No. 99-1408

IN THE SUPREME COURT OF THE UNITED STATES

GAIL ATWATER, et al.,

Petitioners

v.

CITY OF LAGO VISTA, et al.,

Respondent

BRIEF OF THE STATES OF TEXAS, ARKANSAS, COLORADO, DELAWARE, KANSAS, MARYLAND, MONTANA, OKLAHOMA, SOUTH CAROLINA, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Fourth Amendment limit the use of custodial arrests for fine-only traffic offenses?

IN THE

Supreme Court of the United States

GAIL ATWATER, *et al.*,
Petitioners,

v.

CITY OF LAGO VISTA, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ARKANSAS, COLORADO, DELAWARE, KANSAS, MARYLAND, MONTANA, OKLAHOMA, SOUTH CAROLINA, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This case asks whether the Fourth Amendment prohibits the arrest of individuals who commit misdemeanor crimes punishable by fine but not jail time. The Fifth Circuit, sitting *en banc*, held that the arrest of a misdemeanor traffic offender did not violate the Fourth Amendment where the arrest was (1) supported by probable cause and (2) not effected in an extraordinary manner. *See Atwater v. City of Lago Vista*, 195 F.3d 242, 245-46 (CA5 1999) (en banc). For the reasons that follow, *amici* urge the Court to affirm the Fifth Circuit's judgment.

INTEREST OF *AMICI*

The States of Texas, Arkansas, Colorado, Delaware, Kansas, Maryland, Montana, Oklahoma, South Carolina, and Virginia appear as *amici curiae* in support of Respondents. *See* SUP. CT. R. 37.4.

Amici have an interest in this case because it implicates the States' power to enact statutes governing arrests of traffic offenders. Specifically at issue are two Texas statutes that provide peace officers with discretion to arrest individuals who (1) commit any offense in the officer's presence, or (2) violate vehicle and traffic "rules of the road" as defined by the Texas Transportation Code. *See* TEX. CODE CRIM. PROC. art. 14.01(b); TEX. TRANSP. CODE §543.001. Petitioners challenge the constitutionality of Gail Atwater's arrest for an undisputed misdemeanor violation of the Texas Transportation Code that was committed in a peace officer's presence. *See* TEX. TRANSP. CODE §545.413 (defining seatbelt offenses). As such, Petitioners necessarily put at issue the constitutionality of the Texas statutes that authorized Ms. Atwater's arrest, as well as the constitutionality of discretionary arrest statutes in other states.[1]

Three *amici* in support of Atwater[2] make explicit what is implicit in Petitioners' brief: This case asks whether the Fourth Amendment prohibits states from enacting statutes that provide officers discretion to arrest traffic offenders and other misdemeanants. *See Amicus Curiae* Br. of Cato Inst. at 2 ("This case presents the question whether the Texas legislature can bypass the warrant requirement of the Fourth Amendment and empower executive branch officials to effect

[1] The statutory arrest provision that is "[b]y far the most common" amongst the states "permits arrest without warrant for *any* misdemeanor committed in the arresting officer's presence." 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE §5.1(b), at 13-14 & n.76 (3d ed. 1996).

[2] Petitioners will be referred to collectively as "Atwater."

warrantless arrest for misdemeanor offenses that do not involve a breach of the peace."); *Amici Curiae* Br. of ACLU, *et al.*, at 26 ("[I]t is not reasonable within the meaning of the Fourth Amendment for a state to give vast and unchecked power to the police to arrest for minor regulatory offenses."); *Amicus Curiae* Br. of Texas Crim. Def. Laws. Ass'n at 3 ("[S]tatutes giving police officers the authority to arrest for traffic citations [are] unconstitutional . . . as applied in this case."). The State *amici* contend that Texas's arrest statutes are constitutional and advocate for preservation of states' traditional sovereign authority to prosecute and process criminal offenders within state borders.

SUMMARY OF THE ARGUMENT

Amici do not dispute that the States must legislate in a manner consistent with the Constitution, including the Fourth Amendment. *See, e.g., Sibron v. New York*, 392 U.S. 40, 60-61 (1968) ("New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement," provided the state does not "authorize police conduct which trenches upon Fourth Amendment rights"); *see also Payton v. New York*, 445 U.S. 573, 602 (1980). *Amici* contend, however, that the two Texas statutes implicated by this case fulfill that constitutional mandate.

In any search-and-seizure context, officer discretion must be exercised in conformance with the Fourth Amendment. While it is possible for misdemeanor or felony arrests to be executed in a manner that transgresses constitutional boundaries, the Fourth Amendment contains no categorical prohibition against arrests for certain types of offenses. As such, the Fourth Amendment does not proscribe state legislation that affords officers discretion to arrest misdemeanor traffic offenders. Rather, the Fourth Amendment informs an officer's exercise of that statutory discretion.

Atwater and her supporting *amici* do not trust police officers to obey the Constitution. They presuppose that, given

discretion, officers will violate citizens' rights. Consequently, they urge the Court to set out specific rules limiting misdemeanor arrests, request that Fourth Amendment lines be drawn to varying degrees of brightness, and seek constitutionalization of multi-factor, fact-specific arrest tests and model code guidelines. *See, e.g.*, Atwater Br. at 46; Tex. Crim. Def. Laws. Ass'n Br. at 26-28; ACLU Br. at 26; *Amici Curiae* Br. of Inst. Crim. Just. at Univ. Minn. L. Sch., *et al.*, at 21-27; *see also Amicus Curiae* Br. of Ams. Effective L. Enforcement at 8-12 (supporting neither party). The Court should decline these invitations to micromanage states' procedures for enforcing traffic offenses.

