No. 99-1408

*In The*
*Supreme Court of the United States*

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GAIL ATWATER, AND MICHAEL HAAS
AS NEXT FRIEND OF ANYA SAVANNAH HAAS
AND MACKINLEY XAVIER HAAS,
*Petitioners,*

vs.

CITY OF LAGO VISTA,
BART TUREK, AND FRANK MILLER,
*Respondents.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

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# BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF NEITHER PARTY.

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This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioners and Respondents. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

## INTEREST OF *AMICUS CURIAE*

**Americans for Effective Law Enforcement, Inc.** (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 110 times in the Supreme Court of the United States and over 40 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California,

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored and edited for the *amicus* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. Bernard J. Farber, Esq., Research Attorney, Americans for Effective Law Enforcement, Inc., contributed to the editing of the brief. No other persons authored or edited this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

Illinois, Ohio, and Missouri.

*Amicus* is an educational organization representing the interests of law enforcement at the national, state, and local levels. Our constituents include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of making arrests within the bounds of the law; and (2) legal advisors who are called upon to advise law enforcement officers and police and municipal administrators in connection with such matters, including the formulation and implementation of policy on the subject of arrests for minor offenses and traffic infractions.

AELE maintains an independent posture and will support only those law enforcement activities that conform to constitutional requirements and good practice. For example, in *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), we supported a prison inmate who sued correctional officers, arguing that recognition of his claim would discourage the use of minor, but excessive, force by law enforcement and correctional officers.

## STATEMENT OF THE CASE

The petitioner, Gail Atwater, was stopped by a police officer for failure to have her children seat belted in her vehicle. Police officers in Texas, as in other states, ordinarily issue tickets after stopping motorists for traffic violations. Tex. Transp. Code Ann. §§ 543.003-.005 (West 1999).

Rather than doing this, the officer took the



extraordinary step of placing petitioner under full custodial arrest. He handcuffed her with her hands behind her back, placed her in his squad car, and took her to the police station. At the police station, she was forced to remove her shoes, jewelry, and glasses and empty her pockets. Petitioner's "mug shot" was taken, and she was placed in a jail cell for approximately one hour until being taken before a magistrate. Ultimately she pled no contest to the seat belt violation and paid the maximum penalty for this violation—a fifty dollar fine. Additional charges of driving without a license and proof of insurance were dismissed.

Petitioners filed suit in state court against the city of Lago Vista, the police officer, and the chief of police, for damages arising from her incarceration. The city removed the suit to the United States District Court for the Western District of Texas, which granted summary judgment for the city. The district court ruled that petitioners had not identified a constitutional right that had been violated by the custodial arrest.

The United States Court of Appeals for the Fifth Circuit, three judge panel, reversed the summary judgment with respect to the Fourth Amendment claim, holding that petitioner had established that the custodial arrest for not wearing a seat belt violated a clearly-established Fourth Amendment right. The remainder of the district court's judgment was affirmed. *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999).

The Fifth Circuit granted rehearing *en banc* and vacated the panel's decision. A majority affirmed the district court's judgment, holding that the custodial arrest did not violate petitioner's Fourth Amendment rights because the officer had probable cause and the

arrest was not conducted in an unreasonable manner. The court did not consider the issue of whether a full custodial arrest for a minor offense was proper under the common law as subsumed into the Fourth Amendment, nor did it balance the city's interest in enforcing the seat belt law against the extent of the governmental intrusion to test the reasonableness of using a full custodial arrest. Six judges dissented. *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (*en banc*).

This Court granted certiorari on the question: Does Fourth Amendment limit use of custodial arrests for fine-only *traffic offenses? Atwater v. City of Lago Vista*, 120 S. Ct. 2715 (2000).

## SUMMARY OF ARGUMENT

*Amicus* takes the position, as we did in our *amicus* brief in *Ricci v. Village of Arlington Heights*, 116 F.3d 288 (7th Cir. 1997), *cert. granted*, 522 U.S. 1038, *cert. dismissed as improvidently granted*, 523 U.S. 613, 118 S. Ct. 679, 139 L. Ed. 2d 627 (1998), that a citation procedure, rather than a full custodial arrest, in situations such as presented by this case, fully comports with the reasonableness requirements of the Fourth Amendment and is the preferred means of processing such a case. This question should depend upon a number of factors presented by a particular case, whether it be a traffic case or a non-traffic case. Model codes have adopted and encouraged such citation procedures as alternatives to summary arrests for minor offenses and some states have adopted statutes on the subject incorporating various features of the codes. This Court should encourage the continuation of this process of modernizing the law of the states on the subject of arrests for minor offenses to comport with



reasonableness requirements and best practices.

