No. 99-1408

GAIL ATWATER, Individually, 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,

Respondent

BRIEF OF RESPONDENTS

FILED NOVEMBER 1ST, 2000

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTION PRESENTED

Did the Fourth Amendment require Officer Turek to release Petitioner with a citation and a promise to appear rather than arresting her, when the officer observed Petitioner violating Texas seat belt and child restraint statutes and when Petitioner failed to produce a drivers' license or proof of insurance, simply because none of the charges could be punished by jail time, when Petitioner was held at the police station for approximately one hour and promptly received a hearing with a magistrate?

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STATEMENT

1. Facts.

On March 26, 1997 in Lago Vista, Texas, Officer Bart Turek was driving east on Dawn Drive when he met a 1993 Dodge Ram pickup truck being driven in the opposite direction by Petitioner Gail Atwater. Officer Turek saw that Ms. Atwater's three-year-old son MacKinley was standing in the front seat, leaning against the dashboard, and that neither MacKinley, the Petitioner, nor her five-year-old daughter Anya were wearing seat belts, as required by Tex. Trans. Code §§ 545.412, 545.413. R. 380. Officer Turek recognized Petitioner since he had stopped her "several months before" when she had MacKinley seated on an armrest in the front seat of the truck (R. 703), which she acknowledged was unsafe. (R. 379.)

After stopping her, Officer Turek approached Petitioner and, according to her testimony, yelled something to the effect of, "we've had this conversation before, we've met before" and then said "you're going to jail." (R. 703.) Officer Turek then told Petitioner to move her truck to a safer location and return to his police car. Both vehicles were moved off the street. (R. 384.)

While the vehicles were being moved, Ms. Atwater, in an effort to calm her children, told them, "Your mother is wrong. You should have been in your seat belts. He is doing his job. He is trying to protect you." (R. 384.)

After the vehicles were moved, Officer Turek again approached Petitioner's truck and asked to see her driver's license and proof of insurance. (R. 704.) Although Petitioner was required to possess both while

operating the pickup truck,[1] she had neither. (R. 382, 704.) She testified that they were in a purse stolen in an Austin theater several days before. (R. 382-83.) Officer Turek called for another officer to come to the scene, called for a tow truck to take Petitioner's pickup to a secure and locked facility, and arrangements were made for a friend of Petitioner who lived nearby to care for Anya and MacKinley. (R. 421.)

After the second officer, the tow truck, and the friend arrived, Ms. Atwater was for the first time touched by Officer Turek, when he put handcuffs on her and helped her into the back seat of his patrol car. (R. 386.) Petitioner was taken directly to the Lago Vista police station, the handcuffs were removed, her purse was taken and the contents inventoried, her eyeglasses were removed and her shoes were taken. (R. 386, 706.) Petitioner was held alone in a holding cell for about an hour until the part-time municipal court judge arrived. (R. 706.) At the hearing, a bond of $310 was set and Ms. Atwater was released. (R. 388, 424.)

There is no evidence Petitioner was touched other than when handcuffs were put in place. The Petitioner was never searched other than having her purse emptied and the contents inventoried at the police station. There is no complaint that the pickup was searched.

Petitioner was subsequently convicted of three counts of violating the restraint statutes. The driver's license and proof of insurance charges were dismissed when she produced evidence that she had a valid license

[1] Tex. Trans. Code §§ 521.025, 601.053.

at the time of the arrest and had the necessary insurance in place.

2. Proceedings Below.

Petitioner filed her claims against Respondents under 42 U.S.C. §§ 1983 and 1985. The United States District Court for the Western District of Texas granted Respondents' Motion for Summary Judgment (R. 681-89). A panel of the United States Court of Appeals for the Fifth Circuit reversed, 165 F.3d 380 (5th Cir. 1999) (Appendix B to Petition for Writ of Certiorari), and the panel's decision was overturned by that court sitting *en banc*, 195 F.3d 242 (5th Cir. 1999) (Appendix A to Petition for Writ of Certiorari).

3. Texas Statutory Scheme.

Texas requires all adults to secure themselves and all children riding in the front seat of a vehicle with seat belts or a child protective device, and imposes a maximum fine of $50 per violation. Tex. Trans. Code §§ 545.412, 545.413. The State also requires all persons operating motor vehicles on public roads to have with them a valid driver's license, violation of which is punishable by a fine of up to $200 on first offense, *id.* § 521.025, and to have proof of liability insurance on the vehicle, *id.* § 601.053, violation of which is punishable by a fine of up to $350 on first offense, *id.* § 601.191.

Texas authorizes police officers to arrest a person "found committing a violation" of the statutes involved here. Tex. Trans. Code § 543.001. The offending conduct

must take place in the officer's presence. *Soileau v. State*, 244 S.W.2d 224, 225 (Tex. Cr. App. 1951); *Drago v. State*, 553 S.W.2d 375, 377 (Tex. Cr. App. 1977).

After the arrest, the officer can choose to release "the person arrested" if the person makes "a written promise to appear in court," Tex. Trans. Code § 543.005, or can have the person "immediately taken before a magistrate" who has jurisdiction and who "is nearest or most accessible to the place of arrest" for the purpose of determining the collateral necessary to secure the person's appearance at trial. Tex. Trans. Code § 543.002.

SUMMARY OF ARGUMENT

This Court has continually held that the touchstone for evaluating whether a seizure was proper under the Fourth Amendment is probable cause. Of those arrests made with probable cause, only those that are unreasonable in manner or duration will be invalidated. In evaluating reasonableness under the seizure clause when probable cause existed, the Court looks to whether the arrest was accomplished in an extraordinary manner, unusually harmful to an individual's privacy or physical interest. The reasonableness is measured by an objective standard, not by the arresting officer's subjective state of mind.