No departure from traditional Fourth Amendment principles is warranted for the subset of offenders who commit misdemeanor traffic crimes. Carving offense- or punishment-specific niches out of the Fourth Amendment would be inconsistent with the Court's prior search-and-seizure jurisprudence. And on a practical level, it will promote inconsistency amongst the States: the constitutionality of arrests for the same criminal conduct will vary with state legislatures' disparate classifications of that conduct as a felony or misdemeanor, or a jail-term or fine-only offense. Instead of delineating categories of arrestable offenses, the Court should confirm that the same Fourth Amendment principles govern all criminal arrests: unless an arrest is executed in an extraordinary manner, the existence of probable cause ends the constitutional inquiry. *See Whren v. United States*, 517 U.S. 806, 818-19 (1996); *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975); *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Henry v. United States*, 361 U.S. 98, 102 (1959).

The Fourth Amendment does not require this Court to circumscribe state sovereignty by categorically prohibiting—or even categorically limiting—statutory discretion for law enforcement officers to make arrests for misdemeanors, criminal traffic violations, fine-only crimes, or

any other subcategory of criminal offenses. No line need be drawn, and no special test formulated, because general Fourth Amendment principles already govern all exercises of law enforcement discretion in the search-and-seizure context.

Arrest is not always the best course of action when the crime is a misdemeanor fine-only traffic offense. In many cases, citations will adequately ensure an offender's appearance. Citations also obviate the need to expend scarce law enforcement resources on the paperwork and other procedures associated with processing an arrestee. In fact, the Texas Department of Public Safety trains patrol recruits to use citations in lieu of arrest whenever possible. *See infra* Part I.C. But Texas's preference for citations reflects a policy decision, not a constitutional requirement. Certainly, police departments should be encouraged to develop appropriate guidelines for efficiently processing traffic offenders. And state legislatures, too, are free to implement statutory procedures if they so desire. But the Constitution does not mandate these courses of action or require this Court to micromanage law enforcement in the context of misdemeanor traffic offenses.

Because the various forms of line-drawing advocated by Atwater and her supporting *amici* unnecessarily intrude upon state sovereignty without any constitutional justification, *amici* urge the Court to affirm the Fifth Circuit's judgment.

ARGUMENT

I. AN ARREST THAT IS SUPPORTED BY PROBABLE CAUSE AND IS NOT CONDUCTED IN AN EXTRAORDINARY MANNER DOES NOT VIOLATE THE FOURTH AMENDMENT.

A. There Was Probable Cause to Believe Atwater Committed a Crime.

The Fifth Circuit applied traditional Fourth Amendment principles in concluding that Atwater's arrest for an undis-

puted criminal offense did not violate the Constitution. It is well-settled that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment." *Robinson*, 414 U.S., at 235; *see also Whren*, 517 U.S., at 818-19 ("[P]robable cause justifies a search and seizure."). Moreover, a judicial determination of probable cause is not required at the time of arrest. Rather, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein*, 420 U.S., at 113-14.

When an officer arrests "with probable cause, he is protected" from liability under the Fourth Amendment. *Henry*, 361 U.S., at 102. Thus, in assessing the constitutionality of an arrest, the appropriate inquiry is whether at or before the time of arrest the officer "had reasonable cause to believe that a crime had been committed." *Id.*, at 103.[3]

Atwater has never denied that she failed to wear her seatbelt or to belt her two children. These are misdemeanor offenses under Texas law. *See* TEX. TRANSP. CODE §§545.413(a),(b),(d). The arresting officer personally witnessed Atwater's offenses and thus had probable cause to believe she committed a crime. Consequently, the arrest was reasonable under the Fourth Amendment. *See Robinson*, 414 U.S., at 235. Nothing more was required to satisfy "the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police conduct." *Whren*, 517 U.S., at 818.

[3] *Henry* involved a federal statute that governed warrantless arrests by FBI officers. 361 U.S., at 100. The Court noted, however, that the statutory standard paralleled the constitutional standard and therefore used Fourth Amendment principles to analyze the arrest and search at issue in that case. *Id.*

B. The Manner in Which Atwater Was Arrested Was Not Extraordinary.

The Fifth Circuit correctly concluded that once probable cause exists, no further constitutional scrutiny is needed unless the arrest is executed in an extraordinary manner. *See Lago Vista*, 195 F.3d, at 246. As the Court explained in *Whren*, there is no need to balance governmental and individual interests when there is probable cause to believe a crime has been committed:

> "Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches and seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." 517 U.S., at 818.

An extraordinary manner of arrest can occur in several ways. For example, an officer who has probable cause to make an arrest, but uses excessive force in the course of arrest, effects an unreasonable seizure in violation of the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). An officer can also effect an "extraordinary" search or seizure through "unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body." *Whren*, 517 U.S., at 818 (citations omitted). In addition, subjecting a custodial arrestee to unreasonable delay of a judicial, probable-cause determination can violate the Fourth Amendment. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56-58 (1991). These cases all speak to Fourth Amendment limitations on the manner of executing an arrest, not the permissibility of making an arrest.

There was nothing extraordinary about the manner of Ms. Atwater's arrest. She was taken to the Lago Vista police station, routinely processed, and brought before a magistrate within an hour. *See* Atwater Br. at 29. She "admits that she

suffered no physical harm during or as a result of the arrest." *Lago Vista*, 195 F.3d, at 246. Ms. Atwater no doubt found this experience "humiliating." Atwater Br. at 28. And while her arrest may have seemed extraordinary to her personally, *see id.*, at 2, it was not "extraordinary" in any *constitutional* sense.