## ARGUMENT

OFFICERS SHOULD BE REQUIRED TO USE A CITATION WHEN THEY ENFORCE PETTY OFFENSES, INCLUDING TRAFFIC OFFENSES, UNLESS THERE ARE CIRCUMSTANCES WHICH SUGGEST THAT A CUSTODIAL ARREST IS NECESSARY.

To put the matter in practical perspective, one might consider the petty offense committed by petitioner. As pointed out by Professor Timothy P. O'Neill, John Marshall Law School (Chicago): "Consider the number of minor traffic violations that the typical driver makes each time he or she gets into a car." O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. Colo. L. Rev. 693 (Summer, 1998). Every motorist "will commit a traffic offense sometime." Comment, Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 Tulane L. Rev. 1409, 1727 (March, 2000). *See also*, Sulken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221 (1993); Knight, *The Realities of Racial Profiling: Broad interpretations of High Court decisions lead to Fourth Amendment abuses*, 15 Criminal Justice 22 (Summer 2000).

Rare indeed is the person who drives a vehicle or walks in the street who will not be faced someday with a traffic stop, as was the petitioner, although hopefully with different results.

The majority opinion choose not to consider the underlying common law issue. But this Court can do so. As noted in *State v. Jones*, 88 Ohio St. 2d 430, 727 N.E.2d 886, 893 (2000), common law criminal offenses were classified into three categories: treason, felonies, and misdemeanors. 1 LaFave & Scott, *Substantive Criminal Law* (1986) 41, Section 1.6, fn. 1. Many crimes that are classified as felonies under modern federal and state law were classified as misdemeanors at common law, *e.g.*, assault with intent to rob, murder, rape, false imprisonment, kidnaping, and forcible and violent entry.

At common law, officers could make an arrest without a warrant only for offenses classified as felonies and for misdemeanors constituting a breach of the peace committed in the officer's presence. *Carroll v. United States*, 267 U.S. 132, 156-157, 45 S. Ct. 280, 286, 69 L. Ed. 543, 553 (1925). Offenses involving conduct that destroyed or menaced public order and tranquillity such as "violent acts . . . and words likely to produce violence in others," were considered breaches of the peace at common law. *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 905, 84 L. Ed. 1213, 1220 (1940).

It is not likely that offenses classified as minor offenses today, including non-felony traffic offenses, would have been considered breaches of the peace at common law, because offenses classified today as minor are those that society considers to be the least serious. Officers at common law would probably not have been permitted to arrest, at least without a warrant, persons committing offenses similar to the Texas statute involved in this case, unless there were extenuating circumstances. Nevertheless, as noted by the Ohio Supreme Court, *Jones*, 727 N.E.2d at 893, because it is not certain that there was a clear practice forbidding such arrests, a balancing of



the governmental interest with the individual's interest is necessary, a balancing that at least in part has been done by the legislature in some states, as, for example, the Ohio statute on arrests for minor offences (Ohio Rev. Code 2935.26) (the Ohio court found a full custodial arrest for jaywalking violative of the Fourth Amendment and the statute).

*Amicus* submits, however, that the decision to make a custodial arrest for a minor offense should not be predetermined by a *per se* rule, whether based on a statute or a municipal policy (as was purportedly involved in *Ricci*). *See e.g., People v. Scalisi*, 324 Ill. 131, 154 N.E. 715 (1926); *Commonwealth v. Wright*, 158 Mass. 149, 33 N.E. 82 (1893); *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925); *Commonwealth v. Leet*, 537 Pa. 89, 641 A.2d 299 (1994).

Relatively few states have retained the common law rule that such an arrest can be made without a warrant only where a breach of the peace has taken place in the presence of the arresting officer, Note, *Arrest Without a Warrant in New England*, 40 B.U.L. Rev. 58, 71-73 (1960); LaFave, *Search and Seizure*, § 5.1(b), 13 (3d ed. 1995), and many statutes reflect a legislative design calling for a balancing of interests (*e.g.*, Ohio Rev. Code 2935.26). *See* Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 777-84 (1993).