Gail Atwater was observed violating Texas' mandatory seat belt and child restraint laws, and she failed to produce a valid driver's license or proof of insurance, as required by state law. The arresting officer personally observed these offenses. Nothing unusually harmful to

Ms. Atwater is involved here. As part of a typical brief arrest, she was handcuffed and transported to the police station, where she was held for about an hour while she waited for the part-time magistrate to come to the police station to determine the security for her appearance at trial. The brief detention advanced legitimate law enforcement objectives of enforcing traffic safety laws and ensuring Ms. Atwater's appearance at trial, and the arrest was not overly intrusive.

Petitioners maintain that more than probable cause should be required in some, but not all, cases of violation of fine-only laws. This position confuses the purposes of arrest and punishment, is unsupported by this Court's precedent, and invites uncertainty along with differing meanings of the Fourth Amendment among the many jurisdictions of the Nation. Taking an offender before a magistrate for setting of security for appearance is a long-accepted and logically sound law enforcement practice. The Constitution does not require abandonment of this practice in cases such as that presented here.

The fears of discriminatory practices such as "racial profiling" outlined by Petitioners and their *amici* do not justify adopting the prophylactic constitutional rule they suggest. This Court has observed that such practices are forbidden by the constitutional guarantee of equal protection. Nor does authorizing brief arrests for observed violations of traffic safety laws amount to a "general warrant," because arrests still may be made only on particularized determination of probable cause based on observed conduct.

The Fourth Amendment does not incorporate a common law rule limiting warrantless misdemeanor arrests to instances that constitute a breach of the peace. Such rules were subject to legislative alteration since the framing of the Constitution (and even earlier), and have been rejected by states for decades if not centuries. To the extent the common law of warrantless misdemeanor arrest is incorporated into the Fourth Amendment, the only surviving requirement is that the misdemeanor be committed in the presence of the arresting officer, which requirement is met here.

ARGUMENT

THE ARREST AND BRIEF CUSTODY OF PETITIONER WAS REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT WAS SUPPORTED BY PROBABLE CAUSE AND WAS NOT CARRIED OUT IN AN EXTRAORDINARILY INTRUSIVE MANNER.

A. This Court's precedent establishes probable cause as the touchstone for evaluating whether a seizure comports with the Fourth Amendment's reasonableness requirement.

The Fourth Amendment commands that seizures (including arrests) must be reasonable. This command is met when a police officer arrests a person in a public place based on probable cause to believe the arrestee has violated a criminal statute, as long as the arrest is reasonable in manner and duration. More than a half century

ago, this Court noted that the "long-prevailing standards"[2] of probable cause embodied "the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949), as quoted in *Dunaway v. New York*, 442 U.S. 200, 208 (1979). A "single, familiar standard" such as probable cause "is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213-14. Indeed, the Court has stated plainly that "[a] police officer may arrest a person if he has probable cause to believe that person committed a crime." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

The need for a familiar standard that represents an *a priori* consideration of the need for effective law enforcement and personal privacy is especially acute when, as in this case, the offense was witnessed by the officer. In such circumstances, "a policeman's on-the-scene assessment of probable cause provides a legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

Only in the most extraordinary of circumstances has the Court required more than probable cause to justify a

[2] In light of the history of the probable cause standard, Petitioners' characterization of the Fifth Circuit's decision as a "broad new rule," Pet. Br. at 36, is incorrect.

seizure. In these rare cases, the highly intrusive nature of the particular seizure at issue – not any type of allegedly diminished interest in law enforcement based on the nature of the offense or the possible penalty it carries – is the factor that limits police officers' right to make a seizure. *See, e.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (use of deadly force); *Wilson v. Arkansas*, 514 U.S. 927 (1995) (unannounced entry into a home); *Welsh v. Wisconsin*, 466 U.S. 740 (1884) (entry into a home without a warrant); *Winston v. Lee*, 470 U.S. 753 (1985) (physical penetration of the body).

The Court rejected the application of a "probable cause plus" standard, much like that advanced by Petitioner here, in *Whren v. United States*, 517 U.S. 806 (1996). The defendants in *Whren* had committed traffic offenses and were stopped by plain-clothes vice officers, allegedly contrary to usual police practices; after the stop, the officers observed crack cocaine in the truck and arrested the occupants. *Whren*, 517 U.S. at 808-09, 813-14. Whren and his accomplices maintained that a seizure following an observed violation of a traffic law violated the Fourth Amendment unless a reasonable officer would have made the stop. *See id.* at 814-15. The defendants contended that under the circumstances presented, the governmental interest in enforcing traffic laws was not sufficient to justify an invasion of personal privacy based only upon probable cause. *Id.* at 816-17.

In rejecting Whren's argument, the Court noted:

> It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause. . . .
>
> Where probable cause has existed, the only cases in which we have found it necessary actually 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. . . . The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken "outbalances" private interest in avoiding police contact.

Whren, 517 U.S. at 817-18. In other words, when the seizure at issue does not involve extraordinary intrusiveness beyond a typical arrest or detention, there is no need for any type of "balancing" not already embodied in the probable cause requirement, which itself represents an established, predictable balancing between the interests implicated by the Fourth Amendment's reasonableness requirement.

The extraordinary cases cited by the *Whren* Court all involved intrusions much more extensive than the brief arrest and detention of Ms. Atwater. In *Tennessee v. Garner*, 471 U.S. 1 (1985), an unarmed teenager fleeing the scene of a burglary was shot and killed by police, which was held to be an unreasonable seizure. In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Court held that in some

circumstances, police are required by the Fourth Amendment to knock and announce themselves before searching a residence – an act more invasive than a brief arrest of a person in a public place. *Welsh v. Wisconsin*, 466 U.S. 740 (1984), held that in light of the fact that "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,' " *id.* at 748, a warrantless arrest after a warrantless entry of a home was unconstitutional under the circumstances. And in *Winston v. Lee*, 470 U.S. 753 (1985), the Court held that a suspect would not be required to undergo surgery, under general anesthesia, to remove a bullet that might have evidentiary value.

