No. 99-1408

In The

Supreme Court of the United States

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

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Petitioner Gail Atwater was placed under custodial arrest for not wearing a seat belt, a misdemeanor that carries a fifty-dollar fine as its maximum penalty. Does the Fourth Amendment limit the use of custodial arrests for fine-only traffic offenses?

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The decision of the three-judge panel of the Fifth Circuit is reported as *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999), and is reproduced in Appendix B to the petition for writ of certiorari.

The order of the United States District Court for the Western District of Texas was not published, but is reproduced in Appendix C to the petition for writ of certiorari.

JURISDICTION

The court of appeals' judgment was entered on November 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioners' petition for writ of certiorari was filed on February 22, 2000, and this Court granted the petition on June 26, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Tex. Transp. Code Ann. § 545.413 (West 1999) (subsequently amended effective Sept. 1, 1999).

The statute is set out, in relevant part, in the petition for writ of certiorari at p. 2.

STATEMENT OF THE CASE

This case concerns a constitutionally unreasonable use of a full custodial arrest for a fine-only traffic offense. Following a traffic stop, a Lago Vista police officer placed petitioner Gail Atwater under full custodial arrest for violating a Texas statute that requires the use of seat belts.

I. The Facts

Gail Atwater and her family have been residents of the small town of Lago Vista, Texas for sixteen years. (R. 376). Ms. Atwater is a full-time mother and her husband, Michael Haas, is an emergency room physician at a local hospital. (R. 376-77). Their daughter Anya was almost six years old and their son Mac was almost four years old at the time of this incident. (R. 377).

On the afternoon of March 26, 1997, Gail Atwater was driving Anya and Mac home from soccer practice. After leaving the soccer field, one of the children realized they had lost a favorite toy, a winged bat made of rubber with a suction cup that had been affixed to the outside of the truck window. (R. 380). The children asked their mother if they could look for it, so Ms. Atwater back-tracked along the route they had taken to drive to the soccer field. The children had previously been wearing seat belts, but Ms. Atwater permitted them to take off their belts so they could look out the truck's windows in search of their lost toy. (R. 380). There was no traffic on the

residential street near their home on which they were driving, and their speed was approximately fifteen miles-per-hour. (R. 380).

Respondent Bart Turek, a Lago Vista police officer, observed the seat-belt violation and stopped them. While Ms. Atwater and her children remained in her vehicle, Officer Turek approached, then stood by the driver's window and aggressively jabbed his finger toward her face. Officer Turek screamed either that they had met before or that they had had this conversation before. (R. 381-82, 384, 703). Officer Turek's conduct frightened Ms. Atwater's children and they began to cry; she then calmly and in a normal tone of voice requested that Officer Turek lower his voice. (R. 382, 703). Officer Turek responded by telling Ms. Atwater that she was going to jail. (R. 382).

There is no evidence in this summary judgment record indicating in any way that Gail Atwater was sarcastic or belligerent, or that she challenged Officer Turek's authority. (R. 388-89, 414). Ms. Atwater was not under the influence of drugs or alcohol. She was not acting suspicious in any way, she did not pose any threat to Officer Turek, and she was not engaged in any illegal conduct in the officer's view, other than her violation of the seat belt law, when he announced his intention to arrest her.

Despite the lack of any provocation, Officer Turek continued to speak to Gail Atwater in a verbally abusive manner, accusing her of not caring for her children. (R. 384-85, 388-89, 704-05). Ms. Atwater's children and several bystanders, including friends and neighborhood residents, witnessed the incident. (R. 382, 385, 393, 399-400, 405).

Officer Turek's continued verbal abuse and his assertions that Ms. Atwater was on her way to jail caused her children to become increasingly frightened and distressed, so Ms. Atwater asked Officer Turek to allow her to take her children to a friend's home just houses away. (R. 384, 704). Officer Turek refused, and initially planned to take the children into custody as well. (R. 384, 389, 403, 427). Luckily, a friend of the family was called to the scene by a neighborhood child who happened to pass by, and the friend took the children into her care. (R. 385-86, 705).

Officer Turek claimed he had recently stopped Ms. Atwater for not having her children in seat belts (R. 420), but this was false. (R. 379, 405, 703-07). Officer Turek had stopped her several weeks before for allowing her son Mac to ride on the front seat arm rest, but his seat belt had been securely fastened. (R. 379, 703). No citation was issued, and Officer Turek had not told her the basis for making the traffic stop. (R. 379).

Police officers in Texas, as in other states, may issue tickets after stopping motorists for traffic violations. Tex. Transp. Code Ann. §§ 543.003-.005 (West 1999). Rather than doing this, Officer Turek placed Ms. Atwater under full custodial arrest.[1] He handcuffed her with her hands behind her

[1] Officer Turek later claimed that he had also arrested Ms. Atwater for not carrying a driver's license and proof of insurance. (She had neither with her because her purse had recently been stolen.) Officer Turek's claim is inconsistent with his pronouncement, before requesting her license or proof of insurance, that he was taking her to jail. It is also disingenuous because Ms. Atwater provided him with her driver's license number, and Officer Turek had seen both her license and proof of insurance during the previous stop. Be that as it may, even if Officer Turek's

back, loaded her into his squad car, and took her to the police station. (R. 386). At the police station, she was forced to remove her shoes, jewelry and glasses, and empty her pockets. Ms. Atwater's "mug shot" was taken, and she was placed in a jail cell for approximately one hour until being taken before a magistrate. (R. 386-88, 706). She was released after posting a $310 bond. (R. 424).

Gail Atwater pled no contest to the seat belt offense and paid the maximum penalty for this violation — a $50 fine. Charges of driving without a license and proof of insurance, *see supra*, note 1, were dismissed.

II. The Proceedings Below

Petitioners Gail Atwater and her husband Michael Haas, as next friend for their children, filed suit in state court against respondents, the City of Lago Vista, Officer Bart Turek, and Chief of Police Frank Miller, for damages suffered by petitioners arising from Ms. Atwater's incarceration.

Respondents removed the suit to the United States District Court for the Western District of Texas, which granted their motion for summary judgment. The district court ruled that petitioners had not identified a constitutional right that had been violated by the custodial arrest. *See* Pet. App. C.

after-the-fact justification is accepted, the penalties for these offenses are also minor fines. *See* Tex. Transp. Code Ann. §§ 521.025(c), 601.191(b) (West 1999). Furthermore, it is a defense to prosecution if the person charged thereafter produces a valid license and proof of insurance (as Officer Turek well knew that Ms. Atwater would be able to do). *See* Tex. Transp. Code Ann. §§ 521.025(d), 601.193 (West 1999). Officer Turek's contention has no bearing on the Fourth Amendment issue.

A three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the summary judgment with respect to the Fourth Amendment claim, holding petitioners 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. *See* Pet. App. B.

The Fifth Circuit granted rehearing *en banc* and vacated the panel's decision. After oral argument, a majority affirmed the district court's judgment in all respects, holding that the custodial arrest did not violate Ms. Atwater's Fourth Amendment rights. Six judges dissented. *See* Pet. App. A.

SUMMARY OF THE ARGUMENT

Gail Atwater was handcuffed and taken to jail because she and her children were not wearing their seat belts. Placing Ms. Atwater under custodial arrest for this fine-only traffic offense violated the Fourth Amendment's requirement that all seizures be reasonable.

Determining whether a particular governmental action violates the Fourth Amendment requires first asking whether the action would have been prohibited at common law when the Fourth Amendment was adopted. If the answer is unclear, then reasonableness is evaluated by balancing the degree of the intrusion on the individual against the degree to which the intrusion is necessary to further a legitimate governmental interest. *See Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999).

Applying this analysis demonstrates that the custodial arrest here violated the Fourth Amendment. The Fourth Amendment was adopted in response to the use of general

warrants and writs of assistance to prevent the very sort of unbridled discretion that the court below condones. The arrest here would also have been unlawful when the Fourth Amendment was adopted because warrantless arrests were not permitted for misdemeanors unless they were breaches of the peace. Furthermore, even if history is viewed as providing no clear answer, balancing the competing interests does: handcuffing Ms. Atwater in front of her children and taking her to jail furthered no legitimate law enforcement objective that could not also have been accomplished by issuing a traffic citation.