At base, Atwater and her supporting *amici* argue that her arrest was extraordinary simply because it was for a traffic violation. *See, e.g.*, Atwater Br. at 38-39; Tex. Crim. Def. Laws. Ass'n Br. at 6. They contend that everyone violates at least some traffic law every time they drive, suggesting that the frequency of violations somehow limits the State's interest in enforcing these laws. *See, e.g.*, Atwater Br. at 20-22; *Amici Curiae* Br. of Nat'l Ass'n Crim. Def. Laws. at 3, 11.[4] The Court unanimously rejected a virtually identical argument in *Whren*:

> "Petitioners urge as an extraordinary factor in this case that the 'multitude of applicable traffic and equipment regulations' is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us 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. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement." 517 U.S., at 818-19.

There is nothing inherently extraordinary about an arrest for a misdemeanor traffic offense. The Fourth Amendment

[4] Atwater fully acknowledges the State's authority to enforce traffic laws through stops, but contends that enforcement through arrest is impermissible. *See* Atwater Br. at 22.

does not require the Court to ferret through each state's motor vehicle code in order to constitutionalize a hierarchy of arrestable offenses. *See id.*

A violation of law is a violation law. States retain discretion to process offenders in the manner of their choosing—provided it is not an unconstitutionally extraordinary manner. Ms. Atwater was arrested in accordance with Texas law for offenses the arresting officer personally witnessed and thus had probable cause to believe she had committed. Ms. Atwater's Fourth Amendment rights were not violated. *See Robinson*, 414 U.S., at 235; *see also Whren*, 517 U.S., at 818-19; *Gerstein*, 420 U.S., at 113-14; *Henry*, 361 U.S., at 102. The Fifth Circuit's judgment should be affirmed.

C. The State Has a Legitimate Interest in Having Its Laws Obeyed.

Because traditional Fourth Amendment principles demonstrate that no violation of Ms. Atwater's rights occurred, Atwater and her supporting *amici* ask the Court to create new rules governing arrests for misdemeanor fine-only traffic offenses—rules on which even Ms. Atwater and her *amici* cannot agree. According to Atwater, the Court should order States to prohibit such arrests unless "necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road." Atwater Br. at 46. The Texas Criminal Defense Lawyers Association advocates that arrests are unreasonable unless (1) *an officer* can articulate a valid interest in arrest apart from mere commission of a crime for which a citation could issue under state law, or (2) probable cause develops "from another source independent of the fine-only offense." Tex. Crim. Def. Laws. Ass'n Br. at 26-28. And the ACLU flatly contends that no State interest justifies arrests for fine-only traffic crimes absent "exigent circumstances." ACLU Br. at 26.

Atwater and her *amici* miss a fundamental point: An arrest "is intended to vindicate society's interest in having its laws

obeyed." *Terry v. Ohio*, 392 U.S. 1, 26 (1968). Atwater may believe that committing traffic crimes is no big deal. But the State does not forfeit its legitimate interest in obedience to the law simply because the law at issue is a misdemeanor traffic crime.

Reasonable officers might differ as to whether arresting Ms. Atwater was the ideal course of action under the circumstances presented in this case. Undoubtedly, the more common practice would be to issue a citation in lieu of arrest. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 115 n.1 (1998) (noting that "[t]he practice in Iowa of permitting citation in lieu of arrest is consistent with law reform efforts"). In fact, the Texas Department of Public Safety's training manual for new recruits explicitly encourages use of citations, instructing officers to arrest traffic offenders only when necessary "to protect the violator an[d]/or the public, an[d]/or to assure his appearance in court when such appearance is doubtful." Texas Department of Public Safety, All Field Service Recruit Training School, Patrol Procedures, T-438 "Traffic Law Enforcement Action" (1999). Specifically, Texas's manual commands that citations be used unless "by issuing a citation and releasing the violator, the safety of the public and/or the violator might be imperiled as in the case of D.W.I." *Id.* Texas teaches new recruits that citations offer many advantages, including:

"1. Court dates may be set at a time convenient for both violator and officer.

2. Time away from active patrol is kept at a minimum.

3. Court dockets can be equalized by adjusting appearance dates.

4. Convenience of violator who might be unduly delayed if custody arrest was made at that particular time.

5. Better public relations in a good number of cases."

Id.

Citations also enable officers to promote public safety by staying out on patrol rather than bringing offenders into the station for custodial processing. *See id.*; *see also* Inst. Crim. Just. Br. at 11, 15-16 & n.10. Finally, citations alleviate administrative burdens on support staff who have to complete extensive paperwork and related requirements associated with processing a custodial arrest. *See id.*, at 11-12. It is not surprising, therefore, that many model guidelines advocate use of citations in lieu of arrest for misdemeanor traffic offenses. *See* Ams. Effective L. Enforcement Br. at 8-12 (detailing ALI, ABA, and Uniform Acts standards). State *amici* support this approach and agree that in most instances issuance of a citation for a traffic offense makes the most practical sense. But this reflects a policy preference, not a constitutional rule.

Some may disapprove of Ms. Atwater's arrest, but that does not mean the Constitution prohibited it. Certainly, the Constitution does not proscribe Texas from enacting statutes that provide officers with discretion to arrest misdemeanor offenders. In fact, this Court has expressly contemplated that arrests for misdemeanor traffic offenses can and will occur. For example, in evaluating the applicability of *Miranda* to police questioning for traffic offenses, the Court stated that "we have no doubt that, in conducting most custodial interrogations of persons *arrested for misdemeanor traffic offenses*, the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will." *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) (emphasis added). The Court noted that "[t]he occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare." *Id.*, at 434. But the Court did not assume that such arrests could never occur; and there was no suggestion that such arrests are unconstitutional.

