

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - - x  
3   GAIL ATWATER, ET AL.,                   :  
4                   Petitioners                   :  
5                   v.                   : No. 99-1408  
6   CITY OF LAGO VISTA, ET AL.                   :  
7   - - - - - x  
8   Washington, D.C.  
9   Monday, December 4, 2000  
10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United  
12   States at 11:02 a.m.  
13   APPEARANCES:  
14   ROBERT C. DE CARLI, ESQ., Austin, Texas; on  
15                   behalf of the Petitioners.  
16   ROGER J. GEORGE, JR., ESQ., Austin, Texas; on  
17                   behalf of the Respondents.  
18   ANDY TAYLOR, ESQ., First Assistant Attorney  
19                   General of Texas; on behalf of Texas, et al.,  
20                   as amici curiae, supporting Respondent.  
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P R O C E E D I N G S

[11:02 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in Number 99-1408, Gail Atwater v. The City of Lago  
Vista.

Mr. De Carli.

ORAL ARGUMENT OF ROBERT C. DE CARLI  
ON BEHALF OF PETITIONERS

MR. DE CARLI: Mr. Chief Justice, and may it  
please the Court:

Reasonableness is the touchstone of the Fourth  
Amendment. The court of appeals below, however, announced  
a broad new rule that permits custodial arrest for any  
offense committed in an officer's presence regardless of  
the nature of that offense. The court of appeals in doing  
so ignores the Fourth Amendment's requirement of  
reasonableness.

First, it ignores the fact that a common law at  
the time of the Fourth Amendment's adoption such an arrest  
would not have been layoff.

QUESTION: Well, why would the common law be  
involved here Mr. De Carli if Texas law says otherwise?

MR. DE CARLI: Mr. Chief Justice, the common law  
should be considered because it is our position that the  
Fourth Amendment incorporates the protections, the

1 restrictions on arrest that existed at the time of the  
2 Fourth Amendment's adoption.

3 QUESTION: Well, but you're arguing here that  
4 this offense should not have led to a custodial arrest,  
5 now as part of that argument has to be a condition of  
6 Texas law, isn't it? I mean if Texas law had authorized a  
7 custodial arrest for this, wouldn't your case be  
8 different? If you conceded that it authorized it?

9 MR. DE CARLI: No, Your Honor, because it is our  
10 position that the Fourth Amendment restricts the use of  
11 custodial arrest for minor offenses such as this. If  
12 Texas were to increase the penalty for this offense, then  
13 it would be a different balancing.

14 QUESTION: Even with a warrant you couldn't do a  
15 custodial arrest?

16 MR. DE CARLI: No, but let me qualify that. It  
17 would be a much weaker argument, one we would lose the  
18 common law argument. Two, however, this Court -- we're  
19 well aware of this Court's respect for warrants and the  
20 fact that interjecting a neutral and detached magistrate  
21 operates as a check. However, the fact is, by requiring a  
22 warrant, still that would only require probable cause and  
23 it's our position that probable cause does not  
24 sufficiently balance the competing interest, although I  
25 concede it's a much, it would be a much weaker argument --

1           QUESTION: See, my problem is with your common  
2 law argument because the Fourth Amendment does not contain  
3 a warrant requirement, it just says if you do have, get a  
4 warrant, it has to be based upon probable cause, blah,  
5 blah, blah, blah, but the only root requirement of the  
6 Fourth Amendment is that the arrest be reasonable. You're  
7 telling me that you could do arrests at common law, so  
8 long -- at least so long as there was a warrant.

9           MR. DE CARLI: That's correct, Justice Scalia,  
10 and for that reason we say --

11           QUESTION: Why would a warrant make it more  
12 reasonable?

13           MR. DE CARLI: Because, Your Honor, it would  
14 interject a neutral and detached magistrate who we would  
15 hope would say Officer Turek, why are you arresting this  
16 woman for not wearing a seat belt? Why do we not issue a  
17 summons. Why not issue just a traffic citation.

