

IN THE SUPREME COURT OF IOWA

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SUPREME COURT NO. 17-0367

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STATE OF IOWA,  
*Plaintiff-Appellee,*

v.

SCOTTIZE DANYELLE BROWN,  
*Defendant-Appellant.*

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

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AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-  
APPELLANT

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BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES  
UNION OF IOWA, THE NAACP, LEAGUE OF UNITED LATIN  
AMERICANS CITIZENS OF IOWA, AND 1000 KIDS FOR IOWA

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**STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)**

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## **INTERESTS OF AMICI CURIAE**

The American Civil Liberties Union of Iowa (“ACLU of Iowa”), an affiliate of the national ACLU, founded in 1920, is a statewide nonprofit membership organization dedicated to the principle of liberty and equality embodied in the constitutions and laws of the State of Iowa and the United States.

The NAACP is the country’s largest and oldest civil rights organization, founded in 1909. Its mission is to ensure the political, social, and economic equality of rights of all persons, to advocate and fight for social justice, and to eliminate racial hatred and racial discrimination.

The League of United Latin American Citizens (LULAC) of Iowa was formed to advance the economic condition, educational attainment, political influence, housing, health, and civil rights of the Hispanic population of the United States, and is the statewide council of the national LULAC, the largest Latino civil rights and advocacy group in the country, founded in 1929.

The historical and present missions of these three amici make central the furtherance of racial justice and equality in the state of Iowa. They work through litigation, statewide legislative advocacy and advocacy with individual law enforcement agencies, as well as public education to promote

and defend the privacy, due process and civil rights protected by the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution, and have a strong and longstanding interest in eliminating racially disparate police practices in our state that harm Black, Latino, and other Iowans of Color.

1000 Kids for Iowa is a non-profit organization providing services to immigrants, especially to unaccompanied minors who immigrated to this country without their parents. Most of the people who receive services from 1000 Kids for Iowa are of Guatemalan, El Salvadoran, and Honduran descent. Even a minor traffic stop can result in severe immigration consequences, and 1000 Kids for Iowa has a direct interest in ending pretextual stops.

## **ARGUMENT**

### **I. PRETEXT TRAFFIC STOPS ARE UNREASONABLE SEIZURES UNDER ARTICLE I, SECTION 8 OF THE IOWA CONSTITUTION.**

Pretext traffic stops are inherently unreasonable under the Iowa Constitution because they allow police to stop drivers when the true reason for the stop is not supported by reasonable suspicion or probable cause, as required by article I, section 8. Amici urge the

Court to recognize that the real-world consequences of pretext traffic stops are stark and anything but “reasonable.” Unsupported by reasonable suspicion or probable cause, they are arbitrary, insulting, degrading, and violative of personal liberty. Affecting minorities disproportionately, they put People of Color in reasonable fear for the bodily safety and even the lives of themselves, their children, their loved ones and friends; and they exacerbate and perpetuate the profound problem of racial disparities in the criminal justice system and society. By definition, pretext is a falsehood. By utilizing pretext to circumvent constitutional rights, officers breed resentment and undermine trust in law enforcement personnel and the criminal justice system as a whole.

**A. THE REAL-WORLD CONSEQUENCES OF PRETEXT TRAFFIC STOPS DEMONSTRATE THEIR “UNREASONABLENESS.”**

**i. Pretext Traffic Stops Are Insulting, Arbitrary, and Violative of Personal Liberty.**

No one enjoys being stopped by the police and issued a warning or citation, let alone interrogated, searched, or arrested. After all, such actions result in feelings ranging from annoyance to fear, and can be deadly. But a person subjected to those actions *for legitimate reasons* may at least be

confident she is not being unfairly targeted.

That is not the case in a pretext traffic stop. Under *Whren v. U.S.*, the actual motivation of the officer in making a pretext traffic stop is immaterial in determining whether that action is reasonable under the Fourth Amendment. 517 U.S. 806, 813 (1996). Pretext traffic stops are by their very definition arbitrary. In a pretext traffic stop, the officer determines the driver's race, sex, car, location, record, or any number of other characteristics are suspicious. But, because none of those bases would constitute reasonable suspicion or probable cause, the officer stops the vehicle on pretext of a traffic or equipment violation. The officer then may proceed to question occupants about who they are, where they are coming from, where they are going, or whether there is cash or anything illegal in the car; he may seek consent to search the car (oftentimes without informing the driver she is not required to give consent). *See, e.g., State v. Pals*, 805 N.W.2d 767 (Iowa 2011). Professor LaFave illustrates *Whren's* real-life consequences:

The apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality. As the Supreme Court was advised in the briefs of the petitioners and amici, the tactic at issue in *Whren* is one that has been commonly employed by police in recent years in their “war against drugs.” . . . [P]olice are on the watch for “suspicious”

travelers, and once one is spotted it is only a matter of time before some technical or trivial offense produces the necessary excuse for pulling him over. Perhaps because the offenses are so often insignificant, the driver is typically told at the outset that he will merely be given a warning. But then things often turn ugly. The driver and passengers are closely questioned about their identities, the reason for their travels, their intended destination. . . .

[R]ace is often a factor in the otherwise amorphous drug courier profile. As one distinguished Black educator has wryly noted, “there’s a moving violation that many African-Americans know as D.W.B.: Driving While Black.”

