IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0367

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTTIZE DANYELLE BROWN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE NATHAN CALLAHAN, JUDGE

# AMENDED APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

**KELLI HUSER**
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
kelli.huser2@ag.iowa.gov

BRIAN WILLIAMS
Black Hawk County Attorney

CHARITY SULLIVAN
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Federal Cases



### State Cases

**Federal Statute**



**State Statutes**

**Other Authorities**

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

### I. Article I, Section 8 of the Iowa Constitution Requires Only That An Officer Have An Objectively Reasonable Basis to Conduct a Traffic Stop.

*Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001)
*Navarette v. California*, 134 S. Ct. 1683 (2014)
*Terry v. Ohio*, 392 U.S. 1 (1968)
*Whren v. United States*, 517 U.S. 806 (1996)
*State v. Ochoa,* 206 P.3d 143 (N.M. Ct. App. 2008)
*Crittenden v. State*, 899 S.W.2d 668 (Tex. Crim. App. 1995)
*In re Pardee*, 872 N.W.2d 384 (Iowa 2015)
*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)
*Mitchell v. State*, 745 N.E.2d 775 (Ind. 2001)
*People v. Robinson*, 767 N.E.2d 638 (N.Y. Ct. App. 2001)
*State v. Adams*, 13 A.3d 1162 (Del. Super. Ct. 2008)
*State v. Arreola*, 290 P.3d 983 (Wash. 2012)
*State v. Aschenbrenner*, 289 N.W.2d 618 (Iowa 1980)
*State v. Baldon*, 829 N.W.2d 785 (Iowa 2013)
*State v. Bjerke*, 697 A.2d 1069 (R.I. 1997)
*State v. Bolosan*, 890 P.2d 673 (Haw. 1995)
*State v. Bruce*, 795 N.W.2d 1 (Iowa 2011)
*State v. Cardenas-Alvarez*, 25 P.3d 225 (N.M. 2001)
*State v. Carter/Dawson*, 600 P.2d 873 (Ore. 1979)
*State v. Cline,* 617 N.W.2d 277 (Iowa 2000)
*State v. Coleman*, 890 N.W.2d 284 (Iowa 2017)
*State v. Darling*, No. 0607014245, 2007 WL 1784185 (Del. Super. Ct. June. 8, 2007)
*State v. Garcia*, 461 N.W.2d 460 (Iowa 1990)
*State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015)
*State v. Griffin*, 691 N.W.2d 734 (Iowa 2005)
*State v. Harrison*, 846 N.W.2d 362 (Iowa 2014)
*State v. Heath*, 929 A.2d 390 (Del. Super. Ct. 2006)
*State v. Hofmann*, 537 N.W.2d 767 (Iowa 1995)
*State v. Holmes*, No. 1501015446, 2015 WL 5168374 (Del. Super. Ct. Sept. 3, 2015)
*State v. Kreps*, 650 N.W.2d 636 (Iowa 2002)
*State v. Ladson*, 979 P.2d 833 (Wash. 1999)

*State v. Lopez*, 873 P.2d 1127 (Utah 1994)
*State v. McClendon*, 517 S.E.2d 128 (N.C. 1999)
*State v. Nicher*, 720 N.W.2d 547 (Iowa 2006)
*State v. Nyala*, No. 131000634, 2014 WL 3565989 (Del. Super. Ct. July 17, 2014)
*State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010)
*State v. Pals*, 805 N.W.2d 767 (Iowa 2011)
*State v. Richardson*, 501 N.W.2d 495 (Iowa 1993)
*State v. Rosenstiel*, 473 N.W.2d 59 (Iowa 1991)
*State v. Scurry*, 636 A.2d 719 (R.I. 1994)
*State v. Storm*, 898 N.W.2d 140 (Iowa 2017)
*State v. Tague*, 676 N.W.2d 197 (Iowa 2004)
State v. Trice, No. 15-0437, 2016 WL 2745914 (Iowa Ct. App. 2016)
*State v. Turner*, 630 N.W.2d 601 (Iowa 2001)
*State v. Turner*, No. 1502014211, 2016 WL 105668 (Del. Super. Ct. Jan. 5, 2016)
*Turner v. State*, 25 A.3d 774 (Del. 2011)
U.S. Const. amend. IV
Utah Const. Art. I, § 14 and Art. I, § 24
Iowa Const. Art. I, § 8
N.M. Const. Art. II, § 10
Wash Const. Art. I, § 7
*Aaron B. Overton, Federal Gang Laws: A New Tool Against a Growing Threat or Overbroad and Dangerous?*, 9 Rutgers Race & L. Rev. 405 (2008)
Peter G. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syracuse. L. Rev. 731 (1982)
James E. Lange, et al., *Testing the Racial Profiling Hypothesis for Seemingly Disparate Traffic Stops on the New Jersey Turnpike*, 22 Justice Quarterly 193, 216 (2005)
C. Barnum, et al., 2015 Summary of Findings, p. 8, https://www8.iowa-city-org/weblink/0/doc/1524345/Electronic. aspx (last viewed December 20, 2017)
Greg Ridgeway & John MacDonald, *Methods for Assessing Racially Biased Policing, in* Race, Ethnicity, and Policing: New and Essential Readings 180, 182 (Stephen K. Rice and Michael D. White ed., 2010)

Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 Geo. Mason U. C.R. L.J. 219, 239 (2005)