*Amicus* takes no position on whether the common law rule is necessarily subsumed by the Fourth Amendment Reasonableness Clause, as this Court decided in *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995), in the context of the knock and announce requirement. But we do note that the Court has wisely eschewed the adoption of inflexible, so-

called "bright line" rules, in favor of objective reasonableness based upon the totality of the circumstances. *See, e.g., Wilson v. Arkansas; Whren v. United States*, 517 U.S. 820, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996); *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996); *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997); *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997).

Model code development has supported this trend, and in doing so has clearly opted for a non-summary arrest procedure unless extenuating circumstances dictate a summary arrest.

For example, the Model Code of Pre-Arraignment Procedure (ALI: 1975) adopts the position in § 120.1(1), that an officer may arrest for a misdemeanor without a warrant if he has reasonable cause to believe that the person committed it in his presence or merely if he has reasonable cause to believe that the person committed it, but in the latter instance it is also required that "the officer has reasonable cause to believe that such person (i) will not be apprehended unless immediately arrested; or (ii) may cause injury to himself or others or damage to property unless immediately arrested."

The code goes on to provide a procedure for the use of a citation in lieu of an arrest without a warrant:

Section 120.2. Citation in Lieu of or in Connection with Arrest Without a Warrant

(1) Citation Without Arrest. A law enforcement officer acting without a warrant who has reasonable cause to believe that a person has committed an offense may, subject to the regulations to be issued pursuant to Subsection (4) of this Section, issue a citation to such person to appear in court in lieu of arresting him.



(2) Citation After Arrest. A law enforcement officer who has arrested a person without a warrant may, subject to the regulations to be issued pursuant to Subsection (4) of this Section, issue a citation to such person to appear in court in lieu of taking him to a police station as provided in Section 120.9.

(3) Procedure for Issuing Citations. In issuing a citation hereunder the officer shall proceed as follows:

(a) He shall prepare a written citation to appear in court, containing the name and address of the cited person and the offense for which the citation is issued, and stating when the person shall appear in court. Unless the person requests an earlier date, the time specified in the citation to appear shall be at least three days after the issuance of the citation.

(b) One copy of the citation to appear shall be delivered to the person cited, and such person shall sign a duplicate written citation which shall be retained by the officer.

(c) The officer shall thereupon release the cited person from any custody.

(d) As soon as practicable, one copy of the citation shall be filed with the court specified therein, and one copy shall be delivered to the prosecuting attorney.

At least 24 hours before the time set in the citation for the cited person to appear, the prosecuting attorney, or other person authorized by law to issue a complaint for the particular offense, shall either issue and file a complaint charging such person with an offense, or file with the court and deliver to

> such person a notice that a complaint has been refused and that such person is released from his obligation to appear. [Any person who wilfully violates a citation to appear in court hereunder is guilty of a misdemeanor.]

Model Code of Pre-Arraignment Procedure (ALI: 1975). *Also see* § 130.2(1)(b), and the Commentary thereto, p. 338, *et seq.*

A similar approach is found in the Uniform Acts, Rules of Criminal Procedure, Procedures Before Appearance (Approved Draft 1974), Rules 211, 221, 222, and the ABA Standards, Pre-trial Release, 1.1., 2.2(c)ii (Approved Draft 1968).

As noted by the court in *State v. Jones*:

> The United States Supreme Court has not addressed the issue of whether a full custodial arrest for a minor offense is, in some circumstances, an unreasonable seizure. However, Justice Stewart suggested that it was an unreasonable seizure in his concurring opinion in *Gustafson v. Florida, supra*, 414 U.S. at 266, 94 S. Ct. at 492, 38 L. Ed. 2d at 462. In *Gustafson*, a police officer arrested Gustafson for failure to have his driver's license in his possession while driving. While searching Gustafson incident to that arrest, the officer discovered marijuana cigarettes.
>
> The court rejected Gustafson's argument that a full-scale body search incident to an arrest for a traffic violation violated the Fourth Amendment. Gustafson did not argue that the *arrest* itself was unconstitutional. In his concurring opinion, Justice Stewart stated that "a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." *Id.* at 266-267, 94 S. Ct. at 492, 38 L. Ed. 2d at 462. This statement clearly adds support to our decision in the instant case [that the custodial arrest of the defendant for jaywalking, which was a subterfuge for searching him as a suspected drug offender, violated both constitutional and statutory rights].