Wayne R. LaFave, 1 Search and Seizure 1.4(f), p.186-8 (5th ed. 2012)

(footnotes omitted) (quoting Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, 2011.)

The officer, of course, does not subject all drivers to such careful scrutiny. Only those drivers whom the officer wishes to stop for some reason entirely unrelated to the traffic or equipment violation are placed under the microscope. Across the country, traffic laws are so voluminous and pervasive that practically all drivers are violating some law at any given time. This is no less true in Iowa. Iowa Code Chapter 321, “Motor Vehicles and Law of the Road,” is 256 pages long. Iowa Code Chapters 321A through 321N also address motor vehicles. Given this, allowing pretext traffic stops essentially gives police *carte blanche* to stop any driver, at any time, for any reason. Given the necessity of car travel in a largely-rural state like Iowa,

where public transportation options are unavailable or impractical in most communities, *see, e.g.*, Sarah E. Hendricks, “Living in Car Culture Without a License,” Apr. 2014, <https://tinyurl.com/ybrp665n>, pretext traffic stops allow police to exercise a level of power over citizens which is wholly inconsistent with the guarantees of Iowans to avoid unreasonable constraints of their bodily freedom enshrined in article I, section 8.<sup>1</sup>

**ii. Pretext Traffic Stops Perpetuate Racially-Disparate Policing.**

In deciding whether to invoke its independent constitutional analysis to provide Iowa citizens with greater protection than they are afforded under the federal Constitution, this Court may take advantage of its ability to assess the on-the-ground experience following a U.S. Supreme Court decision. Twenty-one years have passed since *Whren*. In that time, a broad nationwide consensus has developed that pretext traffic stops result in a serious contraction of the privacy rights of all, and the liberty and equality rights of People of Color. People of Color are reasonably in fear for their bodily safety, lives, and the lives of their children during every single police

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<sup>1</sup> As noted by Ms. Brown, this is a case of first impression. This Court has not yet decided whether pretext *traffic stops* are valid under article I, section 8. (Br. of Appellant, at 65-69.)

encounter, perhaps most of all during traffic stops.<sup>2</sup> In this way, pretext stops go the heart of the freedom that article I, section 8 seeks to protect, because People of Color in our state must and do limit the exercise of their freedom in society as a result of this reasonable fear. Amici urge this Court to give substantial weight to the real-world consequences of the practice in determining whether pretext traffic stops are “reasonable” within the language of article I, section 8.

The pretext traffic stop can only be truly understood in the context of the nation’s misguided War on Drugs. *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, at 6, 7, 60 (2012); *see also State v. Plain*, 898 N.W.2d 801, 817 (Iowa 2017) (encouraging trial courts to “be proactive” in addressing implicit bias). As Alexander has found, “[d]rug offenses alone account for two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000.” *Id.* at 60. The pretext traffic stop, popularly known as Driving While Black, is the tragic result of the U.S. Supreme Court’s

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<sup>2</sup> Former President Obama powerfully commented on the “gulf of mistrust” between Black people and police, which “scars the hearts of our children” and leads to “fear and resentment and hopelessness.” Barack Obama, President of the United States, Address to the Congressional Black Caucus (Aug. 3, 2015), [https://www.youtube.com/watch?v=N4UyJv8C\\_Xo](https://www.youtube.com/watch?v=N4UyJv8C_Xo).

capitulation to over-reaching by law enforcement, sensationalized media coverage, and pressure from politicians from the left and right for ever greater police discretion. Earlier this year, this Court acknowledged this sad reality:

Iowa ranks worst in the nation for the percentage of our prison population that is African-American (more than 25%), while African-Americans represent just 3.3% of the state's population. Troubling, too, is the fact that *African-Americans in Iowa are ten times more likely to be arrested than persons of other races*; and Iowa ranks third worst in the nation for our incarceration rate for Black men (9.4%).

*Id.* at 826 (emphasis added; citation omitted). It also recognized that “high arrest and incarceration rates have secondary effects, too, presenting barriers for education and employment and contribute to high percentages of families living in poverty.” *Id.* n.10.

The extraordinary racial disproportionality in Iowa arrests is borne out in the FBI statistics for drug crimes, where pretext traffic stops play an integral role. Iowa has the dishonor of having the worst racial disparity in marijuana possession arrest rates of any state, with Black Iowans being 8.34 times more likely than white Iowans to be arrested despite equal usage rates. ACLU, “The War on Marijuana in Black and White (2013)” at 18, <https://tinyurl.com/y9js56gk>. This is more than double the national average. *Id.* Even more recently, Iowa was found to have the second-worst rate of

racial disparities in arrests for drug possessions overall. ACLU, “Every 25 Seconds (2016),” available at <https://tinyurl.com/y9volqbd> (Black Iowans are 7 times more likely to be arrested for drug possession than white Iowans.).

Statewide traffic stop data is not available for Iowa. However, representative studies of specific Iowa communities and data regarding subsets of traffic stops which amici has pulled from public records, submitted to Iowa law enforcement agencies in preparing this brief, show racial disparities in traffic stops in Iowa.<sup>3</sup>

*Iowa City, Iowa*

One study of traffic stops in Iowa City found minorities made up roughly 10 percent of the drivers in the city, yet accounted for as much as 19 percent of stops. C. Barnum et al., St. Ambrose University, “Iowa City Police Department Traffic Study,” 2014, <https://tinyurl.com/y8hbvyw3>. Minority drivers were 2.8 times more likely to be arrested on a traffic stop and 3.45 times more likely to be requested to consent to a search, despite “hit rates” that were actually higher for non-minority drivers. *Id.* at 55-56.<sup>4</sup>

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<sup>3</sup> Amici’s open records requests and Iowa law enforcement agency answers are available upon request.