The Court also has rejected a "balancing" argument contending that law enforcement officials should be able to effect what amounted to an arrest based on something *less* than probable cause. In *Dunaway v. New York*, 442 U.S. 200 (1979), a murder suspect was taken to a police station for questioning without probable cause. The State of New York maintained that the detention and custodial interrogation comported with the Fourth Amendment because police had "reasonable suspicion," which the State alleged was sufficient under a "balancing" analysis. *Id.* at 211-12. The Court disagreed, holding that the established probable cause standard was appropriate.

> The standard of probable cause thus represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment. The standard applie[s] to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.

Dunaway v. New York, 442 U.S. at 208. *Whren* and *Dunaway* establish that in cases of typical arrests, probable cause is the constitutional standard, and neither more nor less is required to justify a seizure.

Here, Petitioners do not contend that the arrest of Ms. Atwater was accompanied by conduct that constituted intrusiveness beyond any of the thousands of custodial arrests that take place every day. Her arrest was extraordinary only in its typicality; she was held at the police station for an hour or less and was seen by a magistrate at the earliest possible opportunity. Rather, Petitioners' only claim is that the arrest violated the Fourth Amendment because Ms. Atwater's offenses – unquestioned though they be – were of insufficient gravity to justify a custodial arrest, no matter how typical or brief.[3]

This Court has never invalidated a run-of-the-mill arrest based on probable cause because the offense was allegedly too minor, and Petitioners have presented no logical reason or precedent to support their desired result.

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[3] *See* Pet. Br. at 38-39.

B. Even if a balancing of interests were proper in this case, the government's legitimate interest in ensuring effective enforcement of traffic safety laws justified the arrest and brief detention.

Because of the absence of extraordinary intrusiveness, the arrest of Ms. Atwater is constitutionally reasonable because it was supported by probable cause. Petitioners argue otherwise based primarily not on governmental intrusiveness, but rather on the perceived magnitude of the offenses. The lynchpin of Petitioners' argument is that the government's interest in the effective enforcement of traffic safety laws is not sufficiently meaningful to justify the brief custodial arrest of Ms. Atwater. This argument misapprehends the state's interest in protecting those on the highway – particularly young children – from death or serious injury, and ignores the utility of the procedure here at issue for ensuring that the laws are obeyed and violations are effectively punished.

1. The government has a legitimate and compelling interest in enforcing traffic safety laws.

In 1998, 41,471 people were killed in 6,334,000 reported motor vehicle accidents in the United States.[4] Of these, 575 were children under the age of five years, 293 of whom, like Ms. Atwater's children, were unrestrained

[4] "Traffic Safety Facts 1998 – Overview," U.S. Department of Transportation, National Highway Safety Administration, DOT HS 808 956 (available online at <www.nhtsa.dot.gov/people/ncsa/pdf/Overview98.pdf>).

by seat belts.[5] More than 3.4 million injuries were documented in police-reported crashes in 1995.[6] Nearly a thousand children are injured in car crashes every day in this country; if all children were properly restrained while in vehicles, five hundred children each day would be spared serious injury.[7] Seat belts are estimated to save 9,500 lives each year, and statistics show a higher degree of seat-belt use in states that aggressively enforce seat belt laws.[8]

Before the arrest here at issue, Ms. Atwater was stopped by Officer Turek on an occasion in which her three-year-old son was sitting on the armrest of her pickup truck, in a manner that Ms. Atwater acknowledges was unsafe, and was warned by Officer Turek. (R.

[5] "Traffic Safety Facts 1998 – Children," U.S Department of Transportation, National Highway Traffic Safety Administration, DOT HS 808 951 (available online at <www.nhtsa.dot.gov/people/ncsa/pdf/child98.pdf>).

[6] "Presidential Initiative for Increasing Seat Belt Use Nationwide: Recommendations from The Secretary of Transportation," U.S. Department of Transportation, National Highway Traffic Safety Administration (available online at <www.nhtsa.gov/people/injury/airbags/presbelt>) (hereinafter "Presidential Initiative").

[7] "Nation's Law Enforcement Declares Zero Tolerance For Unbuckled Children In All 50 States," Woman Motorist world wide web site, <www.womanmotorist.com/sfty/safety-unbuckled-01.shtml> (visited October 16, 2000).

[8] Presidential Initiative, *supra* (seat-belt use is approximately 15 percent higher in states such as Texas having "primary" seat belt use laws, defined as statutes that allow police to detain motorists solely due to nonuse of seat belts).

379.)[9] Despite this earlier warning, Ms. Atwater – in the incident now at issue – once again was observed by Officer Turek driving without her seat belt secured and without having her children properly restrained; indeed, her son was standing and had his head pressed against the windshield. (R. 380.) Ms. Atwater concedes that she was in violation of Texas law and that she was wrong to not have her children properly restrained (R. 384), and that she was not in possession of her driver's license or proof of insurance (R. 382, 704).

The laws here at issue – particularly those protecting the safety of young children by requiring restraints – are not the type of "paternalistic statutes" simply "designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large," contrary to the contention of Petitioners and the original Fifth Circuit panel. *See*, 165 F.3d 380, 385; Pet. Br. at 30. Nor is Ms. Atwater's violation "even less significant than a failure to use a turn signal." Pet. Br. at 31. She disobeyed statutes specifically designed to protect others who are helpless to protect themselves – her minor children.