18           QUESTION: Would that be a magistrate's  
19 prerogative ordinarily? Isn't it a magistrate's  
20 prerogative to find probable cause.

21           MR. DE CARLI: Yes, Mr. Chief Justice, and for  
22 that reason I'm willing to concede that if a warrant were  
23 obtained, this arrest still would be reasonable. Our  
24 position is that probable cause, although it works as a  
25 balancing of the competing interest of law enforcement and

1 the individual in some instances, in the setting before  
2 the court and in most traffic offenses, it does nothing to  
3 balance the competing interest of the individual.

4 QUESTION: What about the situation of a traffic  
5 violator, maybe parking tickets or maybe seat belt use,  
6 who continues repeatedly to refuse to use a seat belt or  
7 to pay the parking fee when parking a car and has a whole  
8 string of tickets for it? Does there come a time when due  
9 to the repeated nature and in the case of seat belts  
10 possible endangerment of children that the state can say,  
11 okay, custody here is required, this person just won't  
12 cooperate?

13 MR. DE CARLI: Justice O'Connor, I believe that  
14 time would come when, if I understand you correctly,  
15 you're alluding to nonappearances, the repeat offender.

16 QUESTION: Well, it's possible that a  
17 nonappearance could amount to something that generates  
18 jail time, but I'm just talking about the repeat offender.

19 MR. DE CARLI: Okay.

20 QUESTION: Without an offense that requires jail  
21 time.

22 MR. DE CARLI: Without the nonappearance  
23 problem. What that raises is it's the distinction between  
24 punishment and enforcement. Punishing the repeat offender  
25 is not the role of the police officer, that's the role for

1 a judge or a legislature that has provided heightened  
2 penalties.

3 QUESTION: Not punishment, a concern for highway  
4 safety.

5 MR. DE CARLI: Well, Your Honor, the thing is,  
6 even the repeated, the fact if there are repeated  
7 penalties and there is no heightened penalty, well then  
8 the legislature has made a determination that on the  
9 balance that does not regard that aspect of highway safety  
10 is that sufficient to justify the intrusion.

11 QUESTION: I notice that Judge Weiner in the  
12 case below had a suggested approach, a different approach,  
13 that when there's a plausible articulable reason for  
14 affecting such an intrusion, it's lawful.

15 MR. DE CARLI: Yes, Your Honor, and I read that  
16 as trying to encompass what this Court in its opinion  
17 issued last week referred to as vehicular-bound imminent  
18 threats to life and limb which would be driving while  
19 intoxicated, driving under the influence of drugs or  
20 alcohol.

21 QUESTION: Oh, presumably that can generate jail  
22 time.

23 MR. DE CARLI: In some cases. In most cases,  
24 however, I believe that in some jurisdictions still first  
25 offense drunk driving there is no jail time. So I would

1 still, we would still argue it would be reasonable,  
2 because some of those offenses driving intoxicated and  
3 reckless driving amount, in essence, to breaches of the  
4 peace, they are by their nature violent, they impose a  
5 threat. They threaten the health and safety of others on  
6 the road directly and I think --

7 QUESTION: Does repeated nonuse of a seat belt  
8 for minor children constitute a threat to safety?

9 MR. DE CARLI: Justice O'Connor, I think it  
10 would be a closer question, but I would still defer to the  
11 fact that if the legislature has not increased, has not  
12 provided for heightened penalties, for repeat offenders,  
13 repeat nonuse of seat belts, that still it is not that  
14 limited category of offenses that impose an imminent  
15 threat to life and limb on the road.

16 QUESTION: When you say -- go ahead --

17 QUESTION: Suppose in this case the driver was  
18 from another state, could there have been an arrest made.

19 MR. DE CARLI: No, Your Honor, and let me  
20 explain why. One, states have already provided for that  
21 kind of situation in the uniform violator compact act  
22 where if somebody does not appear, then their license can  
23 be revoked in that other state.