<sup>4</sup> People of Color typically possess driver’s licenses at lower rates than white

*Linn County, Iowa*

Linn County is the second largest county in Iowa by population. U.S. Census Bureau, “QuickFacts: Linn County, Iowa,” <https://tinyurl.com/y8logmqz> (last visited Nov. 27, 2017). As the data below show, when subtracting the population of Cedar Rapids from the population of Linn County overall, whites comprise 87.8 percent of the population; African-Americans comprise 4.9 percent; and Asian or Pacific Islander individuals, 2.7 percent. *Id.*<sup>5</sup> Traffic stop data from 2015 through much of

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people. *See, e.g.*, John Pawasarat, “The Driver License Status of the Voting Age Population in Wisconsin,” University of Wisconsin-Milwaukee Employment and Training Institute (June 2005) (Over 80 percent of white residents had valid driver’s licenses, while only about half of Black and Hispanic residents did). Therefore, while data showing 10 percent of stops were of African-American drivers where African-Americans comprise 10 percent of the population would seemingly suggest African-American drivers were not pulled over at a disparate rate, that conclusion would be erroneous, because of the significantly lower rates of driver’s licensure among African-Americans.

<sup>5</sup> While Census data includes people living in Cedar Rapids, data from the Linn County Sheriff’s Office does not include traffic stops made by the Cedar Rapids Police Department. Thus, the population percentage in the table was calculated by subtracting the population of each demographic group in Cedar Rapids from the population of the demographic group in Linn County as a whole; subtracting the population of the city from the population of the county; and then dividing the first value by the second.

Unfortunately, the Linn County Sheriff’s Office does not include a category for Hispanics or Latinos, who comprise 3.2 percent of the Linn County population according to the Census, in its traffic stop data.

2017 show African-Americans were stopped at a rate disproportionate to their share of the population in the county. The data also show that, once stopped, African-Americans were 25 percent more likely than whites to be cited rather than warned. Drivers whose race was marked as “unknown” were also significantly more likely to be cited than whites, as were drivers identified as “Asian/Pacific Islander.”

<b>Linn County Sheriff’s Office Traffic Stop Data</b>					
January 1, 2015 to September 30, 2017					
<b>Race</b>	<b>Share Stops</b>	<b>Percent Pop.</b>	<b>Disparity<sup>6</sup></b>	<b>Disposition</b>	
				<b>Warning</b>	<b>Citation</b>
White <sup>7</sup>	91.1%	87.8%	1.04	55.5%	44.5%
Black	6.4	4.9	1.31	44.3	55.7
Asian/Pacific Islander	0.6	2.7	.22	48.5	51.5
Unknown	1.8	n/a	n/a	43.2	56.8

*Scott County, Iowa*

Scott County, Iowa’s third-most populous county, had even worse disparities. Data from the Scott County Sheriff show that Black drivers were

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<sup>6</sup> Disparity was calculated by dividing the share of stops by the percentage of the population. A disparity value of less than one indicates underrepresentation; a disparity value of one indicates no disparity; and a disparity value greater than one indicates overrepresentation.

<sup>7</sup> As used in these tables, “white” refers to individuals who identified themselves as white and not Hispanic or Latino.

pulled over nearly *three times* as often as white drivers.<sup>8</sup> The data also show African-Americans are almost twice as likely as whites to be arrested following a traffic stop.

<b>Scott County Sheriff’s Office Traffic Stop Data</b>						
January 2015 to January 2017						
<b>Race</b>	<b>Share of Stops</b>	<b>Percent Pop.<sup>9</sup></b>	<b>Disparity</b>	<b>Disposition</b>		
				<b>Warn</b>	<b>Cite</b>	<b>Arrest</b>
White	83.8%	85.8%	0.97	50.1%	48.6%	1.3%
Black	10.4	3.6	2.89	48.1	49.6	2.3
Hispanic	3.8	5.6	0.69	48.8	50.4	.8
Asian	1.3	3.8	0.34	45.5	54.5	0.0
Unknown	0.7	n/a	n/a	52.0	48.0	0.0

*Black Hawk County, Iowa*

Data from the Black Hawk County Sheriff’s Office show African-Americans are significantly more likely to be stopped than whites. Also notable is that drivers identified as African-American, Hispanic, Asian, and “Other” drivers are substantially less likely to be warned, rather than cited or arrested, than whites. Drivers of color are also more likely to be searched

<sup>8</sup> As with Linn County, the data from the Scott County Sheriff’s Office does not include information on traffic stops conducted by the Davenport Police Department. Well over half of the county’s population lives in Davenport, where 10.5 percent of people identify as Black or African-American. U.S. Census Bureau, “American FactFinder,” <https://tinyurl.com/y9epymww> (last visited Nov. 27, 2017). Thus, the percentage of African-Americans living outside Davenport is substantially less than 7.6 percent African-American

<sup>9</sup> Percentage of the population in Scott County, excluding population of Davenport, was calculated as in note 5.

than white drivers. The disproportionately high percentage of Black drivers who were stopped, searched, and then warned rather than cited suggests those stops were pretext stops; the disparity further suggests the driver's race was a basis.