The violations for which Ms. Atwater was cited also included failure to possess a valid driver's license and failure to have proof of insurance. Petitioners have argued that Officer Turek must have known that Ms. Atwater had a valid license and insurance because she

[9] The report for the instant offense, written by Officer Turek, states his recollection that the previous stop had been for "the same violation of allowing her children to ride in this truck without a seatbelt on." R. 420.

had shown them when previously detained months earlier, but do not explain why Officer Turek would know that her license and insurance had not expired between the stops. And regardless of when and on what grounds Officer Turek subjectively decided to arrest Ms. Atwater, the proper inquiry for Fourth Amendment purposes is whether the seizure was *objectively* reasonable. *See, e.g., Whren v. United States*, 517 U.S. 806, 811-816 (1996) (discussing cases). In a recent Fourth Amendment case involving a traffic citation, the Court noted that "if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation." *Knowles v. Iowa*, 525 U.S. 113, 119 (1998). In fact, Petitioners themselves suggest that custodial arrests for fine-only traffic offenses comport with the Fourth Amendment when "necessary for the enforcement of traffic laws," Pet. Br. at 46, and give as an example a situation in which "the officer cannot ascertain the driver's identity." *Id.* at 46-47. Even under Petitioner's suggested standard, it would be objectively reasonable to detain a driver who did not possess a license.

2. The arrest and brief detention of Ms. Atwater advanced legitimate state interests.

Contrary to Petitioners' contention, the brief arrest of Ms. Atwater furthered legitimate law enforcement objectives, including the enforcement of child safety laws and encouraging suspects to appear for trial. A recent report from the Department of Transportation's National Highway Traffic Safety Administration indicates that seat belt

usage increases as states adopt more vigorous enforcement tactics.[10] If anything, Petitioner's argument that the offenses here are too inconsequential to require more than a citation and a promise to appear supports the need for vigorous enforcement, particularly in light of the statistics cited above.

Further, the City of Lago Vista had a significant interest in having collateral to secure Ms. Atwater's appearance at trial. She faced possible fines of $700 on the charges against her, plus court costs – a substantial sum of money for most people. If Ms. Atwater did not appear at trial, Lago Vista could have obtained an arrest warrant from the magistrate and sent a police officer to arrest her again; but such a procedure is time consuming, costly, and takes police officers off the street where they are needed to deal with immediate problems. When faced with nonappearance, many local governmental entities simply issue a warrant with hopes that the accused will be stopped for some other violation and the officer has some means to check for outstanding warrants via some central office or computer. A brief detention to enable a hearing before a magistrate allows a bond to be set that will substantially reduce the risk of nonappearance.[11]

Historically a central purpose of an arrest has been to ensure the suspect's presence at trial. *See, e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* (1769) *286. If Ms. Atwater and others who commit fine-only

[10] Presidential Initiative, *supra* note 6.

[11] The process used in this case also places the economic risk of an accused's failure to appear on the accused herself, rather than the state.

misdemeanors cannot be taken into custody, they must either be released with a promise to appear (thus increasing the risk of nonappearance and making law enforcement less effective) or pay a cash bond to an officer in the field, an unwieldy approach prone to administrative headache.

A rule that would prohibit most or all arrests for fine-only misdemeanors would also place a substantial burden upon police officers in the field to know the precise penalty ranges for myriad offenses. "[O]fficers in the field frequently 'have neither the time nor the competence to determine' the severity of the offense for which they are considering arresting a person." *Berkemer v. McCarthy*, 468 U.S. 420, 431 n.13 (1984), quoting *Welsh v. Wisconsin*, 466 U.S. 740, 761 (1984) (White, J., dissenting). These complications are avoided, and the legitimate objective of effective law enforcement is furthered, by the long-standing rule allowing arrests based on probable cause; suspects' privacy rights are at the same time protected by the constitutional rule that seizures remain reasonable in manner and duration.

3. Attempting to regulate authority to arrest based on potential punishment after conviction introduces unnecessary complication and confusion into the law enforcement process and fails to distinguish between two separate stages of the process.

Any rule of law that attempts to dictate when arrest is proper by looking to the potential range of punishment after conviction is much more complicated than Petitioners and their *amici* suggest. For example, the offenses

of public intoxication and disorderly conduct are typically Class C misdemeanors in Texas, punishable by fine only. Tex. Pen. Code §§ 42.01 (disorderly conduct), 49.02 (public intoxication); 12.23 (punishment range for Class C misdemeanors). However, if a person has been convicted three times of public intoxication and/or disorderly conduct within a two-year period, the offense may become punishable by up to 180 days in jail. Tex. Pen. Code § 12.43 (penalties for repeat and habitual misdemeanor offenders). Under the scheme envisioned by Petitioners and *amici*, an arresting officer must know the details of a suspect's criminal history in order to decide whether to arrest him (or would be compelled to release him even though the suspect could be arrested if sufficient information were available); such data is not always readily available in the field. Further, police officers are not, and should not be, the final determinors of what offenses will be charged. For instance, allowing a small child to stand unrestrained in the front seat of a moving pickup truck may constitute child endangerment under Texas law, a state jail felony, Tex. Pen. Code § 22.041(c) and (f). Allowing an officer to place a suspect under arrest and arranging for her to appear before a magistrate promptly is a time-honored and reasonable method of enforcing the law and determining appropriate security for appearance.

Arrest and punishment are two separate stages of the law enforcement process. An arrest is not part of the punishment for committing an offense; indeed it cannot be, as the suspect has not yet been convicted. The punishment that a legislature designates for an offense is a function of many factors unrelated to whether it is appropriate to arrest a suspect. Yet Petitioners' position is that

the government's constitutional authority to arrest should be based, at least in part, on whether the legislature has determined that jail time may be part of the punishment if the suspect is convicted. This argument simply misconceives the relationship between arrest and punishment.