24 QUESTION: So the risk of nonappearance is not  
25 part of the balance that you want the police officer to --



1                   MR. DE CARLI: Well, Justice Kennedy, I think  
2     the approach to that, there already is a way of dealing  
3     with that and that is if a party does not appear, then  
4     that's a separate offense, there is a penalty provided for  
5     that, a warrant may be issued for that person's arrest,  
6     and they are then subject to punishment for that  
7     additional offense.

8                   QUESTION: Can a police officer in an  
9     out-of-state case use the time-honored tradition of giving  
10    you a police escort to the station where you pay your  
11    fine?

12                  MR. DE CARLI: Your Honor --

13                  QUESTION: That's a stop, it's a seizure of  
14    sorts.

15                  MR. DE CARLI: The problem that we --

16                  QUESTION: That's sort of an old tradition in  
17    some of our states.

18                  MR. DE CARLI: Well, it depends -- the problem  
19    with that approach is it leads to, and in part what  
20    respondents, respondents have implicitly made this  
21    argument that this was a brief arrest. Ms. Atwater was  
22    helped into the police car. What that leads to is it's  
23    distinguishing between the degrees of the custodial  
24    arrest, even though once that person is removed from the  
25    scene, the safety of their car, once under custodial

1     arrest, their life -- or excuse me, their liberty and  
2     property interests are completely forfeited.

3             QUESTION:  Mr. De Carli, a moment ago you said  
4     you thought perhaps reckless driving might be a breach of  
5     the peace.  Is that a term of art, breach of the peace?  
6     The briefs indicate that there's considerable differences  
7     to what it meant at common law.

8             MR. DE CARLI:  Mr. Chief Justice, it is clear at  
9     common law that breach of the peace when used in the  
10    context of the law of arrest referred to a group of  
11    offenses that either involved violence or the type of  
12    conduct that would incite immediate violence.

13            QUESTION:  The opposing briefs suggest  
14    differently.  But I recognize also that your briefs also  
15    have supporting authority.  I'm just not sure whether  
16    that's too happy a distinction.  What should turn on  
17    breach of the peace which is basically a common law  
18    concept.

19            MR. DE CARLI:  Well, Mr. Chief Justice, I  
20    believe that if we look to, again the decision of last  
21    week, and other decisions of this Court, Delaware v.  
22    Prous, I guess Sitz would be an example, there are certain  
23    offenses, in the context of the traffic offenses where by  
24    their very nature they impose a grave risk of harm to  
25    others on the road.

1                   QUESTION: What if Texas here had said that this  
2 particular offense was, you know, that it could be 10 days  
3 in jail or \$300 fine? Could the officer have done what he  
4 did here?

5                   MR. DE CARLI: Mr. Chief Justice, it would be a  
6 much closer case then.

7                   QUESTION: Could you answer -- answer yes or no  
8 and then explain.

9                   MR. DE CARLI: Well, let me, part of my  
10 vacillation is in -- we proposed a rule, in looking back  
11 at that, I now wonder, well, perhaps the correct approach  
12 would be to rely exclusively on the common law. The  
13 common law provided a clear boundary, breach of the peace,  
14 nonbreach of the peace and felonies.

15                  QUESTION: The common law as of what date.

16                  MR. DE CARLI: As of the adoption of the Fourth  
17 Amendment which would be 1791.

18                  QUESTION: What is your answer to the Chief  
19 Justice's question, yes or no.

20                  MR. DE CARLI: Unless there were -- the answer  
21 would be no. I'm sorry.

22                  QUESTION: What do you make of the nightwalker  
23 statute argument that at the same period in which you're  
24 arguing there was at least a threshold of immunity set  
25 here, it was clear in English law that nightwalkers who

1       were not breaching the peace in your sense could be  
2       arrested.

3               MR. DE CARLI:   Justice Souter, I think the  
4       correct, I believe the correct way to look at the  
5       nightwalker statutes is this was a time before any  
6       lighting, anybody that was walking about in the dead of  
7       night it was reasonable to presume that that person was a  
8       felon, until --

9               QUESTION: Yeah, but the fact that the person was  
10      a felon, even that he intended to commit a felony, is that  
11      what you mean?