Instead of applying the analysis mandated by this Court's precedents, the court below created a broad *per se* rule blessing all custodial arrests as long as there is probable cause to believe that an offense has occurred. This Court has never held this to be the law, and the holding below ignores and undermines decisions of this Court. There is, however, a rule that would be good public policy, be consistent with this Court's precedents, and satisfy the Fourth Amendment's requirement of reasonableness: The Fourth Amendment prohibits custodial arrests for fine-only traffic offenses except when the arrest is necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road.

ARGUMENT

I. Both the History Leading to the Fourth Amendment's Adoption and Founding-Era Rules Governing Warrantless Arrests Make Clear that the Custodial Arrest Here Was Unconstitutional

In determining Fourth Amendment reasonableness, this Court has reviewed the history leading to the Fourth

Amendment's adoption and inquired whether a specific seizure would have been unlawful at the time of the Fourth Amendment's adoption. In fact, this Court conducted just such a detailed historical review in one of its last major decisions that considered whether a warrantless public arrest complied with the Fourth Amendment. *See United States v. Watson*, 423 U.S. 411, 418-20 (1976). An historical inquiry demonstrates the court of appeals' error. The Fifth Circuit erred in holding police officers have unfettered discretion, rivaling that of colonial officers acting under general warrants or writs of assistance, to arbitrarily select which drivers to jail for traffic offenses, and by ignoring the founding-era rule that prohibited warrantless misdemeanor arrests except for breaches of the peace.

A. The Fourth Amendment Was Adopted to Check Unfettered Discretion of the Sort Given by General Warrants and Writs of Assistance to Conduct Searches and Seizures Arbitrarily

This Court has repeatedly recognized the events that gave birth to the Fourth Amendment: a rejection of the use of general warrants in England and writs of assistance in colonial America. *See, e.g., Warden v. Hayden*, 387 U.S. 294, 301 (1967); *Henry v. United States*, 361 U.S. 98, 100-01 (1959); *Boyd v. United States*, 116 U.S. 616, 624-626 (1886). General warrants and writs of assistance were offensive to colonial Americans because they gave governmental officials unbridled discretion to conduct arbitrary searches and seizures. The Fourth Amendment was a direct response to these abuses, and sought to curtail this discretion.

1. John Wilkes and the rejection of general warrants in England

General warrants gave those using them complete discretion as to whom to arrest, where to search, and for what to search. General warrants became the focus of public attention in England in the 1760s with the searches and arrests associated with John Wilkes' anti-government pamphlets. *See* Telford Taylor, *Two Studies in Constitutional Interpretation* 29-35 (1969); Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 43-48 (1937); 2 William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 886-950 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

With the legal victories of Wilkes and his supporters came court decisions condemning the broad discretion granted by general warrants. For example, in declining to set aside a £300 damage award as excessive for a journeyman printer's wrongful arrest and six-hour imprisonment, Chief Justice Pratt wrote that the jury was justified in awarding the damages to condemn the arbitrary exercise of power that the arrest represented: "[The jury] saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them." *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 769 (K.B. 1763).

Pratt expanded on these concerns in Wilkes' own trespass suit against the undersecretary of state who supervised the search of Wilkes' house, holding that "discretionary power given to messengers to search wherever their suspicions may chance to fall" would "affect the person and property of every man in this kingdom, and is totally subversive of the liberty of

the subject." *Wilkes v. Wood*, 19 Howell St. Tr. 1153, 1167, 98 Eng. Rep. 489, 498 (C.P. 1763); *see also Leach v. Money*, 19 Howell St. Tr. 1001, 1027, 97 Eng. Rep. 1075, 1088 (K.B. 1765) (Mansfield, J.) ("It is not fit, that the receiving or judging of the information [regarding cause to arrest or search] should be left to the discretion of the officer.").

These and other judicial repudiations of general warrants in England did not go unnoticed in America. Wilkes was a hero to the colonists and his resistance to the general warrants an inspiration that had a strong influence on the framing of the Fourth Amendment. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994) (describing *Wilkes* as "the paradigm search and seizure case for Americans," "whose lesson the Fourth Amendment was undeniably designed to embody.").

2. Challenges to writs of assistance in colonial America

At about the same time John Wilkes and others were challenging the use of general warrants in England, American colonists were challenging the use of writs of assistance by British customs officers. The writs gave officials using them even greater discretion than the general warrants used against Wilkes and his compatriots. Any person authorized by a writ of assistance had almost limitless powers to search. All officers and subjects of the Crown were commanded to assist in the execution of the writs, and the writs expired only on the reigning sovereign's death. *See* Lasson, *supra*, at 53-54.

In February 1761, after the writs had expired following the death of King George II, sixty-three Boston merchants brought suit to halt the issuance of new writs of assistance. The merchants were represented by James Otis, Jr. *See* Lasson,

supra, at 53-54. Otis challenged the broad discretion the writs gave customs officers, arguing that they were "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law book." 2 *Legal Papers of John Adams* 140 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). "It is a power that places the liberty of every man in the hands of every petty officer." *Id.* at 141-42. Otis and his merchant clients lost their legal battle, but their challenge inspired Americans to resist British rule, culminating with the Declaration of Independence.[2]

The condemnation of discretionary arrest and search authority voiced by Pratt and Otis was repeated when colonial judges later refused to issue general writs after their authorization by the Townsend Act of 1767. The colonial judges consistently condemned such writs as illegal precisely because they purported to confer discretionary authority on officers. *See* Thomas Y. Davies, *Recovering the Fourth Amendment*, 98 Mich. L. Rev. 547, 556-57 (1999).

The battles against general warrants and writs of assistance were still fresh in the minds of Americans when they were considering whether to adopt a new Constitution. Many were concerned that the new Constitution contained no bill of rights, and specifically no provision curbing broad discretion to search and seize. Anti-federalist opponents to the Constitution argued that it would not restrict agents of the new federal government from conducting arbitrary and invasive searches.

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[2] A young John Adams was a spectator in the packed courtroom during Otis' argument. *See* Lasson, *supra*, at 58-59. He later described the argument as one of the key events leading to the American Revolution. *Id.* at 59-61.

See generally Lasson, *supra*, 92-96; 3 Cuddihy, *supra*, at 1361-1416.

Search and seizure was addressed in at least seven of the state conventions that considered the Constitution, and the last four voting to ratify the Constitution requested that a search and seizure provision be added. *See* 3 Cuddihy, *supra*, at 1380. Of course, the provision ultimately adopted did not ban just general warrants, but any "unreasonable" search or seizure of a similarly arbitrary nature. *See* U.S. Const. amend. IV; Lasson, *supra*, at 103.

3. The Fourth Amendment repudiated unfettered search and seizure discretion

Because of the familiar history leading to the Fourth Amendment's adoption, this Court has recognized that the principle aim of the Fourth Amendment is to limit law enforcement discretion, and thereby prevent arbitrary searches and seizures. "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *see also Delaware v. Prouse*, 440 U.S. 648, 661 (1979). Numerous legal commentators also have recognized that the primary aim of those adopting the Fourth Amendment was to limit governmental discretion. *See, e.g.*, Davies, *supra*, at 556; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 201 (1992); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 222 (1989).

B. Warrantless Arrests Could Only be Made for Felonies and Breaches of the Peace Committed in the Presence of the Arresting Official

This Court has also considered whether a specific seizure would have been unlawful at the time of the Fourth Amendment's adoption to determine whether the seizure complies with the Amendment. *See, e.g., United States v. Watson*, 423 U.S. 411, 418-20 (1976); *Carroll v. United States*, 267 U.S. 132, 149 (1925). Contemporary common-law rules limited the discretion of peace officers to arrest for minor crimes. The founding-era rule was that an arrest could only be made for a misdemeanor when it was ongoing and a breach of the peace:

> In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.

Carroll, 267 U.S. at 157 (quoting Halsbury's Laws of England, vol. 9, part. III, 612); *see also Davis v. United States*, 328 U.S. 582, 610 n.4 (1946) (Frankfurter, J., dissenting) ("The common law rule restricted arrest without warrant for a misdemeanor to those acts which were breaches of the peace.").

