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| **ROLAND BRANCH,** | * | In the |
| Petitioner, | * | SUPREME COURT OF |
| v. | * | MARYLAND |
| **STATE OF MARYLAND,** | * | September Term, 2024 |
| Respondent. | * | Petition No. 148 |

**BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI**

**STATEMENT OF INTEREST OF *AMICI CURIAE***

The American Civil Liberties Union and the ACLU of Maryland are non-profit, nonpartisan organizations dedicated to the principles of liberty and equality enshrined in the Constitution and the nation's civil rights laws. Both organizations advocate for the right to be free from unreasonable, discriminatory, and otherwise excessive law enforcement conduct. The Public Justice Center is a non-profit, civil rights, and anti-poverty legal services organization committed to protecting constitutional rights and ensuring citizens are free from unlawful restraint or intrusion by law enforcement.

**REASONS FOR GRANTING THE WRIT**

In our federal system, "state courts no less than federal are and ought to be the guardians of our liberties." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). Consistent with that principle, this Court has cautioned that while Article 26 is generally interpreted consonantly with the Fourth Amendment, the two provisions need not be interpreted identically. *See King v. State*, 434 Md. 472, 482–83 (2013); *Gahan v. State*, 290 Md. 310, 321–22 (1981). This

Court has previously departed from federal doctrine, *see, e.g., Lupfer v. State*, 420 Md. 111, 130 (2011) (self-incrimination), and has suggested that such departure is appropriate when: (1) federal doctrine proves unworkable or unfair, such that departure is "necessary and appropriate to give full effect to the rights afforded under Maryland law," *Leidig v. State*, 475 Md. 181, 236 (2021); and (2) other courts are "struggl[ing] to make sense" of federal doctrine. *Id.* at 238; *see generally Doe v. Dep't of Pub. Safety & Corr. Servs.,* 430 Md. 535, 549 & n.12 (2013); Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 Temp. L. Rev. 637 (1998). Both factors exist here because *Whren v. U.S.*, 517 U.S. 806 (1996), leads to injustice, undermines public safety, and has generated criticism from state and federal courts across the country. This Court should grant the Petition and revisit its adherence to *Whren* and independently interpret the rights guaranteed to Marylanders under Article 26.

**1. *Whren* has proved unworkable and unfair.**

The Fourth Amendment was designed to prevent the arbitrary use of discretionary police power in searches and seizures as "a direct response to the virtually unrestrained and judicially unsupervised searches pursuant to general warrants and writs of assistance." Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 254–56 (1989). Article 26 "grew out of the same historical background." *Gahan*, 290 Md. at 321. *Whren* held that pretextual stops do not violate the Fourth Amendment if there is probable cause of a traffic violation. *Whren*, 517 U.S. at 813. Many have noted that *Whren* departed from prior Fourth Amendment decisions. *E.g.*,

Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment,* 102 Mich. L. Rev. 1843, 1859 (2004) (*Whren* "misstat[ed] its own precedents" and permitted "arbitrary intrusions upon liberty" that go against the "'central concern' of the Fourth Amendment …." (citations omitted)). *Whren* still hinged on the premise that probable cause of a traffic violation sufficiently cabins police discretion to prevent arbitrary seizures or unreasonable overreach. *Whren*, 517 U.S. at 817–18

Numerous, robust studies seriously undermine *Whren's* premise—a premise always questionable given the expansiveness of the traffic code. One such study found evidence that stops of Black drivers are motivated by race and that Black drivers are searched disproportionately compared to white drivers. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736 (2020). Another found that "[r]acial disparities in traffic stops are large, ubiquitous across the nation, and troubling." Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes*, 9 Duke Forum for Law & Social Change 21, 22 (2017). *See also* Alicia R. Ouellette, *Discriminatory Treatment on the Roadways: Pretextual Traffic Stops of Middle Easterners after People v. Robinson*, 4 Gov't L. & Pol'y J. 41 (2002). The Baumgartner study showed that Black drivers were twice as likely to be searched as white drivers and that race is predictive of searches. Baumgartner at 43–46. Of the states studied, Maryland had among the highest disparity rates. *Id*. at 46, fig.8. These studies found statistically significant evidence that searches of Black and

Latine individuals during traffic stops are based on less cause than white individuals. Pierson at 738–39; Baumgartner at 43–46.