12              MR. DE CARLI:   Well that the person may have  
13      committed a felon or they were up to no good. Nobody  
14      walking about in the dead of the night in the 17th century  
15      was doing anything other than contemplating criminal acts.  
16      I think at the -- that's the way I understand the  
17      nightwalker statute.

18              QUESTION:   They didn't have insomniacs back  
19      then?

20              MR. DE CARLI:   I think Justice Kennedy they  
21      stayed indoors because it was too dark.

22              QUESTION:   You answered the Chief Justice's  
23      question that if the state had said we regard not buckling  
24      up as very serious, therefore 10 days in jail, then you  
25      would have no case to complain about a custodial arrest

1       for that, is that so?

2               MR. DE CARLI:   Well, Justice Ginsburg, again, it  
3       depends on, our case is a core case, I mean it falls under  
4       the rule the common law end of any balancing --

5               QUESTION:   But I'm just asking you the question.

6               MR. DE CARLI:   Yes.

7               QUESTION:   Is it just -- so a seat belt in one  
8       state could be one thing if the state chooses to make it a  
9       more serious offense, and another thing in another state?

10              MR. DE CARLI:   If the line is drawn not based on  
11       the common law but as we had proposed in our brief the  
12       jailable versus fine only distinction.

13              QUESTION:   Now here in this very case, could the  
14       officer have said, child endangerment is a felony, so it's  
15       not simply the misdemeanor of not buckling up, but you've  
16       put your children in danger and therefore the offense is  
17       child endangerment which is a felony.

18              MR. DE CARLI:   Several responses to that Justice  
19       Ginsburg.   First, in that instance, probable cause, if the  
20       arrest were based on alleged child endangerment there  
21       probable cause would act as a restraint because the police  
22       officer to justify the arrest would have to establish a  
23       certain degree of certainty that the specific conduct was  
24       child endangerment.   Now, this was not child endangerment  
25       for several reasons, one, the legislature has imposed an

1 extremely minimal penalty, two, it's not child  
2 endangerment because you are set -- by virtue of the fact  
3 that if we were to call this child endangerment then not  
4 using your turn signal or perhaps speeding or running a  
5 red light, those are just as close to any possible harm as  
6 not wearing a seat belt.

7           There's a causation problem, in other words.  
8 And most importantly is that by, if we truly are concerned  
9 about the welfare of the children, then arresting the  
10 mother and taking the mother away is inflicting a far  
11 greater harm on those children, and it's doing --

12           QUESTION: Well, the facts here are very  
13 unattractive. I mean one doesn't like to think that a  
14 mother is going to be stopped for not wearing a seat belt  
15 and have her children in tears in the car while the mother  
16 is hauled off to jail. You've got the perfect case.

17           MR. DE CARLI: We'd like to think so Justice  
18 O'Connor.

19           QUESTION: But I think what we're concerned with  
20 is the broader rule because it has millions of  
21 permutations and applications across the country. And  
22 conceivably the Fourth Amendment at bottom does always  
23 require a kind of reasonableness test, and that's why I  
24 thought Judge Weiner's approach might make a little sense  
25 here.

1                   MR. DE CARLI: It might. I mean the  
2 extraordinary no arrest for fine only offenses absent an  
3 articulable fact that explains why an arrest would be  
4 justified.

5                   QUESTION: So what do you think, Bob, it seems  
6 to me that the strongest argument against you has nothing  
7 to do with this case, it has to do with the police  
8 officers being human. They say to the police officer,  
9 look, if somebody commits a crime in your presence you can  
10 arrest them. But you can't use -- do an unusual thing,  
11 you know, you can't use excessive force, et cetera, but as  
12 long as you behave in a normal manner, crime, you see it,  
13 arrest them. Anyone can understand that.

14                  MR. DE CARLI: Right.

15                  QUESTION: And the problem with your side and  
16 the people who are supporting it is are they coming up  
17 with something that works? I mean, a policeman isn't  
18 going to know the common law or breaches of the peace. A  
19 police -- they're just not going to understand that. So  
20 is there some kind of practical alternative to this simple  
21 rule which has in it a way of catching abuses through the  
22 nonnormal behavior.