Breach of the peace was a category of non-felony public offenses involving or tending toward violence. Sir Matthew Hale listed "breaches of the publick Peace" as one of three

categories of "[o]ffenses of an Inferior nature."[3] Matthew Hale, *Pleas of the Crown* 134 (2d ed. 1678). The category consisted of affrays, riots, forcible entries, barretries and riding armed. *Id.*; *see also* 1 William Hawkins, *A Treatise of the Pleas of the Crown* 126 (1716) ("Inferior Offenses more immediately against the Subject, not capital, either amount to an actual Disturbance of the Peace, or do not."). William Blackstone also distinguished "Offenses against the Public Peace," discussed in volume four, chapter eleven of his *Commentaries*, from lesser categories of offenses, such as "Offenses against the Public Health, and the Public Police or Oeconomy," which were the subject of chapter thirteen. *See* 4 William Blackstone, *Commentaries on the Laws of England*, 142-53, 161-75 (1769).

This continued to be the generally accepted definition into the nineteenth century. *See, e.g.*, 1 John Bouvier, *A Law Dictionary* 146 (1839) (defining "breach of the peace" as "[a]ny offense against public tranquility, when accompanied by violence."); *see also* Rollin M. Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 230 (1940) (defining breach of the peace as "a public offense done by violence or one causing or likely to cause an immediate disturbance of public order.").

The limitation of warrantless arrests to felonies and ongoing breaches of the peace was well-settled prior to the Fourth Amendment's adoption. "[A] constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest." *Regina v. Tooley*, 2 Ld. Raym. 1296, 1301, 92 Eng. Rep. 349, 352 (K.B. 1710). The rule was

[3] The other two categories of inferior offenses were "Deceipts and Conzenage," and "Nusances." Matthew Hale, *Pleas of the Crown* 134 (2d ed. 1678).

repeated in legal treatises,[4] legal dictionaries,[5] and the handbooks used by the officials required to apply the rule.[6]

The authority to arrest without a warrant for breaches of the peace was based on the nature of the offenses, *i.e.*, that they were violent public disturbances or threats thereof. As Chief Justice Taft explained for the Court in *Carroll v. United States*, the purpose of arresting for breaches of the peace was not to enable apprehension of criminals (the basis for warrantless felony arrests), but to bring an end to the breach of the peace. *Carroll*, 267 U.S. at 157; *see also* Francis H. Bohlen & Henry Shulman, *Arrest With and Without a Warrant*, 75 U. Pa. L. Rev. 485, 490 (1927); *see generally City of Chicago v.*

[4] *See, e.g.*, Matthew Hale, *Pleas of the Crown* 92 (2d ed. 1678); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 75, 77 (1721); 4 William Blackstone, *Commentaries on the Laws of England* 289 (1769).

[5] "None shall be *arrested* for Debt, Trespass &c. or other Cause of Action, but Virtue of a Precept or Commandment out of some Court: But for Treason, Felony, or Breach of the Peace, any Man may *arrest* without Warrant or Precept." Giles Jacob, *A New-Law Dictionary* (7th ed. 1756) (definition of "arrest"); *see also* J. Johnson, *Les Termes de la Ley* 38 (1st Am. ed. 1812) (same definition for "arrest").

[6] *See, e.g.*, *The Conductor Generalis* 25 (Hugh Gaine ed., New York 1788) (limiting a constable's warrantless arrest power to felons and for a "breaker of the peace in his view"); Francois-Xavier Martin, *The Office and Authority of a Justice of the Peace, and of Sheriffs, Coroners, &c. According to the Laws of the State of North-Carolina* 45 (1791) ("In all criminal cases, *where any one is in danger of life, or member*, any private man may arrest another, without process or warrant . . . .") (emphasis added); Eliphalet Ladd, *Burn's Abridgment, or the American Justice* 40-41 (1792).

Morales, 527 U.S. 41, 106-08 (1999) (Thomas, J., dissenting) (describing police officers' common-law "responsibility for preserving the peace").

For other misdemeanors that did not involve public disturbances or actual or threatened violence, there was no need for an exception to the warrant requirement. In fact, one of the bases for distinguishing misdemeanors from felonies at common law was that, unlike a felony, an arrest could not be made for a misdemeanor without a warrant unless it was an ongoing breach of the peace. *See* 9 *Encyclopaedia of the Laws of England* 268 (2d ed. 1908) (defining "misdemeanor"). Immediate arrests were not seen as necessary for misdemeanors. For this reason, a summons was used to initiate the criminal process for a misdemeanor charge, unlike a felony charge, which began with the issuance of an arrest warrant.[7]

In other contexts, "breach of the peace" had a broader meaning that encompassed any violation of the criminal law,

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[7] James Wilson, a signatory of both the Declaration of Independence and the Constitution, and also an early member of this Court, recognized this distinction:

> On an indictment for any crime under the degree of treason or felony, the process proper to be first awarded, at the common law, is a *venire facias*, which, from the very name of it, is only in the nature of a summons to require the appearance of the party. . . . On an indictment for felony or treason, a capias is always the first process.

2 *Works of James Wilson* 689-90 (Robert G. McCloskey, ed. 1967). Wilson noted that it was "now the usual practice" in England to issue a *capias* even for misdemeanors, but he indicated no similar change in this country. *Id.* at 690.

synonymous with the phrase "breach of the king's peace,"[8] but the phrase was used in its narrow sense when describing the power to arrest. *See* 11 *Encyclopaedia of the Laws of England* 3 (2d ed. 1908). In fact, founding-era dictionaries distinguished the term "peace," which was associated with the powers of justices of the peace to prevent public disturbances, from the phrase "peace of the king." *See, e.g.*, T. Cunningham, *A New and Complete Law-Dictionary* (1783 ed.) (definitions of "Peace" and "Peace of the King"); 5 Giles Jacob, *The Law-Dictionary* 112-13 (Am. ed. 1811) (entries for "Peace" and "Peace of the King"). The distinction continued to be recognized during the eighteenth century. *Compare* 1 John Bouvier, *A Law Dictionary* 190 (11th ed. 1865) (defining "breach of the peace"), *with* 2 John Bouvier, *A Law Dictionary* 322 (11th ed. 1865) (defining "pax regis" and "peace").

Following the Fourth Amendment's ratification, the common law rule was well-settled for roughly the first one hundred years of the Republic. Through most of the nineteenth century, courts continued to hold that a warrantless misdemeanor arrest was unlawful when not a breach of the peace.[9] Nineteenth-century American legal commentators were

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[8] The phrase was used in this broader sense when it appeared on a criminal indictment.

[9] *See, e.g.*, *Pow v. Beckner*, 3 Ind. 475, 478 (1852) ("To justify a constable in apprehending without process for an affray, the affray must take place in his view and be still continuing. After it is over he has no more power to arrest the offenders than any other person."); *Commonwealth v. Carey*, 66 Mass. (12 Cush.) 246, 250 (1853) ("[E]ven if he were a constable, he had no power to arrest for any misdemeanor without a warrant, except to stay a breach of the peace, or to prevent the commission of such an offense); *Robison v. Miner*, 68 Mich. 549, 556-59, 37 N.W. 21, 25 (1888) (holding

no different, and in fact, some stated the rule as prohibiting *all* warrantless misdemeanor arrests. William L. Murfee, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 1161, at 629-30 (1884). Other treatises limited warrantless misdemeanor arrests to offenses involving public violence.[10]

By the early twentieth century, courts had begun to ignore the breach-of-the-peace requirement,[11] and legislation in many states permitted warrantless arrests for any misdemeanor committed in an officer's presence. *See* T.W. Hughes, *A Treatise on Criminal Law and Procedure* § 876, at 597 (1919). Obviously, these alterations to the common law a century or more after the Fourth Amendment's adoption provide no insight into the understanding of the Amendment when it was ratified.

Moreover, these changes to the common law rule were made by state courts and legislatures *before* this Court held the Fourth Amendment applied to the states. *See Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). They therefore do not constitute legislative opinions on their constitutionality. Because the Fourth Amendment did not apply to the states, state legislatures would not have been concerned whether their legislation met

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unconstitutional the portion of a liquor law that deemed its violations to be breaches of the peace and permitted warrantless arrests); *see also* Bohlen & Shulman, *supra*, at 486 & n.3 (citing cases).

[10] *See also* 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 15 (1st Am. ed. 1819); John G. Crocker, *The Duties of Sheriffs, Coroners and Constables* § 48, at 33 (2d ed. 1871).