Pretextual stops flourished following *Whren*. Just two years after *Whren*, the ACLU of Maryland challenged a Maryland State Police practice of pretextual stops. Complaint, *Md. State Conference of NAACP Branches v. Md. Dep't of State Police*, No. CCB-98-1098. That practice is part of a persistent and intractable pattern of racial profiling in Maryland. *See* ACLU, *"Driving While Black" in Maryland*, https://www.aclu.org/cases/driving-while-black-maryland (Feb. 10, 2010); U.S. Dep't of Just. C.R. Div., *Investigation of the Baltimore City Police Department*, https://www.justice.gov/opa/file/883366/dl?inline (Aug. 10, 2016). Three decades after *Whren*, "pretextual stops have become a cornerstone of law enforcement practice." *Crane v. City of Arlington, Texas*, 50 F.4th 453, 457–58 (5th Cir. 2022).

Pretextual traffic stops—which occur "on a massive scale," *United States v. Cole*, 21 F.4th 421, 437 (7th Cir. 2021) (Hamilton, J., dissenting)—are also dangerous and sometimes tragic. Philando Castille, for example, was fatally shot after being pretextually stopped for a broken taillight. Tyre Nicholas was fatally beaten after police stopped him for a traffic violation that recordings indicated never occurred.[1] Black men are twice as likely as white men to be killed by police. Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Se*x, 116 Proc. Nat'l

[1] *See Killing of Philando Castille*, Wikipedia, available at https://en.wikipedia.org/wiki/Killing_of_Philando_Castile; *Killing of Tyre Nichols*, Wikipedia, available at https://en.wikipedia.org/wiki/Killing_of_Tyre_Nichols for consolidated cites to reports.

Acad. Scis. 16793, 16794 (2019). And police use excessive force disproportionately against Black and brown people. *See, e.g.*, U.S. Dep't of Just. C.R. Div. & U.S. Att'ys Off. for the Dist. of Minneapolis Civ. Div., *Investigation of the City of Minneapolis Police Department,* https://www.justice.gov/d9/2023-06/minneapolis_findings_report.pdf (June 16, 2023) (one of numerous investigations finding pattern of excessive force against Black, Latine, and Indigenous people). As the Fifth Circuit recently opined, pretextual stops "create grounds for violent—and often deadly—encounters that disproportionately harm people of color." *Crane*, 50 F.4th at 458.

Importantly, racially disparate pretextual traffic stops proliferated not despite the law but because of it. Second Circuit Judge Raymond L. Lohier joined other judges and scholars in recently recognizing that "[a]s a practical matter, *Whren* and later cases have unfortunately given police officers a green light to make pretextual stops based on racial profiling." *United States v. Weaver*, 9 F.4th 129, 158–59 (2d Cir. 2021) (Lohier, J., concurring). *See also*, *e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Cal. L. Rev. 125, 155–56 (2017) (*Whren* "creates an incentive for police officers to engage in pretextual stops" and "helps make them an institutional practice."). Where police are objectively engaged in investigative stops, the absence of Fourth Amendment restraints on discretion incentivizes racial profiling. *See United States v. Hunger*, 88 F.4th 221, 233 (3d Cir. 2023) (McKee, J., concurring) ("the discretion underlying an officer's decision to stop a motorist is often influenced by factors that would raise constitutional concerns but for the Fourth Amendment latitude …."). And a Fourth Amendment remedy for racially

disparate traffic stops is necessary because the Equal Protection Clause has proven insufficient to mitigate the problem. *See* Tracy Maclin, *Race and The Fourth Amendment*, 51 Vand. L. Rev. 333, 337 n.22 (1998).