## ROUTING STATEMENT

Retention is inappropriate for this case. The defendant relies on Iowa Rule of Appellate Procedure 6.903(2)(d) to argue that there is a substantial question of changing legal principles. But the Iowa Supreme Court has already considered pretextual government action under the Iowa Constitution and the policy arguments advanced here are not new or changing. In 2005 under the Iowa Constitution, the Iowa Supreme Court determined that an officer's subjective motives were irrelevant when the government action was objectively reasonable. *State v. Griffin*, 691 N.W.2d 734, 736 (Iowa 2005). Further, the policy arguments are not new. The 1996 *Whren v. United States* decision addresses a concern with selective law enforcement on the basis of race. *Whren v. United States*, 517 U.S. 806, 813 (1996). Additionally, many of the racial profiling studies that the defendant cites are older than *Griffin*. *See* Appellant Br. pp. 39-43 (citing studies from 1996, 1999, and 2000).

The Iowa Supreme Court has already considered pretextual government action under the Iowa Constitution and concluded an objective test is appropriate. The policy reasons have not changed in the interim. Instead, existing legal principles apply and transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

## STATEMENT OF THE CASE

### Nature of the Case

The defendant, Scottize Danyelle Brown, appeals her conviction for operating while intoxicated as a second offense. She argues the traffic stop of the vehicle she was driving was pretextual and that pretextual stops are unconstitutional under Article I, section 8 of the Iowa Constitution. At the motion to suppress hearing, the police officer explained he would not have stopped the defendant for non-functioning license plate lamps, veering over a center line, and accelerating through a yellow light if he had not checked the vehicle owner's name in the computer. When he checked the name, he discovered the vehicle owner was affiliated with gang activity.

### Course of Proceedings

Brown was charged with operating while intoxicated as a second offense in violation of Iowa Code section 321J.2. Trial Information; App. 4. She filed a motion to suppress and argued in

the motion that her traffic stop was pretextual in violation of both the federal and state constitutions. Motion to Suppress; App. 9.

The district court denied the motion. Order on Motion to Suppress; App. 12. It determined that the officer would not have stopped the vehicle absent the officer's discovery of the registered owner's gang affiliation. Order on Motion to Suppress; App. 11. But it recognized the officer's discovery of the gang connection was a subjective reason that was immaterial to the constitutionality of the stop, thus the stop was constitutional. Order on Motion to Suppress; App. 11.

After the district court denied the motion, the defendant agreed to a trial on the minutes. Transcript p. 2, lines 6-25; 3, lines 1-22. The district court found her guilty and sentenced her to fourteen days in jail with 351 days suspended, and to probation for one to two years. Order; App. 18.

**Facts**

The defendant was driving a black Lincoln Navigator at 12:25 a.m. in the city of Waterloo when her driving caught the attention of a patrol officer. Minutes of Testimony; Confidential App. 12. The defendant had accelerated into a right turn on a yellow light and

passed to the left of the vehicle in front of it. Minutes of Testimony; Confidential App. 12. Then the defendant veered across a center line and the officer noticed one of the two license plate lamps was not functioning. Minutes of Testimony; Confidential App. 12.

Prior to the stop the officer investigated the registered owner of the vehicle—not the defendant—and discovered the registered owner had a connection to gang activity. Motion to Suppress Tr. 7, lines 17-25; 8, lines 1-6. The officer explained that it was after he realized the owner was affiliated with a gang that he made the decision to stop the vehicle. Motion to Suppress Tr. 19, lines 19-23.

The officer activated his emergency lights but the defendant did not immediately react to the lights or the siren. Minutes of Testimony; Confidential App. 12. When the officer finally stopped the vehicle, he smelled alcohol emanating from the defendant and saw an open can of Natural Light, a type of beer, in the center cup holder. Minutes of Testimony; Confidential App. 12. The defendant denied that the open can was hers. Minutes of Testimony; Confidential App. 12. The officer discovered that the defendant had a suspended license and transported her to the station where he conducted field sobriety tests. Minutes of Testimony; Confidential App. 12.

## ARGUMENT

### I. Article I, Section 8 of the Iowa Constitution Requires Only That An Officer Have An Objectively Reasonable Basis to Conduct a Traffic Stop.

#### Preservation of Error

Error is preserved on the general claim that the Iowa Constitution prohibits pretextual stops. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); Motion to Suppress; Ruling; App. 9, 11-12.

Error is not preserved on the defendant's attempt—for the first time—to challenge whether she violated Iowa's traffic laws. A defendant must present an issue and the district court must decide it in order to preserve error. *Senecaut*, 641 N.W.2d at 537. The defendant's motion to suppress only argued that the officer's reasons for the stop were pretextual. *See* Motion to Suppress; App. 9. At the suppression hearing, the defendant did not argue that she followed the traffic laws. *See* Motion to Suppress Tr. 29, lines 9-25; 30, lines 1-25; 31, lines 1-16. The defendant has failed to preserve a challenge to her traffic violations.

#### Standard of Review

Review is de novo for this constitutional issue. *State v. Baldon*, 829 N.W.2d 785, 789 (Iowa 2013). This inquiry requires the Court to

make an independent evaluation based on "the totality of the circumstances as shown by the entire record." *Id.* (internal quotation marks omitted).