Petitioners characterize Ms. Atwater's arrest as "particularly invasive and extreme" primarily based upon (1) the fact that the arrest took place in front of her children; (2) the nature of the seizure as a "full custodial arrest" including handcuffing, transport to the police station, and other attendant administrative functions; and (3) the alleged abusive intent of Officer Turek. *See* Pet. Br. at 28-30. One of the primary violations admittedly committed by Ms. Atwater was failure to properly restrain her children, who of course were present, so the arrest could not have been accomplished except in her children's presence; Petitioners offer no authority or reasoned argument as to why the presence of the children transforms a typical arrest into an unconstitutional act. Although the detention was a "custodial arrest," there is no evidence that she was touched at any time other than when she was handcuffed; her detention was brief, and the processing was entirely typical. And the Court has noted that the reasonableness of any seizure is judged by an objective standard; the arresting officer's intent is simply not relevant. *Whren v. United States*, 517 U.S. 806, 811-816 (1996) (discussing cases). Any custodial arrest involves some invasion of an accused's privacy interests. But the Fourth Amendment is implicated only if the invasion is unreasonable. As described above, substantial law enforcement

interests are advanced by allowing arrests based on probable cause.

An arrest for a fine-only misdemeanor comports with the Fourth Amendment when the offense was committed in the arresting officer's presence as long as the arrest is made with probable cause and is reasonable in manner and duration, without any need for further balancing. But even if the constitutional validity of every such arrest is subject to the type of case-by-case balancing that Petitioners advocate, the substantial law enforcement interests here at stake outweigh the intrusiveness of this particular, typical arrest.

C. Petitioners' suggested standard would constitutionalize a "least restrictive means" or "reasonable officer" test and would result in different meanings of the Fourth Amendment from state to state, depending upon the punishment range for misdemeanors adopted by each state's legislature.

Petitioners suggest the following standard:

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

Pet. Br. at 46. This standard suggests that the Fourth Amendment, at least in the context of fine-only traffic misdemeanors, requires an officer to use either the least restrictive means of citing an offender and taking steps to ensure her appearance to answer the charges against her, or take only the action that a hypothetical "reasonable

officer" would under the circumstances. But the Fourth Amendment is not violated whenever police effect seizures that in retrospect go beyond the least restrictive means possible to deal with the situation. The constitutional protection provided by the Amendment is that seizures will not be unreasonable, a standard that allows needed latitude to the law enforcement officer in the field. Even in the context of a "*Terry* stop"[12] – based on reasonable suspicion, a lower threshold than probable cause – the Court has refused to adopt a rule requiring the police to use the least restrictive means of accomplishing their objective. "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But '[t]he fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, in itself, render the [seizure] unreasonable.' " *United States v. Sharpe*, 470 U.S. 675, 687 (1985) (second bracketed material added), quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).

Whren v. United States cautions against using a hypothetical "reasonable officer" test for determining whether police action comports with the Fourth Amendment when probable cause admittedly existed. *Whren*, 517 U.S. at 814-15. That is because probable cause – particularly when, as here, it stems from "observed violations" – affords the "quantum of individualized suspicion necessary to ensure that police discretion is effectively restrained." *Id.* at 817-18 (internal quotes omitted).

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[12] *Terry v. Ohio*, 392 U.S. 1 (1968).

Petitioners also fail to specify when, under their standard, the arrest of Ms. Atwater crossed the line into unconstitutionality. There is no indication whether they contend the Fourth Amendment was violated as soon as Officer Turek allegedly said "you're going to jail," whether the detention was acceptable until she was handcuffed, whether it was her transportation to the police station that crossed the line, or whether the brief detention at the police station was the determining factor. The standard they proffer is so vague that even they do not attempt to apply it to the facts of this case to define with any precision the limits of police activity.

Further, by attempting to define constitutional limits on police power by the punishment ranges adopted by the legislatures of individual states, Petitioners seek a rule of constitutional law that varies from state to state. The Constitution's protections should not be subject to significant change when a person crosses a political border. In rejecting the incorporation of a certain locality's standard police practices into the Fourth Amendment, the Court in *Whren* noted that police practices vary from location to location, and thus the Court "cannot accept that the search and seizure protections of the Fourth Amendment are so variable." *Whren*, 517 U.S. at 815. Once again, Petitioners and their *amici* seek what this Court has already rejected.

The "probable cause plus" standard suggested by Petitioners is not only contrary to precedent and logic, but also is not consistent with the various standards advocated by *amici*:

- Americans for Effective Law Enforcement, Inc. suggests a complex multi-factor "balancing" test for the constitutionality of arrests in cases of "minor" offenses, listing eight factors that are "non-exclusive."
- The ACLU argues that arrests for fine-only offenses are *per se* unreasonable in the absence of "exigent circumstances."
- The Institute on Criminal Justice appears to maintain that custodial arrests for *any* non-jailable misdemeanor is *per se* unreasonable absent "exceptional circumstances."
- The National Association of Criminal Defense Lawyers would bar arrests for fine-only misdemeanors absent a fear for public safety or inability to otherwise bring the offender to justice.

The differences among these proposed rules, and their vagueness, reveal the futility of trying to craft a Fourth Amendment "probable cause plus" rule in this area. Arrests for misdemeanors and fine-only offenses present a very wide variety of circumstances and are best governed by the long-established constitutional concepts of reasonableness and probable cause. The "touchstone of the Fourth Amendment is reasonableness," *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), and "[i]n applying this test [the Court] ha[s] consistently eschewed bright-line rules." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). In defining the limits on police officers' power in this area, state and local governments should be permitted to pursue different approaches, allowing their officers the degree of flexibility that is appropriate to particular local conditions; those officers' decisions should not be subject to judicial

second-guessing unless they violate the constitutional command of reasonableness, as captured by the probable cause rule in all but the type of extreme circumstances not presented here.

D. Allowing brief custodial arrests for observed violations of traffic laws does not amount to a "general warrant" and will not lead to unredressable differential treatment or racial profiling.