Certainly, nothing in the Fourth Amendment *requires* states to compel police officers to arrest traffic offenders. As the Court stated in *Berkemer*:

> "State laws governing when a motorist detained pursuant to a traffic stop may be issued a citation instead of taken into custody vary significantly, but no State *requires* that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate." *Id.*, at 437 n.28 (emphasis added) (internal citations omitted).

See also Knowles, 525 U.S., at 115 (noting that Iowa law authorizes police officers to either arrest individuals who commit traffic offenses or follow "the far more usual practice of issuing a citation in lieu of arrest or in lieu of continued custody after an initial arrest"); *Robinson*, 414 U.S., at 248 (Marshall, J., dissenting) ("Although, in this particular case, Officer Jenks was required by police department regulations to make an in-custody arrest rather than to issue a citation, in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer.").

Just as nothing in the Fourth Amendment compels arrests for misdemeanor traffic offenses, nor does anything in the amendment prohibit such arrests. *See New York v. Class*, 475 U.S. 106, 131 (1986) (White, J., dissenting) ("Class was unlicenced and the police were not *constitutionally* required merely to give him a citation and let his unlicenced driving continue.") (emphasis added). As Justice Stevens has observed:

> "It is, of course, true that persons apprehended for traffic violations are frequently not required to accompany the arresting officer to the police station before they are permitted to leave on their own recognizance or by using their driver's licenses as a form of bond. It is also possible that state law or local regulations may in some cases prohibit police officers from taking persons into custody for violation of minor traffic laws. *As a matter of constitutional law*, however, any person lawfully arrested for

> the pettiest misdemeanor may be temporarily placed in custody." *Robbins v. California,* 453 U.S. 420, 450 (1981) (Stevens, J., dissenting) (emphasis added).

Thus, a driver who commits a misdemeanor traffic offense "could make no constitutional objection to a decision by the officer to take the driver into custody." *Id.,* at 452.

In past opinions, the Court has referenced, without criticism, state statutes that permit arrests for misdemeanor traffic offenses. *See, e.g., Knowles*, 525 U.S., at 115 (citing Iowa's statute permitting arrests for any violation of traffic or motor vehicle equipment laws); *Robinson*, 414 U.S., at 220-21 & n.1 (citing D.C. statute permitting arrests for operating a motor vehicle after revocation of a driver's permit); *Class*, 475 U.S., at 108, 118 (citing New York statute permitting arrests for traffic offenses including speeding and driving with a cracked windshield); *see also Robbins*, 453 U.S., at 450 n.12 (Stevens, J., dissenting) (referencing state laws that afford police officers "discretion to make a 'custodial arrest' for violation of any traffic law").

The Court has also discussed, again without criticism, local police department procedures that *require* an officer to summarily arrest and take into custody certain traffic offenders. *See Robinson*, 414 U.S., at 221 n.2 (describing the D.C. Metropolitan Police Department's standard operating procedures). In *Robinson*, the Court incorporated local police procedures within its rationale for refusing to explore whether a traffic-offense arrest was a mere pretext to search for drugs: "We think it is sufficient for purposes of our decision that respondent was *lawfully arrested for an offense*, and that [the officer's] placing him in custody following that arrest was *not a departure from established police department practice*." *Id.,* at 221 n.1 (emphasis added).

This analysis makes sense, because once probable cause is established it is up to state legislatures and local police de-

partments to determine whether to mandate—or for that matter, prohibit—arrests for particular categories of crimes. "[T]he Constitution does not impose on the States a rigid procedural framework." *McLaughlin*, 500 U.S., at 53. When the Fourth Amendment is at issue, "individual States may choose to comply in different ways." *Id.*; *Gerstein*, 420 U.S., at 113-14 (recognizing "the desirability of flexibility and experimentation by the States" with respect to criminal procedure laws); *see also Ker v. California*, 374 U.S. 23, 34 (1963).

It is up to the States to develop procedures for processing criminal offenders, provided those procedures are consistent with the Fourth Amendment. *See Sibron*, 392 U.S., at 60-61. If an individual violates the law, arresting him will not offend the Constitution unless the arrest is processed in an unreasonable manner. *See Whren*, 517 U.S., at 818. Because Ms. Atwater was not processed in a unreasonable manner, no violation of her Fourth Amendment rights occurred.

II. THE COURT HAS CONSISTENTLY REJECTED CATEGORICAL LINE-DRAWING UNDER THE FOURTH AMENDMENT AND SHOULD DO SO IN THIS CASE AS WELL.

The Court has previously declined to compartmentalize the Fourth Amendment into predefined categories of permissible police conduct. *See, e.g., Robinson*, 414 U.S., at 234-35 (refusing to limit the search-incident-to-arrest rule in the context of an arrest for driving with a revoked license, and concluding that Fourth Amendment principles advocate for "treating all custodial arrests alike for purposes of search justification"); *Warden v. Hayden*, 387 U.S. 294, 300-01 (1967) (refusing to create Fourth Amendment categories of seizable and nonseizable types of evidence); *cf. Berkemer*, 468 U.S., at 429 (refusing "to carve an exception out of" *Miranda* in the

context of custodial interrogation for misdemeanor traffic offenses).[5]

In *Hayden*, the Court rejected the notion that stricter constitutional rules were required for seizures of certain types of personal property possessed by a suspect—namely, "mere evidence" of a crime as opposed to the fruits or instrumentalities of a crime. 387 U.S., at 300-01. Instead, general Fourth Amendment principles would determine the reasonableness of all evidentiary seizures. *See id.*, at 309-10 ("[T]here is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband.").[6]

In declining to engage in categorical line-drawing, the Court cited the plain text of the Constitution: "Nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband." *Id.*, at 301. Similarly, nothing in the plain language of the amendment supports a distinction between permissible seizures (*i.e.*, arrests) based on the

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[5] While the *Miranda* protections are rooted in the Fifth Amendment's prohibition against self-incrimination, *Berkemer* centered on the obligations of police to give *Miranda* warnings during custodial arrests for misdemeanor traffic violations, which are "seizures" governed by the Fourth Amendment. The Court declined to define different constitutional rules for subcategories of arrests depending on "the nature or severity of the offense for which [the arrestee] is suspected or for which he was arrested." 468 U.S., at 434.