<b>Black Hawk County Sheriff Traffic Stop Data</b>								
January 1, 2015 to October 23, 2017								
<b>Race</b>	<b>Share Stops</b>	<b>Percent Pop.<sup>10</sup></b>	<b>Disparity</b>	<b>Disposition (%)</b>				
				<b>Warn</b>	<b>Warn Search/</b>	<b>Cite</b>	<b>Cite Search/</b>	<b>Arrest</b>
White	90.8%	89.5%	1.01	69.9	.7	26.4	0.5	2.5
Black	5.7	2.7	2.11	60.2	2.8	28.2	0.0	8.8
Hispanic	1.9	2.9	0.66	57.4	0.8	35.2	0.8	5.7
Asian	0.7	3.7	0.19	58.1	2.3	37.2	0.0	6.9
Other	0.8	n/a	n/a	54.1	0.0	37.5	8.3	7.8

*Waterloo, Iowa*

Data from Waterloo, where Ms. Brown was stopped, showed the

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<sup>10</sup> Again, this data does not include stops conducted by the Waterloo Police Department, whose data is considered separately in the table on pages 21-22. County-wide population data shows 9.2 percent identify as Black or African-American and 4.3 percent identify as Hispanic or Latino. U.S. Census Bureau, "QuickFacts: Black Hawk County, Iowa," <https://tinyurl.com/y9xhaq54> (last visited Nov. 27, 2017). Black Hawk County is Iowa's fourth-most populous county. *Id.*

Because roughly 9 out of every 10 African-Americans in Black Hawk County live in Waterloo, the African-American population outside of Waterloo is substantially lower than the 9.2 percent county-wide percentage. Percentage of the population of Black Hawk County outside Waterloo calculated as explained in note 5.

worst disparities. Waterloo is the sixth-largest city in Iowa and has the third-largest African-American population of Iowa’s cities.<sup>11</sup> While African-Americans make up just 15.3 percent of the population in Waterloo, traffic stop data from the Waterloo Police Department from January 1, 2015 to November 15, 2017 show 37.8 percent of traffic stops during that period involved Black drivers. Just 57.6 percent of traffic stops involved white drivers. Black drivers were also substantially more likely to be arrested and searched and substantially less likely to be warned than white drivers.

<b>Waterloo Police Department Traffic Stop Data</b>							
January 1, 2015 to November 15, 2017							
<b>Race</b>	<b>Share Stops</b>	<b>Percent Pop.<sup>12</sup></b>	<b>Disparity</b>	<b>Disposition</b>			
				<b>Arrest</b>	<b>Cite</b>	<b>Search</b>	<b>Warn</b>
Asian	1.7%	1.4%	1.21	3.2%	27.4%	3.2%	66.2%
Black	37.8	15.3	2.47	10.2	18.4	10.8	60.6
Hispanic	3.9	5.6	0.69	6.6	26.0	4.0	63.4
Other	0.6	n/a	n/a	1.0	16.1	4.7	78.2
White	57.6	74.9	0.77	6.9	20.6	6.4	66.1

<sup>11</sup> The State Data Center of Iowa and the Iowa Commission on the Status of African-Americans, “African-Americans in Iowa: 2017,” Feb. 2016, <https://tinyurl.com/y9sqjbmK>.

<sup>12</sup> Percentages as reported in U.S. Census Bureau, “American FactFinder,” <https://tinyurl.com/ycacpnd8> (last visited Nov. 27, 2017).

Stops classified as “investigative,” which are stops based on a suspected crime rather than a suspected traffic or equipment violation, paint an even starker picture of racial disparity. Of 369 investigative stops for which data on the driver’s race was available, over half targeted Black Iowans. Such stops were significantly more likely to result in a search for Black drivers.

<b>Waterloo Police Department Investigative Stop Data</b>								
January 1, 2015 to November 15, 2017								
<b>Race</b>	<b>Share Stops</b>	<b>Percent Pop.</b>	<b>Disparity</b>	<b>Disposition</b>				
				<b>Arrest</b>	<b>Cite</b>	<b>ID</b>	<b>Search</b>	<b>Warn</b>
Asian	0.8%	1.4%	0.57	0%	0%	100%	0%	0%
Black	50.4	15.3	3.29	1.1	4.3	60.2	31.2	3.2
Hispanic	1.9	5.6	0.34	0.0	0.0	71.4	0.0	28.6
Other	0.6	n/a	n/a	0.0	0.0	50.0	0.0	50.0
White	46.3	74.9	0.62	1.8	4.7	67.8	19.9	5.8

*Data from Outside Iowa*

Data from outside the state is consistent with the Iowa findings. A 2016 study found minority drivers in Illinois accounted for 28 percent of the estimated driving population but 39 percent of stops. Illinois Department of Transportation, “Illinois Traffic and Pedestrian Stop Study, 2016 Annual

Report, Traffic Stop Analysis,” <https://tinyurl.com/yakm5266>. Minority drivers were more likely to be cited rather than receive a written warning and were more likely to be asked to consent to a search, yet the “hit-rate” for such searches was less than for white drivers (24 percent compared to 30 percent). *Id.*