[11] Contemporary commentators perceived those courts to be misreading this Court's decision in *Carroll v. United States*, 267 U.S. 137 (1925). *See* Bohlen & Shulman, *supra*, at 487-883.

Fourth Amendment standards. Moreover, to hold that post-Fourth-Amendment-adoption alterations to the common law by states are relevant when made before the Fourth Amendment applied to the states would permit state legislatures to preemptively nullify federal constitutional rights before they applied to them. *Cf. Dickerson v. United States*, 530 U.S. ___, slip op. at 1 (June 26, 2000) (rejecting the argument that an Act of Congress vitiated *Miranda* because "a constitutional decision . . . may not be in effect overruled by an Act of Congress").

C. Because Officer Turek's Arrest of Gail Atwater Would Have Been Unlawful When the Fourth Amendment Was Adopted, the Arrest Was Unconstitutional

Gail Atwater was not breaching the peace when she and her children rode in her truck at fifteen-miles-per-hour unrestrained by seat belts. Though there may be traffic offenses that qualify as breaches of the peace, this is not one of them.

Non-use of seat belts is not, by any stretch of the imagination, a public disturbance or an act likely to incite violence in others. It is not even a *public* offense. Unlike many traffic offenses, violations of the Texas seat-belt law have virtually no impact on other drivers. As the three-judge panel of the Fifth Circuit astutely observed, the seat-belt law is one of several "paternalistic statutes" that Texas and many states have adopted "to protect a specific individual from his own conduct, conduct which poses no threat to the public at large." *Atwater v. City of Lago Vista*, 165 F.3d 380, 385 (5th Cir. 1999) (panel), Pet. App. B at 37a. It is difficult – if not impossible – to conceive of a traffic violation that is further from a breach of peace than the seat-belt law.

Furthermore, the common law justification for warrantless breach-of-the-peace arrests is wholly absent in this case. There is no indication that a custodial arrest was necessary to prevent the offense from continuing. In fact, the record indicates the opposite. Ms. Atwater told her children that the policeman was right, and they had broken the law by not wearing their seat belts. (R. 384).

At a minimum, the Fourth Amendment prohibits seizures that were unlawful at the time of the Amendment's adoption. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *see also County of Riverside v. McLauglin*, 500 U.S. 44, 60-61 (1991) (Scalia, J., dissenting) (citing *California v. Hodari D.*, 499 U.S. 621 (1991)). Because the arrest of Gail Atwater would not have been permitted by founding-era common-law rules, her arrest violated the Fourth Amendment.

D. The Decision Below Is Contrary to the Fourth Amendment Because It Grants Law Enforcement Unfettered Discretion to Search and Arrest of the Sort the Fourth Amendment Was Meant to End

The court below not only ignores the nature of the offense for which Ms. Atwater was arrested, but also leaves to the complete discretion of every police officer whether to use custodial arrests for any traffic violation. The Fifth Circuit thereby gives law enforcement the very sort of broad discretion to commit arbitrary searches and seizures that the Fourth Amendment sought to end.

Because of the immense number of traffic laws, it is virtually impossible for any person to drive for any significant distance without committing some infraction. *See, e.g.*, Salken, *supra*, at 223. Violations of traffic laws are numerous. 1993

Department of Transportation statistics indicated that 50% of all vehicles at any time were violating the then-maximum speed limit of 55 miles per hour, with 71% of the vehicles speeding on urban interstates, and 80% on rural interstates. *See* U.S. Dep't of Transportation, National Maximum Speed Limit -- Fiscal Year 1993: Travel Speeds, Enforcement Efforts, and Speed-Related Highway Safety Statistics tbls. 1 & 3 (Oct. 1995). More recently, seven out of ten drivers admitted in an official survey that they had run a red light at least once in the past year. *See* 2 U.S. Dept. of Transportation, National Highway Traffic Safety Administration, National Survey of Speeding and Other Unsafe Driving Actions 119 (1998) (report no. DOT HS 808 749). Violations of seat belt laws are also fairly common. At any given time, almost one-third of vehicle occupants are not using their seat belts. 2 U.S. Dept. of Transportation, National Highway Traffic Safety Administration, 1998 Motor Vehicle Occupant Safety Survey 20 (2000) (report no. DOT HS 809 051).

An observant police officer can come up with a traffic violation for almost any vehicle. *See, e.g., United States v. Smith*, 80 F.3d 215, 219 (7th Cir. 1996) (condoning a traffic stop based on the officer's belief that an air freshener hanging from the rear view mirror of a car amounted to a material obstruction between the driver and the windshield in violation of Illinois law). This means police officers are left to choose which laws to enforce, and against which drivers to enforce them:

> [G]iven the pervasiveness of such minor [traffic] offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, [probable cause for a traffic violation] hardly matters, for here as well there exists 'a power that places the liberty of every man in the hands of

every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.

1 Wayne R. LaFave, *Search and Seizure*, § 1.4(e), at 123 (3d ed. 1996) (quoting 2 *Legal Papers of John Adams* 141-42 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

Petitioners do not challenge police discretion to selectively make stops for traffic violations they observe. State legislatures have determined that various traffic laws help insure safer roads and highways, and police should enforce those laws by making traffic stops and issuing citations for their violation. *See Whren v. United States*, 517 U.S. 806, 818 (1996) ("[W]e 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."). Giving police the discretion to choose which violations to enforce and choosing which vehicles to stop is an acceptable concession to permit enforcement of these laws, even though that means traffic stops may be made for pine tree air fresheners hanging from vehicle windshields. But there is no reason to grant a similar degree of discretion to handcuff and take people to jail for those same minor violations.

Those who insisted on a bill of rights with a provision prohibiting unreasonable searches and seizures likely would be amazed at the freedom and lifestyle enabled by motor vehicles. They also would be shocked that regulation of these motor vehicles is used as an excuse to grant law enforcement almost unlimited discretion to search and seize. Such discretion may be acceptable to permit enforcement by issuance of traffic citations, but not when the discretion includes whether or not to place a person under custodial arrest.

The decision below ignored the common law altogether and turned the historical basis of the Fourth Amendment on its head. Granted, many things have changed since 1791. Organized police forces were unknown in colonial times, as were motor vehicles. Furthermore, many state courts and legislatures abandoned the breach-of-the-peace requirement during the 20th century, thereby lessening the protections afforded by the common law. Still, the evils for which the Fourth Amendment was adopted and the protections afforded by the common law should not be ignored. Balancing the competing interests shows there is no reason for doing so here.

II. Balancing the Competing Interests of Law Enforcement and the Individual Demonstrates that the Custodial Arrest of Ms. Atwater for Non-Usage of Seat Belts Was Constitutionally Unreasonable

The Fourth Amendment's over-arching command is that all searches and seizures must be reasonable. "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968))). The Fourth Amendment reasonableness of a seizure is determined by balancing the competing interests of the government and the individual. "To determine the constitutionality of a seizure, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983); citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976)).

For Gail Atwater, the seizure and subsequent searches to which she was subjected were an extreme intrusion and disruption of her life and the life of her children. No legitimate law enforcement objective or governmental interest was furthered in any way by this conduct.

A. The Nature and Quality of the Intrusion on Gail Atwater's Liberty Interests Was Substantial

Gail Atwater was subjected to a custodial arrest. A custodial arrest in any circumstance is a substantial governmental intrusion, particularly for the average law-abiding citizen. The circumstances of this case – a mother handcuffed and taken to jail in front of her two young children – make the custodial arrest here particularly egregious.

1. Custodial arrests as a general matter are significant governmental intrusions

A custodial arrest of a person is the quintessential seizure. *See California v. Hodari D.*, 499 U.S. 621, 624 (1991) (citing *Henry v. United States*, 361 U.S. 98, 100 (1959)). The Fourth Amendment therefore requires that it be reasonable. *See Payton v. New York*, 445 U.S. 573, 585 (1980). This Court has used the term "custodial arrest" to describe seizures where the person is not just detained, but taken into custody and transported to the police station. *E.g.*, *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); *United States v. Robinson*, 414 U.S. 227, 234-35 (1973).