**Merits**

The defendant broke the law. But she argues that her law-breaking is immaterial because Article I, Section 8 of the Iowa Constitution requires a court to suppress evidence if there are additional reasons for the stop that were not related to her illegal conduct.

The search and seizure provision of the Iowa Constitution requires only that the officer had an objectively reasonable basis to conduct a traffic stop. This objective standard follows the reasoned analysis of *Whren v. United States* in the United States Supreme Court, Iowa's case law involving pretextual government action under the Iowa Constitution, and the reasoning of other state courts on this issue.

The defendant's subjective burden-shifting test is not the answer to the defendant's concerns about selective law enforcement, the number of traffic regulations in force in Iowa, or the number of race-based traffic stops in Iowa. It is not the answer because

concerns about the selective enforcement of traffic laws can be addressed under the existing framework of the Equal Protection Clause. It is not the answer because Iowa case law already provides extensive, unique protections during traffic stops conducted by Iowa officers. And it is not the answer because the current data provided by amici relies on census data, a method too flawed for the Iowa Supreme Court to rely upon it as an accurate commentary on race-based traffic stops in Iowa. For all of these reasons, the district court correctly applied the law.

### A. Case law from the United States Supreme Court, the Iowa Supreme Court, and other state courts requires only an objectively reasonable basis for a traffic stop.

For decades, courts have used an objective standard to assess the reasonableness of a seizure. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (stating "it is imperative that the facts be judged against an objective standard"). The United States Supreme Court has justified an objective test in the face of allegedly pretextual government action, acknowledging selective enforcement of traffic laws is a concern but not a concern addressable under a constitutional search and seizure provision. The Iowa Supreme Court has determined under the Iowa Constitution that an officer's

subjective motive does not undermine probable cause. And other states have found persuasive the reasoning of *Whren v. United States* under their own constitutions.

### *1. The United States Supreme Court identified in* Whren v. United States *that an objective standard is appropriate to assess if a traffic stop is reasonable.*

The Fourth Amendment requires an objective standard to assess the reasonableness of government action during a traffic stop. The Fourth Amendment of the United States Constitution protects the people from unreasonable searches and seizures. U.S. Const. amend. IV; *Whren v. United States*, 517 U.S. 806, 809 (1996). An officer's temporary detention of a person during a traffic stop is a seizure. *Whren*, 517 U.S. at 810. The seizure must be reasonable to be constitutional. *Id.*

A traffic stop is reasonable under the Fourth Amendment when the driver violates a traffic law, even when an officer has additional subjective motive for the stop. In *Whren*, the United States Supreme Court recognized that an officer's additional subjective motive does not invalidate "otherwise objectively justifiable behavior under the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 813 (1996). Thus, "the decision to stop an automobile is reasonable where

the police have probable cause to believe that a traffic violation has occurred."[1] *Id.*

The Court then squarely addressed two concerns identical to what the defendant raises here: that officers were selectively enforcing the traffic laws on the basis of race and that there are too many traffic regulations to avoid breaking the law while driving. In response to the first concern, the Court stated that "[w]e of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race" but recognized the constitutional basis for such a claim was the Equal Protection Clause. *Id.* For the second concern, the Court determined that there was no legal principle available to deem a traffic code too large for officers to enforce. *Id.* at 818-19. Further, there was no practical standard that allowed the judiciary to decide which traffic

[1] The *Whren* defendant admitted that there was probable cause he violated the traffic laws, and the United States Supreme Court used the phrase "probable cause" in its decision. However, the United States Supreme Court has recognized reasonable suspicion—a lower standard than probable cause—can justify a seizure and the Iowa Supreme Court has held the same. *See Navarette v. California*, 134 S. Ct. 1683, 1690 (2014) (recognizing reasonable suspicion can justify an investigatory stop); *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004) (stating the police need only reasonable suspicion to stop a defendant's vehicle for investigatory purposes).

violations were so common that an officer trying to enforce the law would be acting unreasonably under the Constitution. *Id.*

### 2. *The Iowa Supreme Court has recognized under the Iowa Constitution that an officer's additional subjective motive does not negate an otherwise valid government action.*

The Iowa Constitution requires an objective standard to assess the reasonableness of government action during a traffic stop. The Iowa Constitution contains nearly identical language to the Fourth Amendment. *See* Iowa Const. art. I, § 8. The Iowa Supreme Court has recognized it "will engage in independent analysis of the content of [Iowa's] state search and seizure provisions." *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010).

Even so, Iowa courts have long recognized that "constitutional reasonableness of a search or seizure is determined by an objective standard." *State v. Cline,* 617 N.W.2d 277, 280-81 (Iowa 2000) *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001); *see also State v. Harrison*, 846 N.W.2d 362, 365 (Iowa 2014) ("The motivation of the officer stopping the vehicle is not controlling in determining whether reasonable suspicion existed. The officer is therefore not bound by his real reasons for the stop.") (quoting *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002)); *State v.*

*Nicher*, 720 N.W.2d 547, 554 (Iowa 2006) (stating "we must assess a police officer's conduct based on an objective standard"). For evaluating pretextual arrests, for example, the Iowa Supreme Court implicitly adopted an objective test in 1990 and explicitly adopted the same objective test in 1995. *See State v. Garcia*, 461 N.W.2d 460, 463-64 (Iowa 1990); *State v. Hofmann*, 537 N.W.2d 767, 779 (Iowa 1995).