[6] Similarly, *Berkemer* held that "a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." 468 U.S., at 434. If custodial interrogations for misdemeanor traffic offenses were excepted from the general rule, "the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations. Neither the police nor criminal defendants would benefit from such a development." *Id.*, at 432.

category of criminal offense. The Fourth Amendment prohibits unreasonable seizures—not seizures for misdemeanors as opposed to felonies, much less fine-only traffic misdemeanors as opposed to all other crimes.

A. The Common Law Does Not Require the Court to Devise Fourth Amendment Subcategories of Permissible Arrests.

The Court has rejected the notion that the Fourth Amendment only allows searches and seizures that were permitted at common law. In *Hayden*, for example, the Court declined to adopt common law categories of seizable property as Fourth Amendment requirements. Recognizing that the "the common law of search and seizure" permitted seizure of contraband and fruits of a crime, but not of evidence to help apprehend and convict criminals, the Court determined that these common law distinctions were "based on premises no longer accepted as rules governing the application of the Fourth Amendment." *Id.*, at 300-01, 303. *Hayden* overruled a prior case that had tracked common law reasoning and erroneously concluded "that the *Constitution* virtually limited searches and seizures to these categories." *Id.*, at 308 (citing *Gouled v. United States*, 255 U.S. 298 (1921)) (emphasis added). As *Hayden* made clear, no *constitutional* search-and-seizure subcategories exist. Rather, "[t]he requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband." *Id.*, at 307.

Similarly, the Fourth Amendment does not compel constitutionalization of the limited, common law arrest categories Atwater advocates. First, as evidenced by *Hayden*, common law search-and-seizure categories are not dispositive of Fourth Amendment protections. *See* 387 U.S., at 300-01, 303-04; *see also California v. Hodari D.*, 499 U.S. 621, 626 n.2 (1991) ("The common law may have made an attempted

seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions."); *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting) (observing that the common law "requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment, and we have never held that a warrant is constitutionally required to arrest for nonfelony offenses occurring out of the officer's presence") (citations omitted). Contrary to Atwater's suggestions, "this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton*, 445 U.S., at 591 & n.33.

Second, even assuming the common law rule applied, it would not mandate judgment in Atwater's favor. Atwater's common law argument is predicated solely on the meaning of "breach of the peace"—a term to which varying definitions have been ascribed, as she herself acknowledges. *See* Atwater Br. at 16-17; *see also* Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 229 (1940) (noting "some disagreement" over common law authority to arrest for offenses committed in an officer's presence but that do not cause public disorder). To the extent "breach of the peace" meant a violation of law, as opposed to a public disturbance, an arrest for *any* misdemeanor criminal offense committed in an officer's presence would be permissible under the common law. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 538-40 (1997) (Scalia, J., concurring) (noting that in the period leading up to ratification of the Bill of Rights "keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws. '[E]very breach of the law is against the peace.'") (citing *Queen v. Lane*, 87 Eng. Rep. 884, 885 (Q.B. 1704)); *cf. United States v. Brewster*, 408 U.S. 501, 521 (1972) (noting, in construing the Speech or Debate Clause, that "when the Constitution was written the term 'breach of the peace' did not mean, as it came to mean later, a misdemeanor such as

disorderly conduct but had a different 18th century usage, since it derived from breaching the King's peace and thus embraced the whole range of crimes at common law").

Furthermore, this Court has frequently stated the common law rule for misdemeanor arrests without specific reference to any breach-of-the-peace requirement—emphasizing, instead, that a misdemeanor must have been committed in an officer's presence to justify a common law arrest. *See, e.g., United States v. Watson*, 423 U.S. 411, 418 (1976) ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."); *John Bad Elk v. United States*, 177 U.S. 529, 534 (1900) ("So, an officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); *Kurtz v. Moffitt*, 115 U.S. 487, 498-99 (1885) ("By the common law of England, neither a civil officer nor a private citizen had the right, without a warrant, to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate."); *cf. Carroll v. United States*, 267 U.S. 132, 156 (1925) (stating, as the common law "usual rule," that an officer "may only arrest without a warrant one guilty of a misdemeanor if committed in his presence," but noting that the rule "is sometimes expressed" in terms of "a breach of the peace . . . committed in his presence"). Ms. Atwater does not dispute that she committed a misdemeanor offense in the arresting officer's presence. This suffices under the "usual" common law rule articulated by the Court, and it certainly satisfies the demands of the Fourth Amendment.

Finally, and most importantly, Atwater fails to recognize that a state, by statute, may authorize arrests that would not

have been permissible at common law. "[I]t is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states." *See Welsh*, 466 U.S., at 756 (White, J., dissenting) (quotation marks omitted); *see also Carroll*, 267 U.S., at 164, 166-67 (McReynolds, J., dissenting) (noting that statutes can abrogate common law restrictions on misdemeanor arrests and listing examples where Congress has expressly done so); *John Bad Elk*, 177 U.S., at 535 (looking to South Dakota law to determine whether the common law arrest rule had been expanded by statute); *see also* 10 HALSBURY'S LAWS OF ENGLAND §§632, 639-642, at 342, 346-51 (3d ed. 1955); Perkins, *supra*, 25 IOWA L. REV., at 230.