A custodial arrest is a particularly significant governmental intrusion on an individual's liberty interest. The degree of the intrusion an arrest involves is readily apparent

when compared with a routine traffic stop. A traffic stop "is a relatively brief encounter and 'is more analogous to a so-called "*Terry* stop" . . . than to a formal arrest.'" *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). The typical traffic stop, although a Fourth Amendment seizure, often is no more than an inconvenience, in which the motorist "will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, . . . may then be given a citation, but [expects] that in the end he most likely will be allowed to continue on his way." *Berkemer*, 468 U.S. at 437; *but see Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting) ("Traffic stops, even for minor violations, can take upwards of 30 minutes."). Unlike a custodial arrest, a traffic stop is not a complete suspension of an individual's freedom. The person remains in or near his or her car, which is a less threatening and more familiar setting than a police station house or a jail cell.

A custodial arrest is likewise far more intrusive than most searches, especially a vehicle search or a *Terry* frisk. An arrest is "a wholly different kind of intrusion upon individual freedom from a limited search for weapons." *Terry v. Ohio*, 392 U.S. 1, 26 (1968). As Justice Powell observed:

> A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. Although an arrestee cannot be held for a significant period without some neutral determination that there are grounds to do so, *no decision that he should go free*

can come quickly enough to erase the invasion of his privacy that already will have occurred.

United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (citations omitted) (emphasis added). The custodial arrest, not the search incident to the arrest, "is the significant intrusion of state power into the privacy of one's person." *United States v. Robinson*, 414 U.S. 218, 237 (1973) (Powell, J. concurring).

The significance of custodial arrests is sometimes overlooked because the focus often is on the search rather than the arrest. This is usually the case when the Fourth Amendment challenge is raised with the hope of triggering application of the exclusionary rule. For the criminal seeking to exclude otherwise admissible evidence, the search most surely is the utmost concern. But the perspective of the average citizen is the focus of Fourth Amendment balancing, not the perspective of the career criminal. *See Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("the 'reasonable person' test presupposes an *innocent* person") (citing *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting)). For the average citizen, who is always subject to a possible traffic stop for a myriad of reasons, a search is an annoyance. A custodial arrest is a nightmare.

A custodial arrest typically entails physical restraint at the outset. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (recognizing that "the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion"). At a minimum, this restraint usually comes in the form of handcuffing, followed by physically placing the individual in the back of a locked police car for transportation to the booking station.

Once at the booking station, the arrestee is subjected to the booking process, usually including fingerprinting and a "mug shot." Valuables are taken away, and the person is placed in a jail cell. As an incident to the arrest, the arrestee is almost always subjected to a search of his or her person, and may be subjected to more extreme invasions, such as body cavity searches. An arrestee may be detained for as long as 48 hours before a probable cause determination is made by a magistrate. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). If unable to post the bond set by the magistrate,[12] the arrestee will languish in jail until a scheduled court date.

Significantly, pre-trial detention often places multiple detainees in a single holding cell, thus mingling traffic violators with persons arrested for much more serious offenses who pose a risk of physical harm to the traffic-offense arrestee. Most, if not all, liberty interests and expectations of privacy are lost as an incident to pre-trial detention. "The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects, and therefore all searches and seizures of the contents of an inmate's cell are reasonable." *Hudson v. Palmer*, 468 U.S. 517, 538 (1984) (O'Connor, J., concurring) (citations omitted).

The harm from a custodial arrest lingers long after the detention ends. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 26 (1968) (observing that a custodial arrest "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."). The record of the arrest may linger even when there ultimately is an acquittal, and even if no charges are ever brought against the

[12] Ms. Atwater was required to post a $310 bond to get out of jail for a $50 offense. (R. 424).

arrestee. Further, arrest records are easily accessible by the public, and may close the door on a broad array of employment opportunities. *See* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 797 (1993); Salken, *supra*, at 264. In fact, Texas tort law discourages employers from hiring persons with arrest records. *See Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 734 (Tex. 1998).

An arrest following a traffic stop is an even greater governmental intrusion. An arrest for a traffic violation comes as a particularly great shock to a driver, whose expectation is that, at most, it will end with a traffic citation. *See Berkemer*, 468 U.S. at 437. Also, the arrest is commonly a public spectacle, made on the side of a public road in full view of all passers by.

The searches that may accompany the arrest also are more intrusive when a custodial arrest follows a traffic stop. The search incident to arrest encompasses not just the person of the arrestee, but also the vehicle the arrestee had occupied. *See New York v. Belton*, 453 U.S. 454, 460-61 (1981). The vehicle is frequently impounded, and reacquisition requires payment of impoundment fees – regardless of whether a criminal charge follows the arrest. The vehicle then may be subjected to a more thorough search in which the vehicle's contents are inventoried. *See Colorado v. Bertine*, 479 U.S. 367 (1986).

2. The custodial arrest of Gail Atwater was particularly invasive and extreme

The arrest of Gail Atwater had all the characteristics of a full custodial arrest. Furthermore, the arrest was exacerbated by a police officer's humiliating a mother in front of her two young children.

Ms. Atwater was subjected to a full-fledged custodial arrest. Officer Turek handcuffed Ms. Atwater's hands behind her back, loaded her into a police squad car, and then transported her to the police station. Once at the police station, Gail Atwater was forced to remove her shoes and glasses, and empty her pockets, then a "mug shot" was taken. (R. 386-88; 706). She was then placed in a cold jail cell for approximately one hour before being taken to a magistrate. Meanwhile, her vehicle was towed to an impound lot in another city and its interior searched and inventoried.[13] She then had to pay an additional $110 to get it back. (R. 400).

This arrest was particularly egregious because of the presence of Ms. Atwater's children. The arrest began with Officer Turek yelling at her, which subsequently included accusations – in front of her children – that she was a bad mother and did not care about her children. (R. at 384-85, 388-89, 704-05). He also implied Ms. Atwater was a liar, again in front of her children. Officer Turek's behavior is all the more distasteful – and detrimental to Ms. Atwater's children – when it came immediately after she had explained to her children that they were "wrong" for not wearing their seat belts and the police officer was just "doing his job." (R. 384). Ms. Atwater's four-year-old son and six-year-old daughter received a traumatic lesson on what this police officer thought his job entailed.

After hearing their mother vilified by a man with a gun, the children then watched him handcuff their mother and take

[13] The inventory revealed the following: two tricycles, one bicycle, one igloo cooler, two pairs of children's shoes, toys, food, and a bag of Kingsford charcoal. (R. 426).

her away.[14] And what was to become of Gail Atwater's two young children when she was taken to jail? Ms. Atwater begged Officer Turek to permit her to bring her children to a friend's home a few houses away, but he refused. (R. 384, 704). Initially, he planned to take the children into custody as well. (R. 427). Luckily, a family friend arrived, and Officer Turek permitted her to take the children. (R. 386).

The governmental intrusion here was undoubtedly substantial. Ms. Atwater was subjected to a full custodial arrest which her young children were forced to witness.

B. The Government's Interest in Enforcing the Seat Belt Law Does Not Justify the Intrusion Here

Petitioners recognize that as a general matter, government has a "'vital interest' in highway safety and the various programs that contribute to that interest." *New York v. Class*, 475 U.S. 106, 112 (1986) (citing *Delaware v. Prouse*, 440 U.S. 648, 658 (1979)). Seat belt laws, however, are readily distinguishable from most laws that further highway safety: they are "designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large." 165 F.3d 380, 385, Cert. Pet. App. B at 37a. The remaining issue is whether the governmental interest in enforcing the seat belt laws was furthered in any conceivable way by the handcuffing and arrest of Gail Atwater in front of her children. It was not.

[14] This was particularly harmful to the children because they blame themselves for their mother's arrest: they had lost a toy, and were out of their seat belts so they could look out the windows to try to find it. (R. 380, 396).

1. The governmental interest in enforcing the seat belt law is relatively slight

The Texas seat belt statute is a criminal law of relatively recent vintage. *See* Act of July12, 1984, 68th Leg., 2nd C.S., ch. 1, § 1, 1984 Tex. Gen. Laws 11, 12. Indeed, seat belts were not even required in newly-manufactured American automobiles until 1967. *See* Kurt B. Chadwell, Comment, *Automobile Passive Restraint Claims Post*-Cipollone*: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 143-44 (1994).