This objective standard equally applied to traffic stops, even prior to *Whren*. Prior to *Whren*, an officer had to explain the actual reasons for the stop, but an improper reason did not automatically invalidate the stop. Instead, Iowa law included a narrow exception that a stop could be invalid if the *only* reason for the stop was subjectively unreasonable. *See Garcia*, 461 N.W.2d at 464. In *Garcia*, law enforcement had the defendant under surveillance, but did not move to arrest him until they discovered the defendant did not have a valid driver's license. *Id.* at 461-62. The officer testified that he stopped the defendant because he knew the defendant did not have a driver's license and because he "had a very strong suspicion that [the defendant] was dealing in narcotics." *Id.* The Iowa Supreme Court upheld the stop as constitutional, finding that the lack of a

driver's license was a valid reason for the stop. *Id.* The additional suspicion of drug activity did not require a different result. *Id.* Although the court of appeals in that case relied on *State v. Aschenbrenner*, 289 N.W.2d 618 (Iowa 1980) as evidence of a subjective test, the Iowa Supreme Court clarified the test's application. *Id.* It stated that "[e]ven applying this subjective standard [from *Aschenbrenner*], the arrest was proper because the officers did have a proper, albeit a secondary, reason for the stop." *Id.*

Under the Iowa Constitution specifically, the Iowa Supreme Court has recognized that an officer's subjective motive does not invalidate otherwise lawful government action. An officer stopped a defendant for an improperly illuminated rear license plate and an excessively loud muffler. *State v. Griffin*, 691 N.W.2d 734, 736 (Iowa 2005). The defendant admitted he did not have liability insurance either, and was arrested for all three offenses. *Id.* A subsequent search of the vehicle revealed methamphetamine and marijuana. *Id.* The officer admitted at the suppression hearing that when he searched for the defendant's name in the computer and discovered prior drug convictions, he suspected the defendant might have controlled substances in the vehicle. *Id.* The officer testified that if

he had not suspected additional controlled substances, he would not have arrested the defendant and that the arrest was only made to permit a search incident to arrest. *Id.* The Iowa Supreme Court affirmed, finding that under the Iowa Constitution the subjective motive for the arrest did not negate that probable cause existed for the arrest. *Id.*

The principle of stare decisis applies for this Court to continue to follow *Griffin* for claims alleging pretextual government action. "[T]he principle of stare decisis demands that we respect prior precedent and that we do not overturn them merely because we might have come to a different conclusion." *State v. Bruce*, 795 N.W.2d 1, 3 (Iowa 2011). The Iowa Supreme Court decided *Griffin* under the Iowa Constitution within the last seventeen years. It recognized Fourth Amendment precedent was persuasive but not binding, and concluded it "found no basis to distinguish the protections afforded by the Iowa Constitution from those afforded by the federal constitution under the facts of this case." *Griffin*, 691 N.W.2d at 737.

The defendant provides no new facts or policy that requires departure from this case law. Concerns about racial profiling existed before *Griffin*. Several of the racial profiling studies that the

defendant references in her brief pre-date *Griffin*. *See* Appellant Br. pp. 39-43 (referencing a 1996 New Jersey study, a 1999 New York study, a 2000 New Jersey study, and a 2004 Massachusetts study). The defendant's brief re-states longstanding policy arguments. Under the Iowa Constitution, the Iowa Supreme Court has already decided that an officer's subjective motive does not negate otherwise lawful government action and the defendant offers no persuasive reason to depart from *Griffin*.

### 3. *Multiple states follow* Whren *under their state constitutions because of its persuasive reasoning or have employed similar objective tests.*

Other states have followed the *Whren* decision because they have concluded independently that the *Whren* rationale is persuasive. Some states have announced an independence akin to Iowa's opinions for interpreting their own constitutional search and seizure provisions and have determined subsequently that the *Whren* rationale protects their citizens. *See People v. Robinson*, 767 N.E.2d 638, 642 (N.Y. Ct. App. 2001) (acknowledging that it "has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution when a longstanding New York interest was involved" but that the concern of pretextual stops may be

addressed under the Equal Protection Clause); *State v. McClendon*, 517 S.E.2d 128, 131-32 (N.C. 1999) (holding that while North Carolina Constitution affords broader protection than the Fourth Amendment, "we find the reasoning of the Supreme Court in *Whren* to be compelling, and we adopt it here"). Indeed, contrary to expanding the rights of the accused, the New York court recognized that extending its law beyond *Whren* could harm its citizens. *See Robinson*, 767 N.E.2d at 643-44 (noting as an example that a traffic stop could lead to the arrest of a person driving under the influence).

Additionally, five other states have employed objective tests that pre-date *Whren*. *See State v. Bolosan*, 890 P.2d 673, 681 (Haw. 1995) ("This court has also disapproved of analyses of officers' subjective bases for conducting investigatory stops in favor of an objective standard . . . and we see no reason to depart from that position"); *State v. Carter/Dawson*, 600 P.2d 873, 875 (Ore. 1979) ("The officer's motives for an otherwise justifiable traffic stop are . . . not relevant to the question of its validity"); *State v. Bjerke*, 697 A.2d 1069, 1072-73 (R.I. 1997) (noting that Rhode Island reached a similar conclusion to *Whren* in *State v. Scurry*, 636 A.2d 719, 723 (R.I. 1994) and stating that the state "[has] not yet endorsed a view that motive

alone could invalidate an otherwise valid seizure in the automobile context"); *Crittenden v. State*, 899 S.W.2d 668, 671-74 (Tex. Crim. App. 1995) ("We therefore hold . . . that an objectively valid traffic stop is not unlawful under Article I, § 9, just because the detaining officer had some ulterior motive for making it"); *State v. Lopez*, 873 P.2d 1127, 1140 (Utah 1994) ("[B]ecause the pretext doctrine is unsound, we refuse to adopt it under article I, section 14 and article I, section 24 of the Utah Constitution").