*State v. Jones*, 88 Ohio St. 2d 430, 727 N.E.2d at 895.



The point we wish to underscore is simply that a police officer's decision whether to make a summary arrest for a minor offense, traffic or otherwise, should depend upon many factors—whether embodied in a statute or a department policy—including such things as:

**(1) Whether the offense involves a matter of public safety, including a breach of the peace or threatening behavior;**

**(2) Whether the offender is known and verifiable;**

**(3) Whether non-testimonial evidence is needed, such as a driver's blood alcohol concentration;**

**(4) Whether the offender is a resident of the area;**

**(5) Whether the offender is likely to repeat or continue his or her law violations unless summarily arrested (*e.g.*, disruptive demonstrations involving "civil disobedience," trespass, or the blocking of access to businesses or public facilities);**

**(6) Whether the offender has a history of failing to respond to citations and summonses;**

**(7) Whether the offender may be in need of medical assistance or may be in a predicament where the officer may have a civil duty to protect the offender (*e.g.*, a pedestrian on a busy highway or in a dangerous neighborhood), etc.;**

**(8) Whether the officer may have a community caretaking function to perform in connection with an**

**offender, (*e.g.*, preserving the offender's property, safeguarding unattended children, etc.).**

*Amicus* does not propose this list as exhaustive, and refers the Court to the several factors listed in the model codes and their commentaries. We note as well, that in applying a list of factors in such situations, there is a danger, as we said in our *amicus* brief in *Ricci*, p. 10, that the homeless and other disadvantaged persons are less likely to qualify for a citation or immediate release. Legislatures and the courts must be sensitive to this problem.

Police administrators should also be mindful of this concern when they adopt written policies and design training programs; and, indeed, the problem of racial profiling in traffic stops must also be addressed in these materials. *See*, U.S. Dept. of Justice publication, *Traffic Stop Data Collection Policies for State Police, 1999*, a BJS Fact Sheet, National Criminal Justice Reference Service (NCJRS) (Rockville, Maryland), which provides a snapshot, based on a national survey, of the demographic characteristics of drivers and passengers stopped by state police, as well as the traffic-related circumstances under which the stops were made. NCJ-180776, February 2000; and Americans for Effective Law Enforcement, *Specimen Directive on Traffic Stops (and profiling)* at <http://www.aele.org/traffic.html> .

Our point, however, is simply that a per se rule on the subject before the Court is not required by the Fourth Amendment Reasonableness Clause nor desirable from a judicial policy standpoint. *Wilson v. Arkansas; Wren; Robinette; Maryland v. Wilson; Richards; supra.* We believe the states should be encouraged to adopt flexible procedures for such arrests within the parameters of



objective reasonableness, using the model codes as examples and existing state statutes incorporating various code features as models. We would not tie the hands of police and prosecutors in exercising reasonable discretion in weighing relevant factors in making the decision whether an arrest warrant, summons, or a summary arrest is the preferred choice in a particular case.

The real vice in the present case is the officer's use of a summary arrest for a simple traffic violation, when the most cursory balancing of interests would have indicated that a summary arrest was not necessary. The violation of the traffic law by petitioner was open and notorious and involved no breach of the peace or danger to the public. It could be inferred that the officer had some "special agenda" in mind for the petitioner to make a completely unnecessary summary arrest, allegedly verbally abusing her, handcuffing her, locking her up, etc. (an otherwise law-abiding motorist's worst nightmare). It is in part this kind of arbitrary action that impels *amicus* to urge this Court to place restraining limits on the police in making warrantless arrests for minor offenses and infractions.

As law enforcement administrators and legal advisors, AELE believes that reaching the issues that were not resolved in *Gustafson* and *Ricci* and reversing the court below will hasten the adoption of flexible and reasonable statutes and policies on the subject of warrantless arrests for minor offenses. Such a decision will further the adoption of progressive statutes and law enforcement policies on the subject for the benefit of all our citizens, and will at the same time advance the cause of effective law enforcement.

## CONCLUSION

*Amicus* urges this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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