A 2016 Missouri study contains similar findings. Missouri Attorney General, “2016 Vehicle Stops Executive Summary,” <https://tinyurl.com/y7rwfbrg>. Black people make up 10.9 percent of the state’s population but accounted for nearly 18 percent of traffic stops. *Id.* Black and Hispanic drivers were also significantly more likely to be searched and arrested than white drivers. *Id.* Again, the “hit rate” was less than for white drivers. *Id.*

Finally, a 2016 study of traffic stops in Nebraska reached similar conclusions. Darrell Fisher et al., “2016 Traffic Stops in Nebraska: A Report to the Governor and the Legislature on Data Submitted by Law Enforcement,” Neb. Comm’n on Law Enforcement and Crim. Just., Mar. 31, 2017, <https://tinyurl.com/y9u2635g>. While Black people make up roughly four percent of the population in Nebraska, they accounted for nearly eight percent of traffic stops, and were arrested 16.9 percent of the time, compared to 2.6 percent for the general population. *Id.* Drivers identified as Hispanic,

Native American/Alaskan Native, and “Other” were also substantially more likely to be searched and arrested than white drivers. *Id.*

The disparities in the Midwest region are consistent with disparities nationwide. A Stanford University study detailed over 60 million state patrol stops in 20 U.S. states between 2011 and 2015. E. Pierson et al., “A large-scale analysis of racial disparities in police stops across the United States,” The Stanford Open Policing Project (2017), <https://tinyurl.com/y8wfx3c>. After controlling for gender, age, location, and year, the study found Black people are stopped at 1.4 times the rate for whites. *Id.* at 5. Compared to white drivers, Black drivers have a 19 percent higher chance of receiving a citation, while Hispanics have a 34 percent higher chance of receiving a citation. *Id.* at 6. Black and Hispanic drivers are approximately twice as likely to be searched than white drivers, and are far more likely to be subjected to “consent” searches, at 2.2 and 1.9 times the rate of whites, respectively. *Id.* They are also 1.9 times and 2.0 times more likely to be arrested compared to white drivers, respectively. *Id.* at 7. Yet, searches of Black and white drivers yield contraband at the same rate—28 percent—and searches of Hispanics yield contraband at a lower rate—22 percent. *Id.* at 9.

**iii. Racial Disparities in Pretext Stops Lead to Serious Social and Economic Harms.**

The harm of pretext stops starts at the unreasonable constraint on liberty for all people, but especially People of Color, and the inherent fear and distrust of law enforcement that results. But there are also dramatic harms down the line. Pretext traffic stops are often a first step for People of Color into the criminal justice system: a stop leads to a citation, search, or arrest; this leads to fines, fees, or incarceration—whether pre-trial or post-conviction—and this leads to huge personal, family, economic, and social costs.

The country's mass incarceration system is a crisis, especially for People of Color. America's jails and prisons house 2.2 million people at a rate unrivaled globally, with the number locked up growing five-fold over the last four decades. Sentencing Project, "Criminal Justice Facts," <https://tinyurl.com/y73yvbwz> (last visited Nov. 27, 2017). People of Color make up 37 percent of the U.S. population but 67 percent of those incarcerated. *Id.*

Iowa's disparities are even worse. Sentencing Project, "State-By-State Data," <https://tinyurl.com/y7873q6e> (last visited Nov. 27, 2017). Black people in Iowa are 11.1 times more likely to be incarcerated than whites,

with more than two in every 100 African-Americans in the state in jail or prison. *Id.* Hispanics are 1.7 times more likely to be incarcerated than whites. *Id.* Despite the fact that Black Iowans make up just 3.7 percent of the population, and Hispanics make up just 5.8 percent, Blacks make up 25 percent of Iowa’s prison population, and Hispanic or Latino individuals make up seven percent. Iowa Department of Corrections, “Quick Facts,” <https://tinyurl.com/y9e6yc2r> (last visited Nov. 27, 2017).

Racial disparities in Iowa’s criminal justice system are not just a grave injustice and moral wrong with huge personal costs for individuals and families; they also lead to incredible economic and societal costs. Iowa’s prisons held 8,363 people as of June 30, 2017, at a cost of \$95.85 per day, per person. Iowa DOC, “Quick Facts,” <https://tinyurl.com/y9e6yc2r> (last visited Nov. 27, 2017). The cost to taxpayers to incarcerate those individuals is hundreds of millions of dollars. *Id.* This doesn’t include the approximately 4,000 people held in Iowa’s county jails at any given time, millions held in other states, nor approximately 185,000 federal inmates, nearly 40 percent of whom identify as Black. Federal Bureau of Prisons, “Inmate Race,” <https://tinyurl.com/z5pa9ww> (last updated Sept. 23, 2017). All states combined spent \$56.9 billion in 2015. Sentencing Project, “Trends in U.S. Corrections,” June 2017, <https://tinyurl.com/y98fl4fv>.

Criminal convictions also lead to families incurring court-related debt averaging \$13,607; families losing income due to a family member being removed from the household, leaving nearly two-thirds of such households unable to meet their family's basic needs; and future employment becoming difficult to obtain. Ella Baker Ctr. for Human Rights et al., "Who Pays? The True Cost of Incarceration on Families," Sept. 2015, <https://tinyurl.com/yb5jbakr>.