The defendant suggests other states are merely lock-step following federal precedent. This is wrong. Instead, multiple independent jurisdictions have considered the rationale of an objective test and concluded it is the right result.

#### *4. The state courts that have departed from* Whren *either have subsequently disavowed the case law or have constitutional language different from the Iowa Constitution.*

The defendant seeks a burden-shifting test akin to the test adopted by Delaware, New Mexico, and Washington. Delaware has disavowed its case, New Mexico has a substantially different constitutional provision, and Washington's test is similar to Iowa's pre-*Whren* test that upholds the traffic stop if the officer also had an objective reason for the stop.

The defendant first relies on a case from the Delaware Superior Court that is not good law in Delaware. The Delaware case of *State v. Heath*, 929 A.2d 390 (Del. Super. Ct. 2006) has not been followed by that court in subsequent years and has not been adopted by the Delaware Supreme Court. Other superior court decisions in Delaware have explicitly declined to follow *Heath*, describing its proposed tri-partite test as placing "a difficult burden on the court" and noting:

> For obvious reasons of comity, consistency and efforts to minimize confusion, judges on this Court usually follow precedent as enunciated by their colleagues. But the Court in this case cannot do so in this instance. There are too many occasions where, as here, there was a lawful basis to stop a motor vehicle for a traffic violation which led later to arrests for other kinds of offenses.

*State v. Adams*, 13 A.3d 1162, 1166-67 (Del. Super. Ct. 2008); *State v. Darling*, No. 0607014245, 2007 WL 1784185, at *3-4 (Del. Super. Ct. June. 8, 2007). In fact, the Delaware Supreme Court in *Turner v. State* explicitly affirmed a trial court's denial of a motion to suppress that relied on *Heath* and quoted the trial court's analysis:

> In [*Whren*, the Supreme Court] declared an officer's pretext to conduct a stop immaterial, so long as the officer has contemporaneous reasonable suspicion of criminal activity. Similarly, the Delaware Supreme Court . . . does not rely on an officer's actual, subjective

> motives to determine the reasonableness of an officer's conduct.
>
> Officer Golden witnessed Turner in the front passenger seat of the Grand Marquis with an unfastened seatbelt, in violation of 21 Del. C. § 4802(a)(2). These facts constitute a reasonable articulable suspicion that Tann, the driver, committed a traffic violation. Therefore, the officers had probable cause to conduct a traffic stop.

*Turner v. State*, 25 A.3d 774, 777 (Del. 2011). The Delaware Supreme Court found no error in this analysis and affirmed, stating Turner had failed to present an argument that the seizing officer had violated the Delaware Constitution. *Id.* The *Turner* court repudiated the *Heath* decision: "In *Heath*, the Superior Court held that the Delaware Constitution prohibits 'purely' pretextual traffic stops. That decision was not appealed, and *Heath* has not been followed in any other Superior Court decisions. Turner cannot rely on *Heath* as a basis for his constitutional claim." *Id.*

Delaware's lower courts have since noted the validity of *Heath* is in significant question, if not already implicitly overruled. *See State v. Turner*, No. 1502014211, 2016 WL 105668, at *3 (Del. Super. Ct. 2016) ("[D]espite opportunity, the Delaware Supreme Court has declined to adopt the holding in *Heath*. . . . For this reason, the Court

does not rely upon *Heath* as support that an alleged pretextual reason for the stop rendered it and the subsequent search unconstitutional."); *State v. Holmes*, No. 1501015446, 2015 WL 5168374, at *7 (Del. Super. Ct. 2015) (same); *State v. Nyala*, No. 131000634, 2014 WL 3565989, at *10 n.98 (Del. Super. Ct. 2014) (finding no probable cause of traffic violation or reasonable suspicion to support traffic stop, but specifically declining to adopt defendant's reliance on *Heath* to support outcome). The Iowa Supreme Court should not rely on Delaware's intermediate court's repudiated decision that has been described as a "difficult burden."

The defendant also relies on New Mexico law, but New Mexico recognizes a higher expectation of privacy in automobiles and has unique state concerns with border checkpoints. The court in *Ochoa* broke with *Whren*'s objective test based upon an idiosyncratic feature of New Mexico's constitutional jurisprudence on automobiles:

> New Mexico constitutional law permits us to expand the federal protections afforded New Mexico's motorists from unreasonable searches and seizures because New Mexico courts have rejected the notion that an individual lowers his expectation of privacy when he enters an automobile. The extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law and therefore supports our departure from *Whren*.

