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.

Petition for Rehearing

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I. INTRODUCTION

This Court grants petitions for rehearing in only exceptional circumstances. Petitioners respectfully submit that the ramifications of the Court's decision, which may not have been fully briefed at the merits stage, cry out for a second look.

The Court's holding is in part based on the assumption that there is no "epidemic" of incidents similar to the experience of petitioner Gail Atwater. *Atwater v. City of Lago Vista*, 532 U.S. ___, Slip Op. at 32-33 (2001). Petitioners dispute that the Fourth Amendment contains a numerosity requirement. A single deprivation of an individual's civil liberties is one too many.

Nevertheless, existing data reveal an epidemic in progress. Ms. Atwater's experience was far from unique. In Oregon and California alone, 37,814 people were arrested in 1999 for minor traffic offenses.[1] If similar practices exist in the remaining 48 states that do not collect this data, then nearly *one quarter million* motorists nationwide are arrested for minor traffic offenses each year.[2]

The Court's holding will make these arrests even more commonplace. The lowest level police officer now has

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[1] *See* Tables 18 & 19, California Criminal Justice Statistics Center, http://justice.hdcdojnet.state.ca.us/cjsc_stats/prof99/index.-htm; Law Enforcement Data System, Oregon Uniform Crime Reporting Program; Statewide Reported Arrests, http://www.leds.-state.or.us/home.htm.

[2] William Spelman, a professor at the Lyndon B. Johnson School of Public Affairs, interpreted the data from California and Oregon to calculate this figure. His report, prepared at petitioners' request, has been filed as a lodging with this Court.

complete discretion to arrest without a warrant — and the accompanying power to conduct warrantless searches — with no limiting standards. This sort of unlimited power was what the Framers detested and sought to prevent by adopting the Fourth Amendment. It also comports with no societal understanding of the term "reasonable."

II. ARGUMENT

A. The Fourth Amendment Is Not Concerned Only With "Epidemics"

The Court recognizes that Ms. Atwater experienced a "pointless indignity and confinement" for which respondents could offer no justification, but holds the Fourth Amendment was not violated based on a belief that there is no "epidemic" of similar cases. Slip Op. at 26, 33. This numerosity requirement is a novel and frightening addition to constitutional jurisprudence.

The perceived rarity of a constitutional violation makes it no less offensive. There is thankfully no longer an "epidemic" of lynching in this country, but the infrequency of that horrible offense makes it no less of a wrong. It has never been an individual citizen's burden to demonstrate not only that the particular seizure was an unreasonable infringement on her liberty, but also that numerous other people have been subjected to a similar deprivation.

Indeed, this Court has not hesitated to condemn Fourth Amendment violations even when the circumstances of the specific case were somewhat out of the ordinary. *See*, *e.g.*, *Arizona v. Hicks*, 480 U.S. 321 (1987); *United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). This is so because "whether a search and seizure is unreasonable within the

meaning of the Fourth Amendment depends on the facts and circumstances of each case." *Cooper v. California*, 386 U.S. 58, 59 (1967).

B. Existing Data Reveal There *Is* a Widespread Problem Resulting from Police Having Complete Discretion to Arrest for Minor Offenses

1. An Estimated One Quarter Million Arrests for Minor Traffic Offenses Each Year Qualify as an Epidemic

The Court states that "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests." Slip Op. at 33. Existing data indicate otherwise: as many as one quarter million people are arrested each year for minor traffic offenses.

Although only two states keep records of these arrests, the numbers reveal that thousands of Americans each year are deprived of their liberty as was Ms. Atwater. In California, 25,821 people were arrested for minor traffic offenses in 1998, and 23,928 in 1999 (both numbers exclude vehicular manslaughter, hit-and-run and DUI).[3] In the much less populous state of Oregon, 13,763 were arrested for minor traffic offenses in 1998, and 13,886 in 1999 (also excluding vehicular manslaughter, hit-and-run and DUI).[4]

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[3] *See* Tables 18 & 19, Cal. Crim. Justice Statistics Center, http://justice.hdcdojnet.state.ca.us/cjsc_stats/prof99/index.htm.