Finally, pretext traffic stops and the disparities in the criminal justice system that they drive have led to relative political powerlessness for Black communities in Iowa more broadly. Lynn Eisenberg, "Note: States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law," 15 N.Y.U. J. Legis. & Pub. Pol'y 539, 563-64 (2012). This is particularly true in Iowa, one of just four states where all people with felony convictions are permanently disenfranchised. ACLU, "Felony Disenfranchisement," <https://tinyurl.com/y8yvtubp> (last visited Nov. 27, 2017). This has led to nearly ten percent of Black Iowans being disenfranchised currently.<sup>13</sup> Sentencing Project, "6 Million Lost Voters,"

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<sup>13</sup> Sadly, ten percent is an artificially low rate for disenfranchisement, because it is skewed by an estimated 100,000 people whose voting rights were restored under Governor Vilsack's executive order in 2005. Thus, that percentage can be expected to rise each year until it reaches rates that existed

2016, <https://tinyurl.com/y8x7eb5q>.

**iv. Pretext Stops Put People of Color In Fear For Their Lives and Cause Distrust of Law Enforcement.**

People of Color have for decades raised the alarm about disparate policing, including disparate use of force, and the fear they experience during police encounters. The near-ubiquity of cellphone video has documented this experience in recent years, with several high-profile cases of African-Americans being killed by police following pretext stops—and ensuing protests and legal actions—dominating the headlines.

Philando Castile was killed by Minnesota police officers during a pretext traffic stop. Sharon LaFraniere and Mitch Smith, “Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions,” N.Y. Times, July 16, 2016, <https://tinyurl.com/yd9ycez4>. Mr. Castile was purportedly stopped for a cracked taillight and was killed seconds later. *Id.* He had been stopped while driving at least 49 times in the past 13 years, often for low-level traffic offenses like failing to signal, failing to repair a seatbelt, and driving with an unlit license plate. *Id.* African-Americans make

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prior to the July 4, 2005 Executive Order 42 signed by then-Governor Vilsack, when 1 in 4 (24.87 percent) of voting-age African-American citizens in Iowa were disenfranchised. Sentencing Project, “Iowa and Felony Disenfranchisement (2005),” at 2, <http://tinyurl.com/qy9x2z6>.

up about 8 percent of people in the police jurisdiction where Mr. Castile was killed but accounted for 19 percent of tickets and 41 percent of arrests. *Id.*

A pretext stop killed Samuel DeBose a year earlier in Ohio. Richard Perez-Pena, “University of Cincinnati Officer Indicted in Shooting Death of Samuel DeBose,” N.Y. Times, July 29, 2015, <https://tinyurl.com/yasklb3a>. An officer followed DeBose and eventually pulled him over for not having a front license plate. *Id.* DeBose showed the officer the plate in his glovebox and was shot minutes later. *Id.*

A pretext stop killed Walter Scott, who was stopped for allegedly having a broken taillight. Alan Blinder et al., “Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man,” N.Y. Times, June 8, 2015, <https://tinyurl.com/yayxurx3>. A bystander’s cell phone video showed Mr. Scott running from the officer as he was shot several times in the back. *Id.*

A pretext stop also led to Sandra Bland’s death. Mitch Smith, “Sandra Bland’s Family Calls for Criminal Charges Against Texas Trooper,” N.Y. Times, Dec. 22, 2015, <https://nyti.ms/2jty8Yq>. Ms. Bland was stopped for allegedly failing to use her turn signal, and escalated after police threatened to forcibly remove her from her car and shoot her with a Taser. *Id.* She died in custody three days later. *Id.*

Iowa has had its own instances of police using excessive force in

interactions with People of Color. Waterloo, where Ms. Brown was stopped, has faced multiple excessive force lawsuits in recent years involving Black victims, including a lawsuit alleging an officer pushed down a 13-year-old Black girl walking on a sidewalk after she yelled at him to “slow down.” Associated Press, “Excessive Force Lawsuits Against Waterloo Police Settled,” Aug. 11, 2016, <https://tinyurl.com/y7zbyzpn>.

A Waterloo officer was also caught on tape at a 2013 murder scene of 18-year-old Dae’Quan Campbell, a young Black man, saying “When was the last time we had a death where it’s a true victim” and “we just need a semi-apocalyptic event to get rid of 90 percent of them.” John Molseed, “Officer at Campbell murder scene calls own remarks ‘stupid,’ ‘crass,’” Waterloo-Cedar Falls Courier, Aug. 12, 2016, <https://tinyurl.com/ycygsz9>. The officer also referred to Dae’Quan as a “dead mother fucker.” *Id.*

Law enforcement’s disparate use of force against People of Color is not just anecdotal. Numerous studies have demonstrated this is a widespread systemic issue. One study of 12 police departments of varying sizes and geographical locations found the use of force rate for Black residents was 2.5 times higher than the overall rate and 3.6 times higher than the rate for white residents. Center for Policing Equity, “The Science of Justice: Race, Arrests, and Police Use of Force,” July 2016, <https://tinyurl.com/ja33oe2>.

Repeated police interactions—including pretext traffic stops—“overexpose[] African-Americans to the possibility of police violence.” Devon W. Carbado, “Blue-on-Black Violence,” 104 *Geo. L. J.* 1479, 1508 (2016), <https://tinyurl.com/ybfxvqz2>.