The gravity of the offense is an important factor in determining the reasonableness of a search or seizure. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984); *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring). Not wearing a seat belt is obviously less grave of an offense than attempted robbery, malicious wounding, or burglary of a home, all crimes involving direct attacks on the rights of others. *Cf. Winston v. Lee*, 470 U.S. 753, 755-56 (1985); *Tennessee v. Garner*, 471 U.S. 1, 4 (1985). It also is less serious than drunk driving, which poses a threat to all others on the road. *Cf. Welsh*, 466 U.S. at 755 (Blackmun, J., concurring). It is even less significant than a failure to use a turn signal. *Cf. Whren v. United States*, 517 U.S. 806, 810 (1996).

Finally, the penalty for violating the seat belt law is minimal: a fine ranging from $25 to $50 is authorized. Tex. Transp. Code Ann. § 545.413(d) (West 1999). The Texas Legislature intended for the fine to be *the only penalty* for not wearing a seat belt, not custodial arrest and subsequent incarceration. *See Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 134 (Tex. 1994) (the statutory fine was meant

to be "the sole legal sanction for the failure to wear a seat belt"). Texas even bars evidence of the use or non-use of seat belts in civil litigation. Tex. Transp. Code Ann. § 545.413(g) (West 1999). "[T]he penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984). As evidenced by the penalty imposed for a violation of the seat belt law, the governmental interest in the law's enforcement is relatively slight.

2. The custodial arrest furthered no legitimate law enforcement objective that could not also have been accomplished by issuing a citation

Even if the government had a stronger interest in enforcing the seat belt laws, a custodial arrest would not advance that interest. "The most common purpose of arrest is to bring an actual or supposed criminal into court for investigation or trial or to subject a convict to the penalty previously imposed upon him by a competent tribunal." Rollin M. Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 202 (1940). These and other justifications for a custodial arrest usually do not apply to traffic violations.

Because the traditional justifications for custodial arrests do not apply to most traffic offenses, issuing citations is the preferred method for enforcing most traffic laws. "It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law." American Bar Association, *Standards for Criminal Justice*, § 10.2-1 (2d ed. 1980). Academics have made the same recommendation. *See, e.g.*, 3 Wayne R. LaFave, *Search and*

Seizure § 5.2(g), at 91 (3d ed. 1996); Salken, *supra*, at 249 (1989); Arthur Mendelson, *Arrest for Minor Traffic Offenses*, 19 Crim. L. Bull. 501, 503 (1983).

In addition, approving the use of custodial arrests for fine-only traffic offenses such as seat belt laws is counter to the governmental interest in enforcing traffic laws: it raises the stakes of the "routine" traffic stop, increasing the potential danger to police officers. People should not fear police, whose job it is to protect them. But if police have the unfettered discretion to arrest anyone for even the slightest criminal infraction, that will engender fear of police. Currently the expectation of most drivers is that a traffic stop will be brief. Because of this, traffic stops are less adversarial than custodial arrests. "The threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest." *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

If the decision below is approved by this Court, that may change. Every driver who sees the flashing lights of a police car in the rear view mirror will have cause to wonder if this will be the officer who decides to handcuff and take the driver to jail. Drivers will wonder if they will spend the next two days in jail, and their behavior will reflect this.

3. No special circumstances were present in this case to make a custodial arrest necessary or reasonable

Various factors may arise in individual traffic stops that conceivably could make the increased governmental intrusion of a custodial arrest "reasonable." No such factors were present in this case. The custodial arrest did nothing to further "the

community's interest in fairly and accurately determining guilt or innocence." *Winston v. Lee*, 470 U.S. 753, 762 (1985).

A custodial arrest was not necessary to secure an appearance in court for the seat belt violation. Ms. Atwater – known by the officer to be a local resident, wife of an emergency room physician, and mother of two young children – posed no risk of flight. Likewise, Officer Turek confirmed that she was a licensed driver after she presented him with her Texas driver's license number. (R. 386). Once the officer had made the stop, he had obtained all the evidence necessary for prosecution of the offense. *See Knowles*, 525 U.S. at 118. Ms. Atwater's signature on a citation, promising to appear, was all that was needed to insure enforcement of the law.[15]

Similarly, there was no indication that Ms. Atwater would have refused to belt herself and her children once her non-compliance was cited. In fact, the record strongly indicates the opposite: she was telling her children that they were wrong and that they all should have been wearing their seat belts. (R. 384). But Ms. Atwater was not given the chance to sign a promise to appear: Officer Turek *immediately* announced his decision to place her under custodial arrest. (R. 382). Whatever his motivation, from the moment Officer Turek

[15] The Fourth Amendment does not *always* mandate the least intrusive law enforcement practice, *see, e.g., Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983), as when the less intrusive practice poses significant difficulties in its application. But here, what happens to be a "less intrusive" means for enforcing the seat belt law is also the easiest, cheapest, most commonly used, most effective, in short, *the best* means as well.

stopped Ms. Atwater's truck, he made it clear that he intended to take her to jail.[16]

Finally, any of the sort of aggravating circumstances that can cause a traffic stop to "escalate" were wholly lacking in this case. Gail Atwater was not intoxicated or using illegal drugs. There were no outstanding warrants for her arrest. She was not a repeat offender.[17] Ms. Atwater was at all times cooperative and polite, even when Officer Turek's yelling made her children begin to cry. (R. 388-89, 414). There was no indication that Ms. Atwater was armed, or that she posed any threat to the officer's safety. In short, none of the common justifications given for custodial arrests were present in this case. All legitimate law enforcement objectives could have been accomplished by issuing a citation. In the balancing of interests, the respondents' side of the scale is empty.

As the court below erred by refusing to engage in an historical inquiry, so, too, did it err by not balancing the competing interests of the individual and government as mandated by this Court's decisions. Other lower courts have not shirked this responsibility when faced with a custodial

[16] Not surprisingly, Officer Turek's performance review indicates that he led his department in misdemeanor arrests. (R. 653).

[17] At various stages in this litigation, the respondents have mischaracterized Gail Atwater as having previously violated the seat belt law. *See, e.g.*, Brief of Appellees at 3, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999) (No. 98-50302). There is not evidence in the record so indicating. Ms. Atwater had been stopped by Officer Turek a few weeks before the episode that gave rise to this case, but her children were restrained on that occasion and no citation was issued. (R. 379, 405, 703-07).

arrest for a traffic violation. *See, e.g., State v. Jones*, 727 N.E.2d 886, 892-95 (Ohio 2000); *State v. Harmon*, 910 P.2d 1196, 1201-04 (Utah 1995). Under the circumstances of this case, the balancing of the competing interests leads to the same result that would have been reached under common law rules, themselves the result of a balancing of interests: the custodial arrest of Gail Atwater was an unreasonable seizure.

III. The Court Below Erred by Creating a Broad *Per Se* Rule that Probable Cause Without More Justifies *Any* Custodial Arrest, Regardless of the Offense

The Fifth Circuit announced a broad new rule that probable cause is the only Fourth Amendment restriction on a seizure of a person. Such a rule, when applied to minor traffic offenses, cannot be squared with the events that led to the Fourth Amendment's adoption or with any balancing of the competing interests of the individual and law enforcement. Additionally, this Court has never recognized such an unqualified rule, which ignores and even undercuts other decisions of this Court.

A. The Court of Appeals' Reliance on *Whren v. United States* Was Misplaced

The Fifth Circuit relied on language in *Whren v. United States*, 517 U.S. 806 (1996), concluding that any custodial arrest was reasonable so long as there is probable cause, ignoring the character of the offense. *See* 195 F.3d at 244-46, Pet. App. A at 4a-7a. The court below focused on the following passage:

> Where probable case has existed, the only cases in which we have found it necessary to perform the 'balancing' analysis involved searches or seizures

> conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, 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). There are several reasons why reliance on this passage was incorrect.

First, *Whren* did not address the constitutionality of a custodial arrest, but rather of a temporary detention – a traffic stop – based on probable cause to believe that a traffic violation had been committed. *Whren*, 517 U.S. at 808. The *Whren* petitioners contended that a traffic stop should only be permitted if a hypothetical police officer, "acting reasonably, would have made the stop for the reason given." *Whren*, 517 U.S. at 810. This Court unanimously rejected that argument as a thinly-veiled effort to avoid the Court's repeated rejections of efforts to scrutinize officers' objective intent. 517 U.S. at 811-12. All that was before this Court in *Whren* was the constitutionality of a traffic stop, not the custodial arrests that followed.