Atwater glosses past the well-established principle that "[a]n arrest without a warrant may be under a power conferred by common law *or by statute*." 10 HALSBURY'S LAWS OF ENGLAND §632, at 342 (emphasis added). She mischaracterizes legislation expanding common law arrest rules as something that occurred only before the Fourth Amendment applied to the states. *See* Atwater Br. at 18 (citing *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)). To the contrary, there has been consistent, post-*Wolf* recognition of state search-and-seizure powers beyond those permitted at common law. *See, e.g., Hodari*, 499 U.S., at 626 n.2; *Welsh*, 466 U.S., at 756 (White, J., dissenting). Moreover, this Court has repeatedly acknowledged, without apparent alarm, the existence of state statutes that authorize the type of traffic arrests Atwater contends the common law would prohibit. *See supra* Part I.C. Contrary to Atwater's suggestion, common law arrest rules simply do not control the Fourth Amendment analysis in this case.

B. Arrests for Misdemeanor Traffic Offenses Are Not Akin to "General Warrants."

There is no merit to Atwater's argument that permitting fine-only misdemeanor arrests affords officers boundless search-and-seizure discretion reminiscent of British "general warrants," which the House of Commons declared illegal in 1766 and the Framers rejected when they enacted the Fourth Amendment. *See Henry*, 361 U.S., at 100-01 & n.1; *Hayden*, 387 U.S. at 301; *see also Boyd v. United States*, 116 U.S. 616, 624-26 (1886). General warrants provided open-ended authority for British officers "to arrest and search on suspicion," without any requirement that probable cause exist. *Henry*, 361 U.S., at 100. The Secretary of State primarily issued general warrants to search homes for private papers and books, hoping to uncover writings that could be used to convict their owner of "heinously libelous" denunciation of the government. *Boyd*, 116 U.S., at 625-26.

Permitting arrests for misdemeanor traffic offenses is not remotely comparable to issuance of general warrants. In fact, "[t]here is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *Watson*, 423 U.S., at 429 (Powell, J., concurring).

The distinctions between general warrants and on-the-spot arrests for traffic offenses are obvious. First and foremost, such arrests do not entail intrusions upon the sanctity of one's home. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh*, 466 U.S., at 748 (quoting *United States v. United States Dist. Court*, 407 U.S. 297

(1972)).[7] A home intrusion raises Fourth Amendment concerns distinct from those present in a public arrest immediately following commission of a traffic crime. *Compare Welsh*, 466 U.S., at 750 ("Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."), *with Class*, 475 U.S., at 113 ("Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.") (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)).

Second, police officers' discretion to arrest traffic offenders is not boundless. Rather, it is squarely circumscribed by the state statute that defines the offense on which the arrest must be based. Officers cannot make up crimes. Moreover,

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[7] The Institute of Criminal Justice *amici* discuss *Welsh* as though it were an opinion focused on the minor nature of traffic offenses rather than the constitutional requirement that exigent circumstances justify warrantless entry of a home. *See* Instit. Crim. Just. Br. at 18-20. True, *Welsh* did involve an arrest for a non-jailable *civil* traffic offense, and the Court did note that the State of Wisconsin's classification of the offense signaled a lesser state interest in arresting the offender. 466 U.S., at 754 & n.14. However, the issue before the Court was not the permissibility of a routine public arrest, but whether there were exigent circumstances to justify a *warrantless intrusion into the offender's home* for purposes of making the arrest therein. Given this inquiry, the Court concluded that "the special protection afforded the individual in his home by the Fourth Amendment" prohibited a warrantless entry of the offender's home and intrusion into "the privacy of his bedroom for a noncriminal, traffic offense." *Id.*, at 753-54.

Atwater was not arrested pursuant to a warrantless entry of her home. Moreover, the Texas traffic law at issue, unlike the Wisconsin statute considered in *Welsh*, creates a *criminal* offense, albeit a non-jailable misdemeanor. *Welsh* offers no insight into the distinct constitutional question presented here: whether an officer can effect a routine, public arrest of a *criminal* offender when the crime happens to be traffic offense.

they cannot arrest on the type of "mere suspicion" that sufficed for purposes of general warrants. *Henry*, 361 U.S., at 101. Instead, the officer must have probable cause to believe that an individual has committed an actual crime as defined by law. *See id.*, at 102.

Atwater may disagree with the Texas Legislature's decision to criminalize certain traffic offenses. If so, she can lobby for a change in the law. *Cf. Welsh*, 466 U.S., at 754 (noting that "[t]he State of Wisconsin has *chosen* to classify the first offense for driving while intoxicated as a *noncriminal, civil forfeiture offense* for which no imprisonment is possible") (emphasis added). But Atwater cannot contend that her arrest for an undisputed criminal violation of Texas law was unconstitutional, *per se*, simply because her crime was a misdemeanor, fine-only traffic offense. The Fourth Amendment does not curtail states' discretion to criminalize certain forms of conduct or to impose varying penalties for state-defined crimes. *See Welsh*, 466 U.S., at 755-56 (Blackmun, J, concurring) (criticizing Wisconsin's fine-only penalties for first-offender drunk drivers but noting that "if Wisconsin and other States choose by legislation thus to regulate their penalty structure, there is, unfortunately, nothing in the United States Constitution that says they may not do so").