It should come as no surprise that racially-disparate policing, as perpetuated by pretext traffic stops, undermines trust in law enforcement and the criminal justice system. According to recent polling, 40 percent of Americans feel afraid around police officers. Reuters, “I tend to be wary around police officers,” <https://tinyurl.com/ybrv4mzm> (last visited Nov. 27, 2017). For African-American males, that number jumps to 65 percent. *Id.* Polling from 2014 reveals a similar picture. Thirty-one percent overall and 45 percent of African-Americans believe police officers routinely lie to serve their own interests. Reuters, “Do Americans trust their cops to be fair and just? New poll contains surprises,” <https://tinyurl.com/y7z8zgme> (last visited Nov. 27, 2017). Thirty-seven percent overall and 69 percent of African-Americans believe police officers unfairly target Blacks. *Id.*

**B. IF PRETEXT CANNOT JUSTIFY PROLONGING A TRAFFIC STOP, IT CANNOT PROVIDE THE BASIS FOR INITIATING THE STOP.**

This Court has emphasized its authority to analyze the Iowa Constitution independently from analogous provisions of the U.S. Constitution and repeatedly found the Iowa Constitution provides greater protections. *See, e.g., Clark v. Board of Directors*, 24 Iowa 266 (Iowa 1868) (freedom from racial discrimination in public education.); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (overturning same-sex marriage ban under Iowa Constitution). This Court's jealous protection of individual rights is perhaps *most* pronounced in its analysis of article I, section 8. *See, e.g., State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010) (prohibiting warrantless searches of parolees without particularized suspicion); *State v. Pals*, 805 N.W.2d 767 (Iowa 2011) (determining Defendant's consent to an automobile search was involuntary); *State v. Short*, 851 N.W.2d 474 (Iowa 2014) (invalidating warrantless search of probationer's home); *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015) (invalidating warrantless search of a container incident to arrest).

This Court has already held that when the reason for a traffic stop is resolved and there is no other basis for reasonable suspicion, article I, section 8 requires that the driver be permitted to leave. *State v. Coleman*,

890 N.W.2d 284, 301 (Iowa 2017) (officer should have terminated stop based on suspended license of the registered owner, a woman, once he realized driver was male.). *Coleman* recognized that “[l]imiting both the scope and duration of warrantless stops...provides important means of fulfilling the constitutional purpose behind article I section 8, namely, ensuring that government power is exercised in a carefully limited manner.” *Id.* at 299.

This Court has also held that police may not prolong a traffic stop to perform checks unrelated to the reason for the stop when there is no independent reasonable suspicion for such conduct. *In re Pardee*, 872 N.W.2d 384 (Iowa 2015) (questioning and detention of defendants to call in narcotics dog unlawfully prolonged stop). Finally, this Court has noted “the use of minor traffic infractions as a springboard to consent searches has generated charges of abuse and racial profiling.” *State v. Pals*, 805 N.W.2d 767, 772–73 (Iowa 2011).

Finding that pretext stops are unreasonable under article I, section 8 flows from those decisions. Indeed, it would be inconsistent with precedent to hold that police officers are prohibited from *prolonging* a traffic stop under the Iowa Constitution to perform unrelated checks, absent independent

reasonable suspicion for doing so, but that they could nonetheless *initiate* a traffic stop with the intent of doing so.

**C. THIS COURT SHOULD ADOPT A BURDEN-SHIFTING TEST FOR DETERMINING WHETHER A TRAFFIC STOP IS PRETEXTUAL.**

In interpreting article 1, section 8 to prohibit pretext stops, this Court must establish a test to determine when stops are pretextual. The burden-shifting, totality-of-the-circumstances test adopted by the New Mexico Court of Appeals in *Ochoa* best balances protecting drivers from arbitrary and discriminatory policing with legitimate law enforcement action under the Iowa Constitution.

Three years after *Whren*, the Washington Supreme Court repudiated its rationale and held pretextual traffic stops are unconstitutional under its state constitution and evidence gathered pursuant to such a stop must be suppressed. *State v. Ladson*, 979 P.2d 833 (Wash. 1999) (en banc). It found that a pretext traffic stop's purpose is:

not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore, the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.

*Id.* at 837-38. The Court applied the following test:

When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. . . . We recognize the Court of Appeals has held that the test for pretext is objective only. . . . But an objective test may not fully answer the critical inquiry: Was the officer conducting a pretextual traffic stop or not?

*Id.* at 843 (finding stop for expired tags was pretextual because true motive was suspicion of drug dealing).

Later in *State v. Ochoa*, the New Mexico Court of Appeals fully embraced the *Ladson* subjective-objective totality-of-the-circumstances test for determining whether a traffic stop is pretextual: “The totality of the circumstances includes considerations of the objective reasonableness of an officer's actions and the subjective intent of the officer—the real reason for the stop.” 206 P.3d 143, 155 (N.M. Ct. App. 2008) (holding stop for not wearing a seatbelt—when officer’s true reason was narcotics investigation—violated state Constitution). *Ochoa* fashioned a burden-shifting formula akin to that prescribed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) in the employment context:

First, the trial court must determine whether there was reasonable suspicion or probable cause for the stop. As usual, the State has the burden of proof to justify the stop under an exception to the warrant requirement. If the stop can be justified objectively on its face and the defendant argues that the seizure was nevertheless unreasonable because it was pretextual under the New Mexico Constitution, then

the district court must decide whether the officer's "motive for [the stop] was unrelated to the objective existence of reasonable suspicion or probable cause." The defendant has the burden of proof to show pretext based on the totality of the circumstances. If the defendant has not placed substantial facts in dispute indicating pretext, then the seizure is not pretextual. If the defendant shows sufficient facts indicating the officer had an unrelated motive that was not supported by reasonable suspicion or probable cause, then there is a rebuttable presumption that the stop was pretextual. The burden shifts to the state to establish that, based on the totality of the circumstances, even without that unrelated motive, the officer would have stopped the defendant.