206 P.3d 143, 151 (N.M. Ct. App. 2008) (internal quotations and citations omitted). The New Mexico Constitution provides that "no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation." N.M. Const. art II, § 10. In analyzing this provision, the New Mexico courts have concluded that a motorist does not have a lesser expectation of privacy in an automobile. *State v. Cardenas-Alvarez*, 25 P.3d 225, 231 (N.M. 2001). This decision comes in part because of New Mexico's unique interaction with federal border checkpoints. *Id.*

Iowa's courts have rejected the expectation-of-privacy argument, recognizing instead that motorists do have a reduced expectation of privacy in their vehicles. *See State v. Storm*, 898 N.W.2d 140, 146-37 (Iowa 2017). Vehicles function as transport, seldom serve as a residence, and travel public thoroughfares in plain view. *Id.* Iowa's rationale for automobiles is more consistent with federal precedent than New Mexico's unique constitutional law.

Washington also has different constitutional language and its case law recognized that as long as there is an objectively valid reason

to initiate the stop, an officer's subjective motive becomes irrelevant. *See State v. Ladson*, 979 P.2d 833 (Wash. 1999). The *Ladson* court found that pretextual seizures violated the Washington Constitution and determined a totality of the circumstances test was appropriate to determine an officer's subjective intent for the seizure. *Ladson*, 979 P.2d at 843. Yet, the search and seizure provisions of Washington's constitution differ substantially from Iowa. *Compare* Wash Const. Art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.") *with* Iowa Const. Art. I, § 8 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."); *see* Peter G. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syracuse L. Rev. 731, 763 (1982) (noting the Washington framers explicitly rejected a proposal identical to the Fourth Amendment in favor of Article I, section 7).

Even so, the Washington Supreme Court has appeared to subsequently walk back its holding in *Ladson*, holding:

> a traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction (or multiple infractions), for which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop. In other words, despite other motivations or reasons for the stop, a traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.
>
> . . . .
>
> Thus, if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not pretextual. That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop.

*State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012). Under this reworking of *Ladson* formulation, so long as there is an objective reason the officer relied upon in initiating the stop, the existence of an additional, impermissible motive becomes irrelevant: "Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police

discretion, because the officer would have stopped the vehicle regardless." *Id.* at 991-92. Washington—even with its more expansive constitutional provisions—has recognized the persuasive underpinnings of *Whren*.

The Delaware courts have disavowed a totality-of-the-circumstances test. The New Mexico courts have recognized a unique right exists in their state constitution. The Washington courts now follow a test that requires only an objective reason for the stop to counter any impermissible motives. The Court should not rely on any of these cases as persuasive authority to adopt a new test.

### B. The defendant advances a burden-shifting test that is unworkable and unnecessary.

The defendant asks this Court to adopt a burden-shifting test to change Iowa's objective reasonableness requirement to a test that considers subjective motivations. The burden-shifting test fails to account for two practical problems that district courts will face in trying to apply this test. The burden-shifting test is unnecessary under Article I, Section 8 because the Equal Protection Clause already provides a cause of action for selective police enforcement. And the data from amici is misleading and does not provide an accurate portrait of traffic stops in Iowa.

### *1. The defendant's burden-shifting test is unworkable because it does not explain what—if any—level of subjective motivation is permissible.*

Despite federal law, Iowa law, and other states' holdings, the defendant asks this Court to adopt the burden-shifting test used in Delaware and New Mexico. Under the defendant's test, (1) the prosecution would show an objective basis for the stop, (2) the defendant would rebut with subjective motives, and (3) the prosecution could then have one more opportunity to validate the officer's actions. *See* Defendant Br. 77-78.

The defendant fails to account for two practical problems for the district courts with this test. First, the test provides no guidance for what, if any, subjective motives for a stop are permissible. Second, the test leaves each district court unable to determine consistently what the prosecution needs to show in the third step to outweigh an improper subjective motivation for the traffic stop.

First, this test does not guide the district courts on what subjective reasons offend the constitution and what subjective reasons reflect permissible exercise of the officer's discretion. Although the defendant implies her stop was race-based and specifically that she was stopped because she was African-American,

the fact is the officer did not mention race as a factor or even indicate that he knew the defendant's race before he conducted the traffic stop. Minutes of Testimony; Motion to Suppress Tr. 19, lines 19-23; Confidential App. 12. Instead, the officer used his computer to investigate the registered owner's name, and discovered the registered owner was affiliated with a gang. Motion to Suppress Tr. 19, lines 19-23.

Gang affiliation could have indicated to the officer that the vehicle owner had a past history of crime. Further, a racial motivation is not inherent in these facts when "socioeconomic factors influence gang membership more than race." Aaron B. Overton, *Federal Gang Laws: A New Tool Against a Growing Threat or Overbroad and Dangerous?*, 9 Rutgers Race & L. Rev. 405, 410 (2008). The underlying record gives no information on the racial make-up of gangs in Iowa.

This highlights the problem that district courts would face in litigating whether an officer's motive could be construed as race-based. There are numerous additional subjective reasons an officer may have for conducting a traffic stop. A motorist "parked next to chain link fence in a nonresidential area where there were no

legitimate attractions" at 12:40 a.m. can lead to an officer's decision to make traffic stop. *State v. Richardson*, 501 N.W.2d 495, 497 (Iowa 1993). Parking in an area that has frequently been burglarized can lead to an officer's decision to make a traffic stop. *Id.* Pouring a beer can onto a pavement in a tavern parking lot at "a time notorious for drunken driving" can lead to an officer's decision to make a traffic stop. *State v. Rosenstiel*, 473 N.W.2d 59, 62 (Iowa 1991) overruled on other grounds by *State v. Cline*, 617 N.W.2d 277 (Iowa 2000). Being in a "high crime" or "high drug" area can weigh into the officer's decision to make a particular traffic stop. *See State v. Trice*, No. 15-0437, 2016 WL 2745914, at *1 (Iowa Ct. App. 2016). Any of these various observations could be pointed to as connecting to discrimination in some way. Even a bumper sticker with a political or religious message could be included in a defendant's challenge to the motivation of a stop, whether the officer included that fact in his report or even noticed the sticker before initiating a traffic stop.