Ms. Atwater committed a crime under Texas law. A police officer saw her commit that violation, and she was arrested. This was an embarrassing event in her life, but embarrassment does not translate into constitutional injury. Because Ms. Atwater committed a crime, the existence of probable cause ends the constitutional inquiry, and it insulates the arresting officer from liability. *See Whren*, 517 U.S., at 818-19; *Robinson*, 414 U.S., at 235; *Henry*, 361 U.S., at 102.[8]

[8] Even if the Court were to announce special arrest standards for fine-only traffic crimes under which Ms. Atwater's arrest is deemed unconstitutional, Officer Turek, who made the arrest, would not be liable. On March 26, 1997, it was not clearly established that the Fourth Amendment

prohibits arrests for undisputed misdemeanor traffic offenses, and he is therefore entitled to qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 609, 614 (1999). Indeed, far from indicating a constitutional problem, existing law suggested that Atwater's arrest was lawful. The Fifth Circuit—to which a reasonable Texas peace officer would look for guidance—had expressly held that a warrantless misdemeanor arrest, if supported by probable cause, does not violate the Fourth Amendment. *See Fields v. City of S. Houston*, 922 F.2d 1183, 1189 (CA5 1991) (relying on *Street v. Surdyka*, 492 F.2d 368, 372-73 (CA4 1974)). Thus, under controlling precedent in Officer Turek's jurisdiction, a reasonable officer could believe that arresting Ms. Atwater was constitutional. *See Wilson*, 526 U.S., at 617. Moreover, the consistent signal from this Court had been that arrests for misdemeanor traffic violations would not violate the Fourth Amendment if supported by probable cause. *See, e.g., Robinson*, 414 U.S., at 221 n.1, 235; *see generally supra* Part I.C (discussing cases). Under these circumstances, qualified immunity applies.

Furthermore, at the time of arrest, other circuit authority confirmed that misdemeanor traffic arrests need only be supported by probable cause. *See Barry v. Fowler*, 902 F.2d 770 (CA9 1990) (holding that probable cause justified an arrest for the misdemeanor of vehicle tampering, where a daughter asked a friend to paste a "no trespassing" sign on the windshield of a car parked illegally on her parents' property). And, in general, the consensus among the circuits was that arrests for misdemeanor, fine-only, or local petty offenses were permissible whenever supported by probable cause. *See, e.g., Pyles v. Raisor*, 60 F.3d 1211, 1215 (CA6 1995) (holding that arrest for misdemeanor offense of providing a sip of beer to a seventeen-year-old at a rock concert did not violate the Fourth Amendment because it was supported by probable cause); *Higbee v. City of San Diego*, 911 F.2d 377, 379-80 (CA9 1990) (holding that arrest for violation of a "peep show" local ordinance did not violate the Fourth Amendment, even though officers had discretion under California law to issue a citation in lieu of arrest); *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1137, 1139 & n.6 (CA4 1982) (holding that arrest based on probable cause for fine-only offense of eating on a train did not violate Fourth Amendment constitutional standards, even though it may not have been authorized by Virginia's criminal procedure statutes). Although decided two months after Ms. Atwater's arrest, the Seventh Circuit's decision in *Ricci v. Arlington Heights* bears mention because it confirms the circuits' consistency on this issue. 116 F.3d 288, 292 (CA7 1997) (holding that an arrest and one-hour detention for processing paperwork did not violate the Fourth Amendment where there was probable

III. THIS CASE DOES NOT PRESENT THE ISSUES OF RACIAL PROFILING OR PRETEXTUAL ARRESTS TO CONDUCT WARRANTLESS CAR SEARCHES.

Atwater and her supporting *amici* set forth a parade of horribles they fear will ensue if arrests for misdemeanor traffic violations are not prohibited. In particular, they fear that these arrests will lead to racial profiling—*i.e.*, targeting of minority traffic offenders whom officers may be more likely to associate with drug activity. In addition, Atwater and her *amici* proclaim that permitting arrests for traffic offenses will eviscerate the limitations on traffic-related searches this Court implemented in *Knowles v. Iowa*. Neither allegation has bearing on this case for two reasons. First, Atwater has not alleged that she was unconstitutionally searched on racial or otherwise pretextual grounds. These issues, therefore, are not presented in this case. Second, a pretextual search does not violate the Fourth Amendment if it occurs incident to an arrest that is supported by probable cause.

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cause to believe arrestee violated a local ordinance creating the civil, fine-only offense of operating a business without a license), *cert. granted*, 522 U.S. 1038, *and cert. dismissed as improvidently granted*, 523 U.S. 613 (1998); *see also Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (CA1 1997) (holding that the only Fourth Amendment right implicated by a misdemeanor arrest for drunk driving was the right not to be arrested without probable cause).

Given that there was (1) controlling federal precedent in Officer Turek's jurisdiction, (2) "a consensus of cases of persuasive authority in other circuits," and (3) strong signals from the Court that misdemeanor traffic-offense arrests are lawful if supported by probable cause, a reasonable officer in Officer Turek's position could have believed that arresting Ms. Atwater would not offend the Constitution. *Wilson*, 526 U.S., at 617. As such, Officer Turek is entitled to qualified immunity even if the Court determines that he violated Ms. Atwater's Fourth Amendment rights. *Id.*, at 614, 617.

A. Racial Profiling Is Governed by the Equal Protection Clause of the Fourteenth Amendment, Not the Fourth Amendment's Proscription Against Unreasonable Searches and Seizures.