23                  MR. DE CARLI: Justice Breyer, I really do  
24 believe that in the context of traffic offenses, and I'll  
25 explain a little bit later why it's valid to limit a

1 holding or a rule to traffic offenses, it is not all that  
2 complex because there are only a few offenses that -- in  
3 which, most of which this Court has identified in other  
4 opinions where the arrest -- where the use of a custodial  
5 arrest would indeed further enforcement, I mean, I guess  
6 one, drunk driving, driving while intoxicated, reckless  
7 driving, closer arguably the unlicensed driver, although  
8 --

9 QUESTION: Speeding.

10 MR. DE CARLI: No, Your Honor.

11 QUESTION: No what.

12 MR. DE CARLI: No, Your Honor, speeding -- it  
13 would not be reasonable to arrest a driver for speeding  
14 unless the speeding rose to the level of reckless driving.  
15 And that's where you have the same probable cause  
16 determinations.

17 QUESTION: What if the state does think that --

18 QUESTION: What if the speeder is from another  
19 jurisdiction?

20 MR. DE CARLI: I'm sorry.

21 QUESTION: What if the speeder if from another  
22 jurisdiction?

23 MR. DE CARLI: Your Honor, oh, Justice Stevens,  
24 again, that returns to the response I believe I gave to  
25 Justice O'Connor or Justice Kennedy that in essence



1 respondents seek a prophylactic rule in that we are to  
2 cede discretion to arrest to police officers on the chance  
3 that people from another jurisdiction are going to run  
4 away and not pay their fine.

5 QUESTION: I think that's a standard rule for  
6 policemen to stop motorists and state if you're from out  
7 of the jurisdiction you either pay the fine now or follow  
8 me to the courthouse.

9 MR. DE CARLI: But Justice Scalia --

10 QUESTION: I'm quite sure that's standard  
11 procedure in any number of states. And you say that's all  
12 bad, you just have to say, well, hope you come back to  
13 Wyoming someday.

14 MR. DE CARLI: It's -- Justice Scalia, I think  
15 the reason why it's, I mean if we're looking for a bright  
16 line rule, the problem that permitting a custodial arrest  
17 in that situation would lead to is, if we say, okay,  
18 out-of-state person, he's not going to come back to  
19 Wyoming, high risk, if you allow the arrest, then what  
20 that means is the person is potentially held in custody  
21 before a probable cause --

22 QUESTION: I hate to constitutionalize all this  
23 thing, everything becomes a constitutional case. Is there  
24 a police chief in Lago Vista?

25 MR. DE CARLI: Yes, yes, Justice Scalia.

1 QUESTION: Is he elected?

2 MR. DE CARLI: Yes.

3 QUESTION: Do his constituents think it's a good  
4 idea for his officers to arrest women for not having their  
5 kids in seat belts.

6 MR. DE CARLI: My understanding is there is a  
7 deep divide in the community regarding the issue.

8 QUESTION: But he's not in the case anymore and  
9 that raises another question, given the division of the  
10 judges, it's really interesting, the district court  
11 thought your case was frivolous and then five judges on  
12 the court of appeals thought it was very serious. But  
13 isn't it almost certain that this Officer Turek would have  
14 qualified immunity given -- how could one say that the law  
15 was clearly established given the division among the  
16 Federal judges.

17 MR. DE CARLI: I have three responses to that,  
18 Justice Ginsburg. First, the Fifth Circuit clearly did  
19 not address that issue, the en bloc majority. They  
20 explicitly refrained from making that determination. But  
21 second, even though, yes, it is conceivably -- it would be  
22 a tough hurdle to overcome with regard to Officer Turek.  
23 However the city still is in the lawsuit and Judge --

24 QUESTION: But the police chief isn't. He's been  
25 dismissed and you're not challenging that. If you're

1     relying on a practice or policy of the city to hold the  
2     city, where would that policy or practice have come from  
3     other than the police chief who has been dismissed?