Petitioners, and particularly their supporting *amici*, argue that a ruling in favor of Respondents will effectively grant law enforcement officers license to arrest motorists virtually at will and to engage in blatantly discriminatory practices for which victims will have no redress. *See, e.g.*, Brief of *Amicus* The American Civil Liberties Union *et al.*[13] at 6 (Texas law allowing arrests for traffic misdemeanors "is reminiscent of the general warrants the framers of the Fourth Amendment found so offensive"); Brief of *Amicus* National Association of Criminal Defense Lawyers *et al.* at 4-5 (allowing arrests for traffic violations "removes any constitutional constraint on officers performing traffic stops"); *id.* at 10-14 (arguing that upholding the constitutionality of Ms. Atwater's arrest would permit and perpetuate "profiling"). These arguments are unpersuasive for several reasons.

First, Petitioners and *amici* seek a constitutional protection that to date has not been recognized; Respondents merely seek a reaffirmation of the long-standing rule that

[13] Hereinafter "ACLU Brief."

arrests based on probable cause – and, in this case, when the offense was admittedly committed in the arresting officer's view – comply with the Fourth Amendment's reasonableness requirement. This is not akin to granting a general warrant or writ of assistance, which conferred broad authority to search and seize virtually at will, often without even specifying a location. *See, e.g., Stanford v. Texas*, 379 U.S. 476, 481 (1965) (describing "those general warrants known as writs of assistance. . . . [that] had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws"); *Warden v. Hayden*, 387 U.S. 294, 315 n.1 (1967) (Douglas, J., dissenting) (describing the 1776 Virginia Declaration of Rights' definition of "general warrant," which included a license "to search all and any places in the discretion of the officers"); Pet. Br. at 9 ("General warrants gave those using them complete discretion as to whom to arrest, where to search, and for what to search."); *id.* at 10 ("Any person authorized by a writ of assistance had almost limitless powers to search."). General warrants and writs of assistance surely were seen by the Framers as one of the evils that led to the adoption of the Fourth Amendment, but allowing brief custodial arrests when an officer observes the commission of multiple misdemeanors does not come close to being a comparable practice, and does not grant "unfettered discretion" (Pet. Br. at 20-21) to police officers to arrest virtually anyone on the road.

Second, in maintaining that traffic violations are so common that their enforcement carries little if any weight as a legitimate state interest and invites discriminatory

enforcement, Petitioners and *amici* present an argument that was rejected in *Whren*, 517 U.S. at 818:

> 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 unaware 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.

Third, arrests made with probable cause still must be reasonable in manner and duration under the Fourth Amendment. Upholding the constitutionality of Ms. Atwater's arrest does not remove all constitutional restraints from officers enforcing traffic laws. Pernicious and discriminatory practices such as racial profiling already are prohibited by the constitutional guarantee of equal protection. *Whren*, 517 U.S. at 813. A generalized fear does not justify the adoption of a prophylactic constitutional rule, particularly in a case where there is no suggestion of such prohibited discrimination. And, as a practical matter, state laws allowing custodial arrests for fine-only traffic offenses are common, *see, e.g.*, ACLU Brief at 21-25 (citing state statutes that allow custodial arrests for various types of misdemeanors), and the courts have not been flooded with claims of abuse or pretextual use of such arrest power. This is doubtlessly due at least in part to the states' own willingness to impose restrictions on the power of law enforcement

officers to make arrests for misdemeanor offenses, as well as the fact that arrests consume far more time and resources than issuing citations or warnings.

E. The result advocated by Petitioners is not demanded by this Court's decisions in *United States v. Watson* or *Knowles v. Iowa*.

In *United States v. Watson*, 423 U.S. 411, 418 (1976), the Court noted "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." Despite this language clearly approving of the Fifth Circuit's decision here, Petitioners argue that *Watson*'s analysis actually supports their position. They maintain that the Court "did not take for granted that probable cause was sufficient to justify a warrantless felony arrest," but rather "carefully reviewed common-law authorities to determine if a warrantless felony arrest was proper when the Fourth Amendment was adopted." Pet. Br. at 40. In *Watson*, the Court supported its holding that the warrantless arrest at issue was proper because it was made with probable cause with citation to voluminous authority – ranging from the "ancient" common law to modern statutes – authorizing warrantless arrests when made with probable cause. *Watson* demonstrates that arrests based on probable cause had long been considered reasonable and thus consistent with the Fourth Amendment. Nothing in its analysis suggested that the outcome of the case hinged solely on an interpretation of the common law in 1791, and the Petitioners cannot avoid the case's clear language noting the acceptance at common law of arrests for misdemeanors committed in the officer's presence.

Petitioners and *amicus* National Association of Defense Lawyers also argue that the Fifth Circuit's ruling here at issue either undermines or is contrary to *Knowles v. Iowa*, 525 U.S. 113 (1998). In *Knowles*, the Iowa legislature passed a law allowing field searches of motorists stopped for traffic violations, even when the police officer had already issued a ticket in lieu of arrest. The state's theory was that since the officer *could have* arrested the offender and conducted a search incident to the arrest, the officer had the constitutional authority to search even if no arrest actually took place. The Court disagreed, noting that Iowa's argument misconstrued the purpose of the search incident to arrest doctrine. It is the *arrest*, not the offense, that provides the authority for the search; the doctrine is based on "(1) the need to disarm the subject in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles*, 525 U.S. at 116. In a traffic stop when the officer has already determined there will be no arrest, "the threat to officer safety . . . is a good deal less than in the case of a custodial arrest." *Id.* at 117. As to the second justification, "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained." *Id.* at 118. Thus, the factors that justify a search incident to arrest simply are not present in a non-arrest situation.