The State *amici* condemn racial profiling and firmly agree that "the Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren*, 517 U.S., at 813. However, the Court has made clear that the proper constitutional basis for raising claims of selective traffic enforcement is the Equal Protection Clause of the Fourteenth Amendment, not the Fourth Amendment. *Id.*, at 813. The type of subjective intent at issue in racial profiling has no place in Fourth Amendment "reasonableness" analysis—which entails an objective inquiry centered on probable cause. *See id.*, at 814-16.

Thus, even assuming there were allegations of facially selective traffic enforcement at issue in this case—which there are not—there would be no impact on the reasonableness of Ms. Atwater's arrest. Because the arrest was supported by probable cause, no violation of Ms. Atwater's Fourth Amendment rights occurred.

Moreover, the fact that no racial profiling occurred in this case makes it an inappropriate vehicle for exploring this complex issue. *See Robinson*, 414 U.S., at 221 n.1 (dismissing allegations of a pretextual arrest-related search that was incident to a lawful traffic arrest effected pursuant to police department procedures, and "leav[ing] for another day questions which would arise on facts different from these"); *cf. Berkemer*, 468 U.S., at 434 n.21 (deferring, to a more factually appropriate case, consideration of *Miranda*-related questions not necessary to resolve the actual issue before the Court).

B. Permitting Arrests for Traffic Offenses Does Not Conflict with *Knowles v. Iowa.*

Atwater and several *amici* proclaim that arrests for traffic violations create carte blanche for officers to search traffic offenders in a manner that conflicts with *Knowles v. Iowa*. No such conflict exists.

Knowles addressed the constitutionality of a search in connection with a traffic offense for which the driver was cited but not actually arrested—in other words, "a search incident to citation." 525 U.S., at 115. In analyzing the constitutionality of the search, the Court noted that Iowa law permitted officers to either arrest or issue citations to traffic offenders. *See id.* In addition, a subdivision of the Iowa citation statue permitted officers to conduct a search even if they chose not to make an arrest. *See id.*

The Court concluded that although the "search incident to citation" was authorized under state law, it violated the Fourth Amendment. When an officer exercises his discretion under Iowa law to issue a citation rather than effect an arrest, he cannot then search incident to the citation. *See id.*, at 117-18. This is because the safety concerns and other rationales underlying a search incident to custodial arrest are not present when an officer merely issues a citation. *Id.*, at 117. The fact of arrest, and not the "grounds for arrest," determines the permissibility of the search. *Id.*

Nothing about an arrest for a misdemeanor traffic offense conflicts with *Knowles*. *Knowles* did not suggest that arrests for such offenses are prohibited by the Fourth Amendment. To the contrary, *Knowles* indicated that arrests were necessary in order to justify searches in connection with traffic violations. *Id.*

The Court's unanimous decision in *Whren* demonstrates that even a pretextual traffic arrest does not offend the Fourth Amendment if the arresting officer has probable cause to believe a traffic offense has been committed. 517 U.S., at 811-13 (dispelling notions that "ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law occurred"); *see also Robbins*, 453 U.S., at 452 (Stevens, J., dissenting) (stating that a driver arrested for a traffic offense cannot make any "constitutional objection" to being taken into custody as justification for a search of the entire interior of the vehicle); *cf. Graham*, 490 U.S., at 397 (noting, within the context of an excessive force claim, that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force"). Put succinctly, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Whren*, 716 U.S., at 814.

Although *Whren* involved an allegedly pretextual stop, as opposed to a pretextual arrest, its reasoning applies equally in the arrest context. *See id.*, at 811-14 (citing *Robinson*, 414 U.S., at 221 n.1, for the proposition that a lawful traffic-violation arrest "would not be rendered invalid by the fact that it was 'a mere pretext to search for narcotics'"). If anything, there should be fewer concerns about pretextual arrests, because an arrest requires more police accountability than a stop. A patrolling officer can freely stop individuals for traffic offenses, and if the officer opts not to arrest or cite the offender, there is likely to be no formal documentation of the incident. By contrast, an officer who opts to make a custodial arrest must take the offender in for processing, and the officer must complete and sign supporting documentation. It is far less likely that officers will commit arrest abuses, because they are so readily traceable.

Even some of Atwater's supporting *amici* acknowledge that the documentation procedures associated with an arrest would make an officer's abuse of arrest discretion detectable and redressable by the officer's police chief. *See* Inst. Crim.

Just. Br. 15-17 & n.11. But these *amici* simply do not trust police departments to keep their officers in line. *See id.*, at 16 n.11; *cf.* Nat'l Ass'n Crim. Def. Laws. Br. at 3, 11-12; ACLU Br. at 8.

Because Atwater and her supporting *amici* expect police to abuse their authority to search incident to arrest, they ask this Court to make a preemptive strike by prohibiting arrests for "common" crimes such as traffic offenses. But anticipatory fear of hypothetical abuses is not a legitimate basis to categorically circumscribe officer discretion and strip states of their traditional sovereign authority to regulate the processing of criminal offenders within their borders. Nor is it grounds to constitutionalize a hierarchy of offenses, with only some worthy of enforcement through arrest. The Court already unanimously rejected a similar argument in *Whren*. 517 U.S., at 818-19.

If concerns exist that pretextual arrests will be used to justify vehicle searches, those concerns should be addressed in a case that actually presents the issue. Ms. Atwater does not challenge any search incident to her arrest. Nor does she allege that she was pretextually arrested for the purpose of searching her vehicle. The Court should decline to speculate about hypothetical police abuses that are not at issue in this case. *Cf. Robinson*, 414 U.S., at 221 n.1; *Berkemer*, 468 U.S., at 434 n.21.

CONCLUSION

For these reasons, *amici* respectfully request that the Court affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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