*Id.* at 156.

Consistent with *Ochoa*'s holding that both "the objective reasonableness of an officer's actions and the subjective intent of the officer" are relevant to the pretext analysis, this Court should clarify that the State's rebuttal burden requires it to prove the asserted basis for the stop was sufficiently serious to justify the intrusion according to a reasonable, objective officer standard. *Ochoa* instructs that this inquiry should not be limited to whether the particular officer subjectively believed the traffic violation implicated significant safety concerns.

Borrowing from a state trial judge who had experience sifting the evidence in pretextual traffic stop cases, *State v. Heath*, 929 A.2d 390 (Del. Super. Ct. 2006) (suppressing evidence where vehicle was stopped for failing to signal but officer stated he also stopped the vehicle to investigate

whether defendant or his passenger were connected with warrants), the Court also developed an extensive but nonexhaustive list of factors to guide trial judges as they determine, from the totality of the circumstances, whether a traffic stop was pretextual. *Id.*

The *Ladson* and *Ochoa* Courts recognized that most cases, unlike Ms. Brown's, do not involve direct evidence of pretext. The objective reasonableness test focuses on whether the purported traffic violation was one which implicated safety concerns serious enough that it was customary procedure for law enforcement to stop the vehicle. Ms. Brown's case involving a very minor equipment violation is a perfect example of one where a claimed safety rationale for a traffic stop is unpersuasive.

Amici are aware the Washington Supreme Court has subsequently added a "mixed motive" analysis in pretext traffic stop cases, *State v. Arreola*, 290 P.3d 983 (Wash. 2012). According to that test, pretext stops are permissible if law enforcement had a secondary rationale for making the stop that was legal, even if the reason would not have prompted a reasonable law enforcement to make the traffic stop. This Court should reject the *Arreola* mixed-motive test.

In modifying the rebuttal step afforded the State in the totality-of-the-circumstances test, the *Arreola* Court failed to account for the real-world

dynamics of trials and the natural inclination for compromise when difficult factual questions, such as a police officer’s primary motivation or intention, are posed. The dissent in *Arreola* robustly articulated the failings of the mixed-motive defense, which is that it wrongly shifts the focus from the officer’s primary or predominant motivation for the stop to whether there was a legitimate but secondary traffic-related justification for the stop. *Id.* at 992-93 (J. Chambers, dissenting) (“The majority does not offer any convincing means of distinguishing a ‘primary’ reason from a ‘real’ reason. Because I do not believe the spirit of *Ladson* will survive the court's opinion in this case, I dissent.”)

Applying an essentially identical “mixed motive” affirmative defense in employment discrimination cases litigated in his federal courtroom over the past twenty-five years, Judge Mark Bennett has found that the “same decision” defense<sup>14</sup> has rendered the mixed-motive theory of discrimination a “Trojan Horse”—promising much but delivering nothing. *See, e.g., Coe v. Northern Pipe Products*, 589 F.Supp.2d 1055, 1097-98 (N.D. Iowa 2008); Panelist, Celebrating the 40th Anniversary of the EEOC (2004), <https://tinyurl.com/yamcq24r>. In Judge Bennett’s experience, it has proved

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<sup>14</sup> 42 U.S.C. §2000e-2(m) (Section 706(g)(2)(B)) provides a “partial” affirmative defense if “a respondent demonstrates [he] would have taken the same action in the absence of the impermissible motivating factor.”

itself a too-easy compromise verdict for factfinders to conclude that despite the employer's discriminatory discharge of the plaintiff, the employer would have reached the same decision because of some misconduct or poor performance. *Id.*

The critical flaw in the *Arreola* opinion is not that it weighs the State's proof that there was a traffic-related reason for the stop—necessarily this must be done in a totality-of-the-circumstances test—but rather that *Arreola* denies relief *even if* the State fails to prove that the traffic-related justification was the primary reason for the stop. Denying relief when the officer's traffic-related reason for the stop was “a” reason for the stop, albeit the secondary reason, will eviscerate the constitutional right; *Arreola* appears to have adopted a badly flawed harmless error analysis. The Court should have focused on whether the muffler violation was sufficiently serious or implicated a traffic safety concern such that an objectively reasonable officer would have initiated a traffic stop.

#### **D. SUPPRESSION IS THE NECESSARY REMEDY.**

Because pretext traffic stops are unreasonable and violate the Iowa Constitution, this Court should instruct district courts to apply the remedy that it has already found to be appropriate for other violations of article I,

section 8. That remedy is exclusion. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *see also State v. Height*, 91 N.W. 935 (Iowa 1902) (self-incrimination in violation of article I, section 8 should have been excluded).

The *Ochoa* and *Ladson* opinions held the fruits of pretext traffic stops must be suppressed. This is a familiar remedy for Iowa courts where evidence is obtained in violation of the state or federal constitutions, and thus would be readily understood by prosecutors and the defense bar. A lesser remedy has no precedent under the Iowa Constitution and would be a departure from existing case law.

### **CONCLUSION**

For the reasons provided herein, this Court should ban pretext stops under the Iowa Constitution, and reverse the district court.

Respectfully submitted,

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