Petitioners first argue that upholding the constitutionality of Ms. Atwater's arrest "nullifies any protection *Knowles* provides against full searches incident to arrest." Pet. Br. at 43. But *Knowles* in no way limits the "search incident to arrest" doctrine; it merely holds that there must actually be an arrest if there is to be a valid search

incident to an arrest. Ms. Atwater then maintains that since searches incident to arrest may take place before the actual arrest is accomplished, *see Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980), police officers who stop motorists for traffic violations will first conduct a field search (without probable cause to believe the motorist possesses contraband) and *then* decide to arrest if contraband is found during the search, arguing that they all along intended to effect an arrest for the initial traffic violation and that the search was incident to the arrest. Pet. Br. at 43-44. But officers have discretion as to timing of searches incident to arrests regardless of the outcome of this case, *Knowles* still disallows searches incident to arrest absent an actual arrest, and Petitioners seek a rule that gives additional constitutional protection to offenders who violate traffic laws while transporting contraband. The claim of *amicus* National Association of Criminal Defense Lawyers that *Knowles* "assumes that a custodial arrest for a misdemeanor traffic offense alone does not permit a custodial arrest," NADCL Brief at 6, misinterprets *Knowles*. Not only does *Knowles* simply reaffirm that an arrest is necessary for a valid search incident to arrest, but the Court observed that an arrest would be proper "if a police officer is not satisfied with the identification furnished by the driver," *Knowles*, 525 U.S. at 118 – which of course is closely analogous to the situation with Ms. Atwater, who was unable to produce a driver's license.

F. Traditional common law limitations, to the extent they are incorporated in the Fourth Amendment, do not invalidate the arrest in this case.

Petitioners and several of their *amici* rely heavily on what they describe as a common law rule that warrantless arrests for misdemeanors are improper unless the offense is committed in the presence of the arresting officers and constitutes a breach of the peace. Pet. Br. at 7-20; Brief of National Association of Criminal Defense Lawyers *et al.* at 14-19; ACLU Brief at 18-21; Brief of Americans for Effective Law Enforcement at 6. To the extent that the common law survives as a limit on the authority of modern police officers, it survives only as to the requirement that the misdemeanor be committed in the officer's presence, without the "breach of the peace" standard. But even more fundamentally, the common law rule was and always has been subject to modification by statute; and legislative action before, during, and after the time of the framing of the Constitution reflects widespread broadening of authority to arrest for misdemeanors without warrants beyond the strictures advocated by Petitioners.[14]

[14] As the Fifth Circuit observed, Petitioners raised the common law argument for the first time in their *en banc* brief. Thus the argument is waived and need not be considered by this Court. 195 F.3d at 245 n.3.

1. Common law rules regarding the scope of proper warrantless arrests have been modified by statute since before the adoption of the Constitution and continue to be subject to such modification.

The "nightwalker" statutes serve as an example of approving arrests without warrants or the breach of the peace requirement. A treatise from early in the 19th Century describes the Statute of Winchester:[15]

> That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff, and the sheriff . . . shall keep him safely until he be acquitted in due manner.

2 William Hawkins, *A Treatise of Pleas of the Crown*, ch. 13, § 5, at 198 (1824). Bailiffs were also authorized by statute "to make inquiry of all persons being lodged in the suburbs, or in foreign places of the towns; and if they do find any that have lodged or received any strangers or suspicious persons," the bailiffs "may lawfully arrest and detain any such stranger, being found under probable circumstances of suspicion, until he shall give a good account of himself." *Id.*, § 12, at 182. Blackstone gives a similar account:

> Watchmen, either those appointed by the Statute of Winchester . . . to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to constables, may *virtue*

[15] This statute dates to 1285. *See Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993).

> *officci* arrest all offenders, and particularly nightwalkers, and commit them to custody until morning.

4 *Blackstone's Commentaries* *289.

In the United States – dating back to the time of the framing of the Constitution – it has consistently been understood that legislatures may enlarge the common law arrest power by statute. In determining whether a warrantless search was valid, the Supreme Court in *Carroll v. United States*, 267 U.S. 132, 153 (1925), noted that statutes passed early in the history of the Republic allowed the type of warrantless search at issue in that case, thus indicating that the Framers considered that type of search to be constitutional. *See also Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (discussing *Carroll* and noting that its interpretation of the Fourth Amendment turned in large part on legislation enacted by Congress during the time of the framing, "as well as subsequent legislation from the Founding era and beyond").

This approach is consistent with the earliest Supreme Court cases that discuss common law warrantless arrest rules. In *Kurtz v. Moffitt*, 115 U.S. 487 (1885), the issue was whether local police officers had the power to arrest an alleged deserter from the army. The Court stated: "If a police officer or a private citizen has the right, without warrant or express authority, to arrest a military deserter, that right must be derived either from some rule of the law of England which has become part of our law, *or from the legislation of congress.*" *Id.* at 498 (emphasis added). After discussing the common law rule and English statutes, the Court carefully considered American statutes as well. *Id.* at 498-505. The case included no suggestion that

federal legislation enlarging the common law authority might violate the Fourth Amendment.

In the next case discussing the common law principle, the Court did not rely solely on the common law, but also examined statutory law to determine whether law enforcement authorities acted properly. In *Bad Elk v. United States*, 177 U.S. 529 (1900), a trial judge had instructed jurors that police officers acted lawfully in attempting to arrest the defendant, who was convicted of murder on an Indian reservation for killing one of the officers who was attempting to arrest him. After discussing the common law, the Court proceeded to consider whether there was a state or federal statute "giving any right to [the decedent] to arrest an individual without a warrant, on a charge of misdemeanor not committed in [his] presence." *Bad Elk*, 177 U.S. at 535. The Court ultimately held that the result was the same under the common law and the statutes: the arrest was unauthorized. But if the only law informing the meaning of the Fourth Amendment is the common law at the time of the framing, and if that law did not authorize the arrest, the Court need not have considered statutory authority. Similarly, in *Johnson v. United States*, 333 U.S. 10, 15 & n.5 (1948), the Court stated that "[s]tate law determines the validity of arrests without warrant" when Washington law authorized arrests for crimes committed in the presence of the arresting officer.