Second, the defendant's test provides no guidance on what amount of subjective reasoning is permissible. If no subjective motive is valid, the defendant's test ends at the second step and officers will need to justify why they did not pull over every speeding

car on the highway. If some subjective motive is permissible, the district courts will need to settle on the constitutionally appropriate amount of subjective motivation. Perhaps an officer's motive to stop a vehicle is ninety percent because the defendant is speeding, and ten percent because the defendant is a teenage male and the officer identifies the traffic stop as a teachable moment. Or maybe the officer's motive is sixty percent because the defendant is speeding, twenty percent because the defendant is a teenage male, and twenty percent because he is driving a red sports car. But perhaps the officer testifies in more general terms that he stopped the car equally because it was a red sports car that caught his attention, because the car was speeding, because it was in a high-crime area, because the owner of the car had a suspended license, and because the owner of the car was affiliated with a gang. Different district courts will come to different conclusions on whether the stop is constitutional because under the defendant's burden-shifting test, there is no clear answer.

And while the State does not dispute that Iowa's district courts can apply complex frameworks, this is not simply a credibility determination. District courts will not only need to look into the minds of the officers to identify the subjective intent, but district

court will be required to decide how much pretext is permissible under the Iowa Constitution, leading to different results in different counties.

### *2. A burden-shifting test is unnecessary because the Equal Protection Clause is available for selective enforcement claims.*

A motorist is not without recourse if the motorist believes he or she was targeted for selective enforcement of a traffic law. The United States Supreme Court and other states have recognized that the federal Equal Protection Clause is the proper mechanism to challenge the selective enforcement of traffic laws. *See Whren*, 517 U.S. at 813; *Robinson*, 767 N.E.2d at 644 (acknowledging that the real concern of pretextual stops is that police officers will use their authority to stop persons on a selective and arbitrary basis but the answer is an action under the Equal Protection Clause). Iowa defendants have invoked the Equal Protection Clause in an effort to challenge their convictions. *See, e.g., In re Pardee*, 872 N.W.2d 384, 386 (Iowa 2015) (recognizing the defendant challenged his stop by arguing, in part, that the State targeted out-of-state vehicles in violation of equal protection principles). Defendants who feel

targeted by selective enforcement of traffic laws have a constitutional claim; it is just not the claim available under Article I, Section 8.

### *3. The burden-shifting test is unnecessary because Iowa is distinctly protective of motorist rights during traffic stops.*

Iowa law provides distinctly extensive protection to motorists during traffic stops beyond what is required under the federal constitution. Officers cannot extend a traffic stop once the reason for the traffic stop is resolved. *State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017) (finding the Iowa Constitution prohibits any action that prolongs a traffic stop once "the reason for the traffic stop is resolved and there is no other basis for reasonable suspicion"). Officers are limited on their use of the search-incident-to-arrest exception. *State v. Gaskins*, 866 N.W.2d 1, 17 (Iowa 2015) (determining the search of a safe in the car was not a valid search incident to arrest). Officers cannot justify a stop if they were mistaken on the law that applied. *See State v. Coleman*, 890 N.W.2d 284, 298 n.2 (Iowa 2017) (recognizing that the officer's mistake of law violated the Iowa Constitution, which differed from the more lenient federal constitution standard). Even consent to a search of a vehicle during a traffic stop is analyzed more stringently in Iowa. *State v. Pals*, 805

N.W.2d 767, 782 (Iowa 2011) (determining under an Iowa version of the federal totality-of-the-circumstances test that consent was not voluntary). As one sister state has recognized, the concerns with the unreasonableness of pretextual stop is not in the initial legally justified stop but "in the ensuing police investigatory conduct that may be excessive and unrelated to the traffic law violation." *Mitchell v. State*, 745 N.E.2d 775, 787 (Ind. 2001). The extended protections of the Iowa Constitution sufficiently address these concerns in existing case law.

Amici in support of the appellant try to show that the state of the nation requires expansion of Iowa law, but much of amici's data is either not relevant to traffic stops or comes from different states with different constitutional protections. Amici assert that racial disparities for marijuana possession rates and general arrests for drug possession show racially-disparate policing. *See* ACLU Amici Br. 14-16. But these comments are not linked to the traffic stops at issue in this brief, and are not directly relevant to this defendant's operating-while-intoxicated conviction. Amici rely on data from states such as Illinois, Missouri, and Nebraska to attempt to show the prevalence of racially-motivated traffic stops. *See* ACLU Amici Br. 22-24. The data

from outside Iowa is not persuasive because, as discussed above, Iowa's courts provide more protection during traffic stops than other states. It is illogical to rely on data from less-protective states as evidence that Iowa needs even more protection.