[4] *See* Law Enforcement Data System, Oregon Uniform Crime Reporting Program; Statewide Reported Arrests, http://www.-leds.state.or.us/home.htm.

If California and Oregon are representative of the other 48 states that do not keep records, then there were 250,567 people arrested nationwide for minor traffic offenses in 1998, and 239,363 arrested in 1999. *See* Report of William Spelman on Arrests Nationwide for Minor Traffic Offenses, May 18, 2001, filed as a lodging with the Court. Averaging the two years, a rough estimate of the arrests nationwide for minor traffic offenses (not including vehicular manslaughter, hit-and-run, and DUI) is 245,000. *Id*. For 1999, this means that of the approximately 187 million licensed drivers, slightly more than one in each thousand were arrested for a minor traffic offense. This is consistent with the results of a recently published Bureau of Justice Statistics survey finding that 578,310 drivers were arrested in 1999 during a traffic stop. Bureau of Justice Statistics, *Contacts between Police and the Public*, Feb. 2001, at 16 (http://www.ojp.usdoj.gov/bjs/abstract-/cpp99.htm).

At least from the perspective of the one in every thousand drivers who is arrested, there is indeed an epidemic of arrests for minor traffic offenses.[5] The Fourth Amendment's reasonableness requirement was to prevent such an outbreak.

2. Existing Data Underestimate the Problem

Even more significantly, existing data likely underestimate the frequency with which traffic offenses are used to justify custodial arrests. First, once a police officer

[5] Petitioners regret not anticipating the importance the Court would place on how many *other* Americans have endured the pointless humiliation of a traffic-offense arrest. Given more time, petitioners could obtain additional data to further document the problem. Petitioners request that the Court order further briefing if the Court believes more facts are needed.

makes an arrest and conducts a search of the vehicle incident to the traffic arrest, if contraband or evidence of some other crime is located, the arrest would not be recorded as a traffic arrest but as an arrest for the more serious offense. Moreover, if the search incident to the traffic arrest reveals no contraband or evidence of some other crime, police officers have been known to "retract" the decision to arrest, remove the handcuffs, and issue only a ticket. No governmental agency would ever learn of such incidents even if it were counting traffic offense arrests. After the Court's holding here, they would almost certainly not be memorialized in future appellate court decisions.

When read along with *Whren v. United States*, 517 U.S. 806 (1996), and *Knowles v. Iowa*, 525 U.S. 113 (1998), even if Ms. Atwater's experience is not commonplace now, the Court's decision encourages such conduct in the future. And current data indicate epidemic proportions already exist.

3. Racial Profiling; a Specific Type of Abuse of Minor-Offense Arrest Authority

The Court states that "there is simply no evidence of widespread abuse of minor-offense arrest authority," Slip Op. at 33 n.25, yet our nation is in the midst of a controversy over a closely related subject: racial profiling. There is no longer any dispute that racial profiling is an ongoing problem, with even state governments conceding its existence. *See* Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling, April 20, 1999, http://www.state.-nj.us/lps/intm_419.pdf (New Jersey); Evaluating North Carolina State Highway Patrol Data, Nov. 1, 2000, http://-www.nccrimecontrol.org/shp/ncshpreport.htm. A recently published federal study also found that Blacks (5.2%) and Hispanics (4.2%) were more likely to be arrested after a traffic stop than Whites (2.6%). Bureau of Justice Statistics, *supra*, at

16. Even federal judges are not immune. United States District Judge Filemon Vela learned the hard way: he has been stopped twice by U.S. Border Patrol agents in his own judicial district. *See* James Pinkerton, *Border Patrol Twice Stops U.S. Judge on Way to Court*, Houston Chronicle, Oct. 1, 2000, at State p.1.