4             MR. DE CARLI:  My understanding is that the --  
5     if it were to be remanded back to the Fifth Circuit, if  
6     this Court were to find a Fourth Amendment violation, the  
7     Fifth Circuit majority never addressed that -- those  
8     specific issues, but it would still be live against the  
9     city based on the finding of Judge Sparks that there was a  
10    policy on the part of the city.  The city had this policy.

11            QUESTION:  Which judge made that.

12            MR. DE CARLI:  Judge Sparks, Judge Sparks in the  
13    -- I guess it would be Appendix -- the third Appendix  
14    basically stated that it was a -- a policy was  
15    established.  A policy was established, but no  
16    constitutional violation had been established.

17            QUESTION:  This is the judge who thought the  
18    claim was frivolous.

19            MR. DE CARLI:  Yes, but Judge Sparks is a good  
20    judge.  And I think part of that resulted from the trial  
21    counsel, frankly.

22            QUESTION:  Mr. De Carli, let's assume that I  
23    don't find your constitutional argument conclusive, at  
24    this point I'll be candid to say I'm not sure how to  
25    assess it.  But I assume that I don't find it conclusive.

1 One of the things that I would like to know more about if  
2 we have to engage in a reasonableness determination here  
3 in setting a standard, is how bad the problem is out  
4 there. And one of the things that I know both, I forget  
5 whether it's from your brief or from the brief on the  
6 other side, in a number of jurisdictions in which arrests  
7 for misdemeanors without any distinction, and arrests for  
8 even the more minor offenses, some states called them  
9 violations, the sub-misdemeanor, but technically criminal  
10 offenses, is permitted without warrant if committed in the  
11 officer's presence.

12 And the commonness of the practice leads me to  
13 question how many horrible cases like this one are there  
14 out there? Are we faced with a case in which the facts  
15 indeed are about as good for you as I think, you know,  
16 they could be, but are we, by the same token, faced with a  
17 case which is very rare and should not be the basis for  
18 constitutionalizing a general rule? How big is the  
19 problem.

20 MR. DE CARLI: Justice Souter, I've tried to  
21 determine how big the problem was by going to the  
22 Department of Justice, which of course provides the most  
23 authoritative statistics. Unfortunately, they don't  
24 address the issue. However, anecdotally, there, you know  
25 -- well, just a few weeks ago we saw the young girl

1       arrested for not -- for eating french fries in the  
2       substation.

3                QUESTION:  Where did we see this?

4                MR. DE CARLI:  In the District of Columbia, I  
5       believe.

6                QUESTION:  I hadn't seen it myself.

7                MR. DE CARLI:  I'm sorry.  It was in the --

8                QUESTION:  I didn't see it.

9                QUESTION:  He immerses himself in these briefs.

10              MR. DE CARLI:  And that's good.

11              QUESTION:  It's not a constitutional violation  
12       for a police officer to be a jerk.  And what we're trying  
13       to do is define whether there are some rules that we can  
14       work with.  And yours seems to me so amorphous, and the  
15       brief of the respondents summarized four or five different  
16       tests being given by the amicus briefs and they're all  
17       different.  And you're not even clear that your own tests  
18       -- you say on reflection this is adequate --

19              MR. DE CARLI:  Well, Justice Kennedy, all of the  
20       tests provided by petitioners and their amici are actually  
21       remarkably similar in that they all recognize that there  
22       should be a limited amount of discretion for those close  
23       cases, however, we can carve out whether that be through  
24       offenses that involve -- of imminent threat of harm.  Or  
25       if we call it a breach of the peace.  Or if we draw a

1 distinction between fine only and jailable, lines can be  
2 drawn. That's one point. To get back to Justice Scalia's  
3 comment about the fear of the problem of  
4 constitutionalizing everything, I refer to Justice Story's  
5 comment that the Fourth Amendment was indeed an embodiment  
6 of the common law.

7 QUESTION: What about deterrence? Don't you  
8 think people are going to be pretty unlikely to eat french  
9 fries on the subway in Washington.