This case illustrates *Whren's* impact. Police were patrolling for crime and called a drug-sniffing dog as part of "common practice." Pet. at 6. No individualized suspicion preceded the stop; officers just wanted to "check [Mr. Branch] out…." *Id*. at app. 36. Yet *Whren* compelled the trial court to uphold the officers' discretionary decision to subject Mr. Branch—a Black man—to an investigation without cause. The two other petitioners asking this Court to depart from *Whren* confront the same situation. In one, a narcotics unit conducted a traffic stop and then searched the car as part of "normal ritual." *Duane Corey Johnson v. State of Maryland*, ACM-REG-0023-2023 (SCM-PET-0115-2024). In the other, officers who were investigating a person based on previous contacts with police initiated a traffic stop and searched the car. *Joshua Caleb Osakwe v. State of Maryland*, ACM-REG-1762-2023 (SCM-PET-0111-2024). In all, police faced no judicial limit on their discretion to conduct an investigative stop.

**2. <u>Other Courts are Frustrated with Whren.</u>**

Departures from and criticisms of *Whren* in other jurisdictions confirm that this Court's review is warranted. Two state supreme courts have held that pretextual traffic stops violate state analogues to the Fourth Amendment. *State v. Ochoa*, 146 N.M. 32 (2008); *State v. Ladson*, 138 Wash. 2d 343 (1999); *State v. Arreola*, 176 Wash. 2d 284 (2012). Judicial opinions in other states have questioned *Whren* or attempted to mitigate

its impact. In Massachusetts, for example, the Supreme Judicial Court articulated its own framework for establishing that a traffic stop violates the Massachusetts Constitution's equal protection guarantee. *Commonwealth v. Long*, 485 Mass. 711 (2020). Going further, Chief Justice Kimberly Budd "would prohibit all pretextual stops." *Id*. at 737 (Budd, C.J., concurring). *See also, e.g. Chase v. State*, 243 P.3d 1014, 1019 (Alaska Ct. App. 2010) (indicating it is an open question whether Alaska will follow *Whren*); *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002) (rejecting *Whren* in the context of retaliatory arrests).

Judicial opinions that depart from or criticize federal doctrine have influenced whether this Court charts its own course under the Maryland Constitution, *see Leidig*, 475 Md. at 236, and they also play a role in developing federal law. For example, after two state courts interpreted their state constitutions to protect cell phone location data—even though the U.S. Supreme Court had held that individuals lose Fourth Amendment protections in certain data shared with third parties—the U.S. Supreme Court followed suit, relaxing its third-party doctrine and recognizing Fourth Amendment protections for location data. *Compare State v. Earls*, 214 N.J. 564 (2013)*, Commonwealth v. Augustine*, 4 N.E.3d 846 (Mass. 2014) *with Carpenter v. United States*, 585 U.S. 296 (2018).

Unlike state courts, lower federal courts must follow the U.S. Supreme Court's interpretation of the Fourth Amendment. But numerous federal judges have nevertheless expressed concern about pretext stops, implying that they are abiding by *Whren* only because they have no choice. *See Weaver*, 9 F.4th at 158–159 (Lohier, J., concurring);

*Hunger*, 88 F.4th at 229 (McKee, J., concurring); *Crane*, 50 F.4th at 457–58; *Cole*, 21 F.4th at 437 (Hamilton, J., dissenting).

## CONCLUSION

This Court has a choice about whether to revisit its adherence to *Whren*. If it does, it can improve the law, advance liberty and safety for countless Marylanders, and ensure Marylanders have a right against arbitrary and unconstrained stops and searches under Article 26, regardless of race. Amici respectfully urge this Court to grant the writ.

Respectfully submitted,

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## STATEMENT OF INTENT TO FILE SUPPLEMENTAL BRIEF PURSANT TO RULE 8-511(E)(2)

Should this Court grant the petition for a writ of *certiorari*, the *amici* intend to seek consent of the parties or move for permission to file an *amicus curiae* brief on the issues before the Court.

## CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH 8-112

1. This brief contains 1890 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ David R. Rocah
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## CERTIFICATE OF SERIVICE

I hereby certify that, pursuant to Rule 20-201(g), on June 28, 2024, the following Brief of Amici Curiae in Support of Petition for Certiorari was electronically filed via the MDEC File and Serve.

/s/ David R. Rocah
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