolerated in more affluent neighborhoods." Pet. App. 8a (Hamilton, J., dissenting). And the limitless power to seize based on the pretext of a triviality like a parking violation would carry with it the power to "order all occupants out of the car, often frisk them, question them in an intimidating way, visually inspect the interior of the car, often search at least portions of the vehicle's interior, and hold the driver and passengers while a drug-detection dog inspects the vehicle." Pet. App. 12a–13a (Hamilton, J., dissenting) (citing *Maryland v. Wilson*, 519 U.S. 408 (1997); *Arizona v. Johnson*, 555 U.S. 323 (2009); *Colorado v. Bannister*, 449 U.S. 1, 4 & n.3 (1980); *Arizona v. Gant*, 556 U.S. 332 (2009); *Michigan v. Long*, 463 U.S. 1032 (1983); *Illinois v. Caballes*, 543 U.S. 405, 406–08 (2005)). This case illustrates the risk of abuse perfectly: the officers were on the hunt for "bigger and better things," and they descended on the Toyota by boxing it in, pinning it with bright light, and

swarming out to surround it. Pet. App. 10a (Hamilton, J., dissenting).

c. If the government is correct in its unrestrained view of *Whren*, then courts must necessarily accept aggressive responses every time an officer has probable cause for a parking violation. Or, say, a truancy violation (making youthful-looking individuals vulnerable to seizures throughout the school day). *See* Milw. Ord. 106-23.1 (prohibiting truancy). But if the government is correct, then the protections of the Fourth Amendment would wither in the face of trivial government interests.

3. The government's various attempts to blur the distinction between this case and cases involving moving violations are unpersuasive. For starters, the government does not attempt to dispute the point that moving violations often create severe safety risks, whereas parked cars rarely do. *See* Pet. 14–15.

The government interest in a seizure is also diminished when no seizure is necessary to enforce the violation. Here, the government does not dispute that enforcing moving violations generally requires a seizure of a moving car, whereas parking tickets are generally issued without a seizure. *See* Pet. 15–17.

The government suggests an equivalence between seizing a moving car with an expired tag and a parked car with an expired tag, Br. in Opp'n 9, but an officer cannot enforce a tag violation on a moving car without stopping it, whereas enforcing a tag violation on a parked car does not require a seizure—just a ticket on the windshield. The government also likens a parked, occupied car with a running motor to a moving car, Br. in Opp'n 9, but the same distinction applies. An officer

can enforce a law against a moving car only by seizing it, but no seizure was necessary here. That distinction also dispatches the government's argument that declining to extend *Whren* to parking violations would require courts to decide "'which particular provisions are sufficiently important to merit enforcement.'" Br. in Opp'n 9 (quoting *Whren*, 517 U.S. at 818–19). The question is not whether parking violations merit enforcement but whether they merit pretextual *seizures* where no seizure is needed for enforcement.

4. Petitioner does not dispute that the government's limitless version of *Whren* is the majority rule in the lower courts. Indeed, the dominance of that rule—and its evisceration of Fourth Amendment protections in the face of minor infractions that do not require seizures—is a reason to grant review. But it is also true that a division of authority exists. The holding of *State v. Holmes* is unmistakable: "[W]e hold that a police officer who merely has reasonable suspicion that a *parking* violation has occurred cannot seize an individual for the purpose of investigation." 569 N.W.2d 181, 185 (Minn. 1997). The Supreme Court of Washington has "decline[d] to extend the *Terry* stop exception to include nontraffic civil infractions." *State v. Duncan*, 43 P.3d 513, 521 (Wash. 2002) (en banc). Review here would provide greatly needed clarity. In short, review is warranted because the majority rule—*Whren* on steroids—is unsettled, incorrect, and toxic to Fourth Amendment liberty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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