Second, the custodial arrests in *Whren* were not traffic arrests, but drug arrests based on probable cause. The vehicle occupants were arrested for possession of narcotics after the officer approached the vehicle and saw the passenger holding in plain view two large bags of what appeared to be crack cocaine. *Whren*, 517 U.S. at 808-09. The officers who made the arrests in *Whren* were plainclothes "vice-squad officers" patrolling in a "high drug area." *Id.* at 808. The officers had observed a vehicle with temporary plates that had stopped for an unusually long time at a stop sign, for no apparent reason. *Id.* The vehicle then drove away when the police car made a U-

turn and approached. *Id.* The petitioners contended that the stop and ultimate arrests were for a traffic violation in the hope that this Court would announce a rule that prohibited "pretextual" traffic stops. *Id.* at 810, 811-12. However, the facts in *Whren* arguably were sufficient to justify a brief detention based on reasonable suspicion apart from any traffic violation. *See United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

Finally, the custodial arrest of Gail Atwater *was* extraordinary. A custodial arrest is admittedly less of an intrusion than a physical penetration of the body, and based on precedent, entries into the home are treated as greater intrusions than physical incarceration of one's person. But what constitutes an "extraordinary" seizure is relative to the crime at issue. The infraction for which Ms. Atwater was arrested is much less serious than the offenses in the decisions listed by this Court in *Whren* as involving "extraordinary" intrusions: drunk driving,[18] burglary,[19] armed robbery,[20] or trafficking in narcotics.[21] The nature and quality of an intrusion on an individual's Fourth Amendment interests must be balanced "against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983); citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976)). The degree of the governmental intrusion on Gail Atwater was

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[18] *Schmerber v. California*, 384 U.S. 757, 758 (1966).

[19] *Tennessee v. Garner*, 471 U.S. 1, 5 (1985).

[20] *Winston v. Lee*, 470 U.S. 753, 755 (1985).

[21] *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

just as extraordinary as the intrusions in the cases listed in *Whren*, when the basis for the governmental intrusion – enforcing the seat belt law – is considered.

Indeed, even the Solicitor General has indicated that, after making a traffic stop based on probable cause to believe that a traffic violation has occurred, it is extraordinary to do more than issue a ticket, absent some indication of other ongoing criminal activity:

> Once a police officer has completed his investigation and citation of the traffic offense that gave rise to the stop, the motorist must be permitted to leave, unless the officer has by that time developed reasonable suspicion that the motorist has committed or is committing another offense. *See United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998); [*United States v. McRae*, 81 F.3d 1528, 1535 (10th Cir. 1996)]. A reasonable suspicion to continue to detain a motorist requires a 'particularized and objective basis for suspecting the person stopped of criminal activity,' *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (internal quotation marks omitted), in additional to the original traffic offense.

Brief for the United States in Opposition at 9-10, *Potts v. United States*, No. 98-2000. In *Potts*, the police officer stopped the vehicle after it had changed lanes without signaling and it had been speeding; there was no question the officer had probable cause to believe that these offenses had occurred. *United States v. Potts*, 173 F.3d 430, 1999 WL 96756 (6th Cir. Feb. 2, 1999) (unpublished disposition). If probable cause to believe a traffic offense has occurred were alone sufficient to justify a custodial arrest, then the issue of whether a traffic stop lasts too long – a much less significant governmental intrusion

than a custodial arrest – would rarely, if ever, be a concern.

B. *United States v. Watson* Upheld Only Warrantless *Felony* Arrests, and its Analysis Supports Petitioners' Position

The Fifth Circuit also ignored this Court's anaysis in *United States v. Watson*, 423 U.S. 411 (1976). *Watson* dealt with the validity of a warrantless felony arrest based on probable cause. *Watson*, 423 U.S. at 415-16. The *Watson* Court did not take for granted that probable cause was sufficient to justify a warrantless felony arrest. Instead, the Court carefully reviewed common-law authorities to determine if a warrantless felony arrest was proper when the Fourth Amendment was adopted. Like *Watson*, the instant case involves a warrantless custodial arrest. The *Watson* analysis, therefore, should be applied here.

The *Watson* opinion contains a broad statement indicating that probable cause would also be sufficient to justify a warrantless arrest for a misdemeanor: "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." *Watson*, 423 U.S. at 418. But the authorities cited to support this statement either address only felony arrests[22] or note the common-law rule

[22] *See Samuel v. Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K.B.1780); *Beckwith v. Philby*, 6 Barn. & Cress. 635, 638-39, 108 Eng. Rep. 585, 586 (K.B.1827); *Kurtz v. Moffitt*, 115 U.S. 487, 504 (1885); *Rohan v. Sawin*, 59 Mass. (59 Cush.) 281, 284 (1850); *Wakely v. Hart*, 6 Bin. 316, 318 (Pa.1814); *Holley v. Mix*, 3 Wend. 350, 350 (N.Y. Sup. Ct.1829); *State v. Brown*, 5 Del. (5 Harr.) 505,

limitting arrest authority to breach-of-the-peace misdemeanors.[23]

Instead, the analysis and holding of *Watson* demonstrate that an arrest that meets the common law standards satisfies Fourth Amendment requirements. As the *Watson* Court stated, a "balance [was] struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant." *Watson*, 423 U.S. at 421. The common law struck a different balance depending on the nature of the offense. The arrest in *Watson* satisfied the common law rules. The arrest in this case does not.

C. The Decision Below Abrogates the Automobile Exception by Permitting Warrantless Vehicular Searches *Without* Probable Cause that a Vehicle Contains Contraband

Although the Fifth Circuit's decision purports to place importance on probable cause, the ironic effect of the holding

507 (Ct. Gen. Sess. 1853); *Johnson v. State*, 30 Ga. 426, 426, 429-30 (1860); *Wade v. Chaffee*, 8 R.I. 224, 225 (1865); *Reuck v. McGregor*, 32 N.J.L. 70, 74 (Sup. Ct.1866); *Cf. Baltimore & O. R. Co. v. Cain*, 81 Md. 87, 100, 102, 31 A. 801, 803, 804 (1895) (stating that "[i]t is settled that an officer has the right to arrest without a warrant for any crime committed within his view," but the issue before the court was whether a non-police officer could arrest without a warrant for breach of the peace).

[23] 10 *Halsbury's Laws of England* 344-345 (3d ed. 1955); 4 W. Blackstone, Commentaries *292; 1 J. Stephen, *A History of the Criminal Law of England* 193 (1883); 2 M. Hale, Pleas of the Crown *72-74; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541 (1924).

is to dispense with probable cause altogether for warrantless searches of automobiles. If custodial arrests were permitted for any fine-only traffic offense, then there would no longer be a probable cause requirement for application of the "automobile exception."

Seventy-five years ago, this Court recognized the "automobile exception" to the warrant requirement, holding that a warrantless search of a motor vehicle based on probable cause satisfied the Fourth Amendment's reasonableness requirement. *See Carroll v. United States*, 267 U.S. 132, 153 (1925). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) (citing *California v. Carney*, 471 U.S. 386, 393 (1985)).

If the decision below is affirmed, police will not only be permitted to search vehicles "without more," they will be allowed to search vehicles with *even less*. "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981). If custodial arrests are allowed for all minor traffic offenses, the automobile exception's probable cause requirement will have been effectively jettisoned.

This is true, of course, whenever police conduct a warrantless arrest: they are then permitted to conduct a warrantless search incident to the arrest. The probable cause that justifies the arrest essentially transfers to support the warrantless search when there may have been no probable cause to justify the search alone. This is palatable when there is probable cause that a serious crime has been committed, but

much less so when the offense for which the arrest is made is merely a minor traffic offense. The fact that a citizen happens to violate a traffic law is no indication of any other criminal conduct. This Court has observed that "the *Carroll* doctrine does not declare a field day for the police in searching automobiles." *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973). If the decision below is left intact, the field day will have been declared.

D. The Court of Appeals' Ruling Undermines this Court's Decision in *Knowles v. Iowa*

Finally, the decision below undermines this Court's recent decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). *Knowles* held that a police officer cannot search a car following a traffic stop when the officer issues a traffic citation and does not place the driver under custodial arrest. *Knowles*, 525 U.S. at 114. The decision below undermines *Knowles* in two respects.