Read with this Court's decision in *Whren*, there is now no constitutional remedy for law enforcement singling out minorities for abuse while they operate their motor vehicles. Nor should the solution to racial profiling be left solely to the fifty state legislatures. There already are laws on the books — and constitutional provisions — prohibiting discrimination on the basis of race, yet the problem of racial profiling persists. The Court's decision insures that racial profiling is here to stay.

C. The Court Has Ignored the Fourth Amendment's Original Intent: the Framers' Undisputed Opposition to Granting Unfettered Discretion to Ordinary Officers

Despite the thorough review of pre-Fourth Amendment English arrest laws, the Court ignores the most undisputed original understanding of the Fourth Amendment: granting unfettered discretion to every "petty officer" to arrest and search was repugnant to the Framers, and the Fourth Amendment was meant to end it. The Nation had just finished fighting a war instigated in part by this very controversy. The Court's decision now takes away from Americans the very protections won in the American Revolution.

Two hundred forty years ago, James Otis explained that the writs of assistance threatened liberty because they entrusted unlimited discretion to search and arrest in the hands of the lowest level law enforcement official. The writs of assistance were "the worst instance of arbitrary power, the most

destructive of English liberty, that ever was found in an English law book" because they placed "the liberty of every man in the hands of every petty officer." 2 *Legal Papers of John Adams* 141-42 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

The Court has now returned Americans' liberty to the hands of every "petty officer," even while recognizing that some abuse their power. Slip Op. at 32-33. The vast majority of police will not take advantage of the broad authority given to them by the Court's decision, but our Constitution's limitations on governmental power are based on the proposition that we cannot simply entrust our freedoms to the good will of public servants, including police officers in the field.

The Court noted that this case involved "a police officer who was (at best) exercising extremely poor judgment." Slip Op. at 26. By granting this police officer and officers of similar ilk unfettered discretion to arrest and search, the Court also immunizes and legitimizes their actions at their worst.

D. Reasonableness Is Jettisoned, and Societal Liberty Expectations Are Ignored

Finally, the Court's decision jettisons the Fourth Amendment's explicit textual requirement of reasonableness. "Reasonable" now means that although a person cannot be jailed for certain offenses if ultimately convicted, the person can *still* be jailed for up to 48 hours even before a judicial officer determines there was probable cause to justify the arrest. The preference for warrants is lost along with the requirement of reasonableness. At least in the context of traffic stops, there is now absolutely no incentive to obtain a warrant to arrest, or to search a motor vehicle. *Cf. Illinois v. McArthur*, 531 U.S. __, Slip Op. at 2 (2001) (Souter, J., concurring)

(observing that "the law's strong preference for warrants" should be applied to "raise incentives to obtain a warrant").

The root of this unreasonable notion of reasonableness is that the Court ignores current societal expectations *of liberty*, while it continues in other cases to defer to societal expectations *of privacy*. The Court condemns trivial, unobtrusive searches of inanimate objects[6] and searches justified by compelling governmental interests,[7] yet condones a full-blown seizure of a person that furthers no governmental interest that would not have been equally served by the issuance of a citation, and which American society regards as inherently unreasonable.[8] The exclusionary rule and the

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[6] *Bond v. United States*, 529 U.S. ___ (April 17, 2000) (squeezing a piece of luggage stored in an over-head compartment).

[7] *Ferguson v. City of Charleston*, 532 U.S. ___ (March 21, 2001) (invalidating a search justified to protect the health of a pregnant woman and her unborn child).