#### *4. A burden-shifting test is unnecessary because the amici on behalf of the appellant fail to provide accurate statistical analysis showing racially-motivated traffic stops in Iowa.*

The amici supporting the appellant use census data to frame their argument that certain races are targeted during traffic stops. Census data is inaccurate for that conclusion because census data fails to measure accurately the number of motorists of a particular race driving on Iowa's roadways. Census data fails to account for commuting patterns, which "can easily exaggerate the racial disparities in traffic stops." Greg Ridgeway & John MacDonald, *Methods for Assessing Racially Biased Policing, in* Race, Ethnicity, and Policing: New and Essential Readings 180, 182 (Stephen K. Rice and Michael D. White ed., 2010); *see also* Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 Geo. Mason U. C.R. L.J. 219, 239 (2005) ("Census data is an unreliable estimate of the driving population because it measures the static residential

population of an area rather than its fluid population of motorists."). Census data undercounts certain groups of the population, including African-Americans. *Chavez v. Illinois State Police*, 251 F.3d 612, 643 (7th Cir. 2001) ("It is widely acknowledged that the Census fails to count everyone, and that the undercount is greatest in certain subgroups of the population, particularly Hispanics and African-Americans."). Census data becomes outdated during the ten-year period between surveys. Recognizing these flaws, researchers have turned to alternative methods including studying photographic stoplight enforcement cameras and observational benchmarks to tally racial distribution of motorists. Ridgeway & MacDonald, *supra*, at 182-83.

As an example of the flaws within amici's census data, the amici subtract the population of Cedar Rapids from the population of the entire county. *See* Amici Br. 17 n.5. This assumes that no Cedar Rapids residents were stopped for traffic violations outside of Cedar Rapids and that no other Iowans or non-Iowa drivers travel within the county. A thorough critique of the many statistical flaws in the ACLU amici's data is contained in the amicus brief from the Iowa County Attorneys Association.

Yet even takin the census data at face-value, the data does not automatically correlate to racially-motivated traffic stops. As one study recognized, this data may be consistent with officers patrolling more often in certain neighborhoods, or that a certain intersection has a disproportionate number of people who speed. James E. Lange, et al., *Testing the Racial Profiling Hypothesis for Seemingly Disparate Traffic Stops on the New Jersey Turnpike*, 22 Justice Quarterly 193, 216 (2005) ("These results suggest that during the period of data collection, New Jersey State Troopers assigned to the Turnpike stopped Black drivers in approximate proportion to their representations among speeders."). This study acknowledged that its data and methodology could not show racial profiling was nonexistent, but it succeeded at showing that racial distribution in the population as a whole is not necessarily the same as racial distribution in the population of drivers who are violating traffic laws. *Id.*

The sole academic study of Iowa traffic data undercuts amici's assertions. Amici cite to a 2014 study of Iowa City stops, overlooking that the same author's subsequent 2015 study came to the conclusion that "comparatively little traffic stop disproportionality was found in

areas of town where the bulk of the traffic stops were made," and "disproportionality in most stop outcomes has decreased in recent years." C. Barnum, et al., 2015 Summary of Findings, p. 8, https://www8.iowa-city-org/weblink/0/doc/1524345/Electronic.aspx (last viewed December 20, 2017). This Court cannot rely on flawed statistical analysis to change Iowa law.

### C. Because the officer's subjective motives are irrelevant under Iowa law and there is no persuasive reason to depart from existing Iowa case law, the defendant's stop was valid.

The defendant has failed to preserve error on a challenge to the traffic violations. Her sole argument in her motion to suppress and at the hearing was that her stop was pretextual. *See* Motion to Suppress; App. 9. She did not argue to the district court that she did not violate any traffic laws. *See* Motion to Suppress Tr. 29, lines 9-25; 30, lines 1-25; 31, lines 1-16. Her complaints about the quality of the record could have been addressed if she had challenged that issue to the district court, but she did not. Her argument that there was no probable cause for the stop is unpreserved, and this Court should not consider this argument for the first time in this appeal.

If preserved, the officer had reasonable suspicion to stop the vehicle when the defendant broke multiple traffic laws. The officer

observed the defendant accelerating into a right turn on a yellow light and passing to the left of the vehicle in front of it. Minutes of Testimony; Confidential App. 12. The officer observed that the defendant veered across a center line and the officer noticed one of the two license plate lamps were not functioning. Minutes of Testimony; Confidential App. 12. The defendant's actions violated Iowa Code sections 321.388 and 321.257.

The defendant's manner of driving and the non-functioning license plate lights supported the stop. Because nothing more is required under Iowa law, the stop was constitutional.

## CONCLUSION

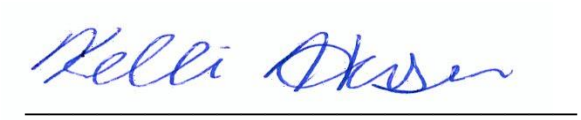
Under Iowa law, the officer's subjective motive for the traffic stop is irrelevant. Because the officer had reasonable suspicion to stop the vehicle based on the defendant breaking multiple traffic laws, the district court correctly denied the motion to suppress. This Court should affirm.

## REQUEST FOR NONORAL SUBMISSION

The State believes oral argument is unnecessary to decide this case and will not "be of assistance to the Court." *See* Iowa R. App. P. 6.908.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



**KELLI HUSER**
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
kelli.huser2@ag.iowa.gov

## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **7,152** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: January 26, 2018

**KELLI HUSER**
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
kelli.huser2@ag.iowa.gov