The common law was understood only to provide a limitation that, like other common law doctrines, could be altered by statute. Cases have upheld warrantless misdemeanor arrests without applying the breach of the peace requirement, and many states permit such arrests

without retaining that requirement. *See, e.g., Allen v. City of Portland*, 73 F.3d 232, 236 n.2 (9th Cir. 1995) ("A warrantless misdemeanor arrest which violates state law does not implicate the Fourth Amendment unless there is no probable cause"); *Fields v. City of South Houston*, 922 F.2d 1183, 1189 (5th Cir. 1991) ("The United States Constitution does not require a warrant [to arrest] for misdemeanors not occurring in the presence of the arresting officer"); ACLU Brief at 21-22 & n.14 (citing statutes of 22 states allowing warrantless misdemeanor arrests without a breach of the peace requirement); Brief of Americans for Effective Law Enforcement at 7 ("Relatively few states have retained the common law rule that such an arrest can be made without a warrant only where a breach of the peace has taken place in the presence of the arresting officer"). Petitioners themselves, citing a treatise from 1919, acknowledge that "[b]y the early twentieth century . . . legislation in many states permitted warrantless arrests for any misdemeanor committed in an officer's presence." Pet. Br. at 18. Not only are statutes modifying the claimed common law rule widespread and long-standing, but adoption of Petitioners' position would result in declaring at least portions of many states' laws unconstitutional. In 1974, the Fourth Circuit observed:

> The Fourth Amendment protects individuals from unfounded arrests by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974). Similarly, a leading treatise states:

> As for the common requirement of a warrant for misdemeanors not occurring in the presence [of the arresting officer], it is likewise not grounded in the Fourth Amendment. . . . [T]he presence test is not mandated by the Fourth Amendment.

3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.1(b) at 21, 23 (3d ed. 1996).

American courts have long authorized warrantless arrests for violations of regulatory ordinances and other arguably "minor" offenses. As one commentator noted:

> It is impossible to classify or enumerate the great number of such misdemeanors or breaches of ordinances for which peace officers may arrest, without a warrant, if committed in their presence. They include violations of health and food regulations; Sunday traveling or entertainments, nuisances on streets or sidewalks, or loitering, or meetings on same, cruelty to animals, vagrancy, drunkenness, disturbances in school houses, or at elections. . . .

Horace Wilgus, "Arrest Without a Warrant", 22 Mich. L. Rev. 541, 706-07 (1923-24). *See also* 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, 258-59 (1989) (acknowledging that with the advent of professional police forces, legislatures broadened arrest powers). There is not a tradition in the United States of prohibiting arrests such as that of Ms. Atwater.

2. Even if some common law limits are embodied in the Fourth Amendment, the arrest here at issue is consistent with any possible surviving common law limitations.

This Court "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Tennessee v. Garner*, 471 U.S. 1, 13 (1985), quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980). *See also Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (Breyer, J., concurring) ("I join the Court's opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question."). In determining whether the Fourth Amendment incorporates a common law principle, the Court has considered not just the historic common law practice but whether there is "a clear consensus among the States adhering to that well-settled common law rule." *Payton*, 445 U.S. at 590, citing *United States v. Watson*, 423 U.S. 411, 421-22 (1976). "In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions." *Tennessee v. Garner*, 471 U.S. 1, 15-16 (1985). At the most, the common law principles apply when they "ha[ve] been generally adhered to by the traditions of our society." *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting).

As discussed above, the common law rule advanced by Petitioners has not been generally accepted. "As a general rule it may be said that the modern police officer has authority to arrest without a warrant for any public offense committed in his presence, and this includes city

ordinance violations." Edward Fisher, *Laws of Arrest* 130 (1967). "By far the most common statutory provision removes the breach of the peace limitation and thereby permits arrest without warrant for *any* misdemeanor committed in the arresting officer's presence." 3 LaFave, *Search and Seizure* § 5.1(b) at 13-14 (emphasis in original). "[C]ourt cases and statute[s] . . . allow arrest for *any offense* committed in the presence of the police officer. . . . This practice has never been successfully challenged and stands as the law of the land." *Higbee v. City of San Diego*, 911 F.2d 377, 379 & n.2 (9th Cir. 1990).

Professor Schroeder, in a law review article titled "Warrantless Misdemeanor Arrests and the Fourth Amendment," noted the following:

> Over the last century, . . . most American jurisdictions have expanded the power of police officers to make warrantless misdemeanor arrests. . . . Only a few American jurisdictions still substantially follow the common law rule limiting warrantless misdemeanor arrests to breaches of the peace committed in the arresting officer's presence, and even these permit some minor exceptions. . . . Many jurisdictions authorize warrantless misdemeanor arrests if there is probable cause to believe that a misdemeanor was committed in the arresting officer's presence. Most of these jurisdictions also permit warrantless arrests on probable cause for misdemeanors not committed in the officer's presence if there is probable cause to believe that specified circumstances exist and/or if the arrest is for a specified misdemeanor.

William A. Schroeder, "Warrantless Misdemeanor Arrests and the Fourth Amendment," 58 Mo. L. Rev. 771, 774-78 (1993) (footnotes omitted).

In keeping with the American rejection of the breach of the peace element, the Court's descriptions of the common law rule often simply have omitted that requirement. *See, e.g., Watson*, 423 U.S. at 418 ("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"); *Carroll v. United States*, 267 U.S. 132, 156-57 (1925) ("The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."); *Bad Elk v. United States*, 177 U.S. at 534 ("[A]n 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. at 498-99 ("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").

Even if the common law rule governing misdemeanor arrests is understood as a constitutional limitation, the part of the common law principle that has taken root in American law permits – at the very least – warrantless misdemeanor arrests, on probable cause, for any offense committed in the officer's presence. Because Ms. Atwater's offenses were committed in the presence of

Officer Turek, her arrest was consistent with the Fourth Amendment.[16]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[16] Petitioners do not argue to the Court that their interpretation of the Fourth Amendment is clearly established law, and thus Officer Turek and Chief Miller at a minimum are entitled to qualified immunity as to the individual capacity claims against them.