[8] American society's view that this was an unreasonable deprivation of liberty is apparent from the nearly universal condemnation of the Court's decision. *See*, *e.g.*, The Honorable Dick Armey, *Disappointing Supreme Court Decision*, April 24, 2001, http-://www.freedom.gov/news/statements/seatbelt.asp; *A Bad Decision By Supreme Court*, The State Journal-Register (Springfield, IL), May 10, 2001, at 10; *A Decision Lacking Reason*, Investor's Business Daily, April 26, 2001, at 22; Sandy Banks, *Why A Mom's Fate Should Worry Us All*, Los Angeles Times, April 27, 2001, at 1E; Mark Cloud, *Extreme Searches*, Chicago Tribune, May 4, 2001, at 25N; Steve Forbes, *Junk Judgment*, Forbes, May 28, 2001, at 40; James O. Goldsborough, *Belting Justice For A Seat-Belt Violation*, The San Diego Union-Tribune, April 30, 2001, at B7; James J. Kilpatrick, *Punishing Logic in Soccer Mom's Case*, The News and Observer (Raleigh, NC), May 7, 2001, at A11; Peter Moskos, *U.S.*

(continued...)

interests of those relatively few accused of serious crimes are elevated above the rights of the many, normally law-abiding — but occasionally traffic-law violating — American citizens.

The only justification given for permitting future deprivations of liberty of the sort endured by petitioner Gail Atwater is that ruling otherwise would be inconvenient for law enforcement. Slip Op. at 26-27. This concern could easily be addressed by proper training.[9]

There is also a more fundamental problem with excusing unreasonable governmental intrusions because preventing them would be administratively inconvenient: the very purpose of the Fourth Amendment is to restrict law enforcement. Thankfully, this Court has on only rare occasions failed to protect constitutional rights because doing so might pose an administrative inconvenience. But when it has, the results have been horrifying. *See*, *e.g.*, *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (permitting confinement of Japanese Americans because "disloyal members of that

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Supreme Court Ruling Sowed Confusion, Injustice, The Baltimore Sun, May 3, 2001, at 13A; Ed Quillen, *Tell Us Again, Which Side Won The Cold War?*, The Denver Post, April 29, 2001, at E6; Theotis Robinson, Jr., *Supreme Court Eroding Our Freedom*, Knoxville News-Sentinel (Knoxville, TN), April 30, 2001, at A12; Bob Ray Sanders, *High Court Ruling Gives Bad Cops a New Weapon*, The Fort Worth Star-Telegram, April 27, 2001, at Metro p.1; Rob Zaleski, *Supreme Court Ruling is Boggling*, Capital Times (Madison, WI), May 14, 2001, at 1B.

[9] *Cf.* Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc. in Support of Neither Party, at 13.

population . . . could not be precisely ascertained," and "could not readily be isolated and separately dealt with").

If a driver is to be arrested rather than ticketed, "a satisfactory explanation ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case." *Maryland v. Wilson*, 519 U.S. 408, 422, (1997) (Kennedy, J., dissenting). If no justification can be articulated for the further deprivation of the citizen's liberty interest, the arrest violates the Fourth Amendment by definition.

III. CONCLUSION AND PRAYER

The Court's decision has placed the liberty of the over 187 million licensed drivers in this country[10] in the hands of the "petty officer," which was the state of affairs prior to the American Revolution and prior to the Fourth Amendment's adoption. The Court acknowledges these officers can and do abuse their power, but assumes there is no "epidemic." On the contrary, an arrest rate of one in a thousand surpasses epidemic proportions. But more importantly, if the Fourth Amendment's protections lie dormant until there is an outbreak of abuses, then its protections have little meaning. Petitioners respectfully request that the Court reconsider its decision, grant this petition for rehearing, and insure that American motorists retain their Fourth Amendment rights.

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[10] Office of Highway Policy Information, Federal Highway Administration, Highway Statistics 1999, Table DL-1C: Licensed Drivers by Sex and Ratio to Population - 1999.

Respectfully submitted,

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May 21, 2001

CERTIFICATION

Pursuant to Rule 44 of the Rules of the Supreme Court of the United States, I hereby certify that the instant petition for rehearing is presented in good faith and not for delay.

/s/_____
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