First, the Fifth Circuit nullifies any protection *Knowles* provides against full searches incident to arrest. Any officer wishing to avoid the holding of *Knowles* need only place the driver under custodial arrest for the traffic violation, and thereafter search the vehicle and driver as a search incident to arrest. *See United States v. Robinson*, 414 U.S. 218 (1973). If the decision below is allowed to stand, *Knowles* will cease to provide any protection to the average citizen. Indeed, a zealous officer will have an incentive to make custodial arrests in order to expand the scope of permissible searches.

Second, unless the decision below is reversed, *Knowles* will be meaningless when read against this Court's earlier decisions addressing searches incident to arrest. This Court has held that when a police officer has probable cause to believe an

offense has occurred for which an arrest may be made, the search incident to the arrest can be conducted either before or after the actual arrest. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980); *Peters v. New York*, 392 U.S. 40, 40-43 (1968). Thus, unless limitations are placed on when custodial arrests may be used for traffic offenses, avoiding the holding of *Knowles* becomes a matter of timing: a police officer may simply search the vehicle first, and if contraband is found, declare that the driver has been arrested for the traffic violation, thereby justifying the search after-the-fact. The officer also then avoids the trouble of actually making the custodial arrest unnecessarily[24] but accomplishes the desired search. As Professor LaFave has explained, "if *Rawlings* is not to undo *Knowles*, it will be necessary for the Court to find some way to avoid its use in the manner just suggested." 3 Wayne R. LaFave, *Search and Seizure* § 5.2, at 16 (3d ed. 2000 Supp.).[25] Prohibiting the use of custodial arrests for fine-only traffic offenses absent extraordinary circumstances would solve this dilemma.

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[24] Because of this, the systemic disincentives to making custodial arrests, raised by the respondent in *Ricci* as a reason for not placing limits on the use of custodial arrests for minor offenses, will not deter a police officer who wishes to conduct a thorough search of a vehicle or person. *See* Respondent's Brief at 15, *Ricci v. Village of Arlington Heights*, No. 97-501, 1998 WL 134006. Significantly, the respondent in *Ricci* essentially conceded that it would be proper to require citations rather than custodial arrests for traffic offenses. *Id.* at 16.

[25] *See also* Wesley M. Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 Tulane L. Rev. 1409, 1453 (2000) ("The unanimous decision in *Knowles* simply would make no sense if probable cause to believe an offender had committed a traffic offense alone justified taking him into custody.").

IV. This Case Lends Itself to Articulating More Clearly the Permissible Boundaries of When a Custodial Arrest May Be Used for Fine-Only Traffic Offenses

It would not be necessary to announce a general rule in this case in order to determine that the court below erred. The specific circumstances of this case make clear that the custodial arrest of Gail Atwater for violating the seat belt law was unreasonable under the Fourth Amendment. The arrest furthered no legitimate law enforcement interests. It would not be inappropriate to leave to the lower courts the task of determining if and when custodial arrests for other minor traffic offenses, under different circumstances, comply with the Fourth Amendment. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) ("[W]e leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."). Indeed, this Court often has eschewed bright-line rules in Fourth Amendment settings. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

Nevertheless, this Court has not hesitated to provide guidance to police officers and the public when appropriate. As the Court has explained in setting forth a general rule, "Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment." *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *see also Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998). This is a case that lends itself to establishing those boundaries.

Both the extreme intrusion of custodial arrests on law-abiding Americans, and the literally millions of traffic stops that occur every year, make it desirable to articulate the limits on when custodial arrests may be used for traffic offenses. While in some instances, a wide array of approaches in different regions makes sense, that is not true here. For

uniformity, to avoid arbitrary exercises of discretion, and to avoid the likelihood of future Fourth Amendment violations, Petitioners suggest the following rule:

> The Fourth Amendment prohibits custodial arrests for fine-only traffic offenses except when the arrest is necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road.

Issuing traffic citations is already the most common method for enforcing fine-only traffic offenses. Custodial arrests, on the other hand, are rare. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 434 (1984). The proposed rule preserves the common-law distinction between lesser and more serious offenses, but does so without reliance on terms such as "misdemeanor," "felony," or "breach of the peace," which have definitions that vary widely in different jurisdictions and differ substantially from their common-law meanings. *See United States v. Watson*, 423 U.S. 411, 440 n.9 (1976) (Marshall, J., dissenting) (listing federal statutes making offenses felonies that were misdemeanors at common law).

Furthermore, the proposed rule curbs unfettered discretion in conducting searches and seizures of the over 185 million Americans drivers for fine-only offenses that are only marginally criminal. Such limitations on police discretion are good for both the police and the public. *See* Amicus Curiae Brief of the Institute on Criminal Justice at the University of Minnesota Law School *et al.* The proposed rule limits discretion, however, without thwarting legitimate law enforcement objectives. Arrests would still be permitted for drunk driving and other offenses that will continue to pose a danger to others if the driver is not detained. Similarly, it would permit custodial arrests in cases when the officer cannot

ascertain the driver's identity, thus ensuring effective enforcement of traffic offenses.

Finally, the proposed rule leaves police with ample room to detect other more serious crimes.[26] Police will still be able to do any of following during a traffic stop:

- With probable cause to believe that a motor vehicle contains contraband, police may stop and search a vehicle without first obtaining a warrant as thoroughly as a magistrate could authorize. *See United States v. Ross*, 456 U.S. 798, 823 (1982).

- Police may order a driver to exit the vehicle and conduct a protective "frisk" of the driver's person for weapons. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

- Police also may order any passengers to exit the vehicle, and frisk them as well. *See Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

- Police may demand to inspect the VIN, and remove any objects obscuring the view of it. *See New York v. Class*, 475 U.S. 106, 115, 118-19 (1986).

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[26] The potential that *other* crimes might not be discovered if police are not permitted to arrest for any traffic offense is not a legitimate part of the Fourth Amendment inquiry. To consider the government's interest in enforcing crimes other than the one for which the arrest was made is to allow the effect of the exclusionary rule – which is a Fourth Amendment *remedy* – to impact the *substance* of the Fourth Amendment. Nevertheless, this concern may have motivated the Fifth Circuit in reaching its result.

- To insure their safety, police may conduct a limited search of the vehicle's interior, including the passenger compartment and any closed containers in the area, to ensure no weapons are present, if there are reasonable grounds to believe that their safety is threatened. *See Michigan v. Long*, 463 U.S. 1032, 1049-51 (1983).

- Police may seize, without a warrant, any contraband they encounter in "plain view" while conducting the above searches, and arrest the driver or passengers based on the probable cause developed from that discovery. *See Texas v. Brown*, 460 U.S. 730 (1983).

- Police may question a driver and passengers regarding unrelated criminal activity without first warning them of their right to remain silent. *See Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984).

- Police may seek and obtain a driver's consent to conduct more expansive searches, and are not required to tell the driver that he or she need not consent. *See Ohio v. Robinnett*, 519 U.S. 33, 36, 39-40 (1996).

- Police may have a drug-sniffing dog circle the vehicle to ascertain the presence of drugs. *See United States v. Place*, 462 U.S. 696, 707 (1983) (drug sniffing dog sniffing luggage not a search); *but see Edmond v. Goldsmith*, 183 F.3d 659 (7th Cir. 1999), *cert. granted*, No. 99-1030 (Feb. 22, 2000).

In short, police officers making traffic stops have at their disposal abundant powers to detect crimes, other than traffic violations, that may be occurring.

"An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Delaware v. Prouse*, 440 U.S. 648, 662 (1979). Having the discretion to take the actions listed above provides police with ample opportunities to uncover any other criminal activity. In the case of Gail Atwater, of course, there was no other criminal activity. Allowing police to retain the broad discretion to arrest granted them by the Fifth Circuit will not further detection of other crimes. It will simply, when exercised, constitute a severe and arbitrary governmental intrusion on otherwise law-abiding citizens who happen to violate minor traffic laws.

V. Conclusion

History, balancing the competing interests of the individual and government, and faithfully following this Court's precedents all demonstrate that Gail Atwater's Fourth Amendment rights were violated. Petitioners therefore respectfully pray that the Court reverse the court of appeals' *en banc* decision, and remand this case to the district court for trial.

Respectfully submitted,

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