10 MR. DE CARLI: That's correct, Justice Scalia --

11 QUESTION: And maybe in Lago Vista, not to belt  
12 up their kids?

13 MR. DE CARLI: Yes, but the problem --

14 QUESTION: Well is that worth nothing?

15 MR. DE CARLI: No. But that is confusing  
16 punishment with enforcement. Deterrence is a  
17 justification for punishment. And police officers should  
18 be enforcing laws and not punishing. Mr. Chief Justice, if  
19 I may, I'd like to reserve the remainder of my time.

20 ORAL ARGUMENT OF ROGER J. GEORGE

21 ON HALF OF RESPONDENTS

22 MR. CHIEF JUSTICE: Very well, Mr. De Carli.

23 Mr. George we'll hear from you.

24 MR. GEORGE: Mr. Chief Justice, and may it  
25 please the Court:

1           The problem we're facing on the Fourth Amendment  
2   has to include both the seizure and the scope of the  
3   seizure and the nature of the seizure. And I want this  
4   Court to pay particular attention to the Texas statutory  
5   scheme, because the Texas statutory scheme is remarkable  
6   in that in traffic violations particularly, as opposed to  
7   other kinds of violations, it provides very explicitly  
8   that once an officer makes the decision to arrest, as  
9   opposed to giving a citation, that officer must  
10   immediately and the word in the statute is immediately,  
11   take the accused before the nearest magistrate and to have  
12   that magistrate determine whether or not the person should  
13   have to put up a bond or be released on their own  
14   recognizance. That system is exactly the system that is  
15   in my opinion specifically authorized by this Court's  
16   opinion in U.S. v. Watson, if you read the specific  
17   footnote 11 in that opinion, that is the specific kind of  
18   procedure that was authorized by this Court.

19           It has the advantages that is the tradition in  
20   this country, at least since we've had automobiles, that  
21   in rural Texas, where I'm from, the fact that you get --  
22   run a red light in El Paso, and you're from Brady, doesn't  
23   -- the people in El Paso are somewhat concerned that  
24   they'll ever see you again. It's a little easier to do  
25   something about it in today's world of computers and

1 instant, relatively instant communication.

2 QUESTION: Mr. George, can I just ask sort of a  
3 general question, why wouldn't that interest, and  
4 obviously you're certainly entitled to arrest somebody  
5 who's about to flee the jurisdiction or something like  
6 that, but why wouldn't that interest be accommodated by  
7 the statement of Justice Weiner, Judge Weiner in his  
8 dissent? There's got to be some reason, any reason, as  
9 long as it's plausible and relates to the problem. And  
10 the reason there is obvious the guy may not show up to pay  
11 the fine.

12 MR. GEORGE: I believe the problem with Judge  
13 Weiner's appointment is the problem of being too unclear  
14 as to exactly what kind of reasons are good enough  
15 reasons.

16 QUESTION: It's about like a Terry stop, that's  
17 pretty -- if there's a particular articulable reason to  
18 suspect there's a problem here you can make a Terry stop,  
19 I don't see that it's that different. That seems to work.

20 MR. GEORGE: It does work in the Terry stop  
21 situation and we can --

22 QUESTION: Why wouldn't it work here?

23 MR. GEORGE: You can argue it was here. I mean  
24 this man's -- if you look at page 422 of the record, his  
25 police report says I just stopped her a few weeks ago for



1 the same violation. That's disputed fact. But that's  
2 what he articulated. And your concern about the repeat  
3 violators was at least written on the contemporaneous  
4 repeat offense report. It's important --

5 QUESTION: I'm not asking about this case.

6 MR. GEORGE: I understand that.

7 QUESTION: I'm asking about an appropriate  
8 workable rule. And I want to know why the Weiner  
9 formulation in your view is unworkable.

10 MR. GEORGE: I think -- well, I think it leads  
11 to the same problems that we've had to some extent in this  
12 Terry stop rules. Some rules, because it has to be  
13 coupled in my opinion with this instant immediate  
14 appearance before somebody else to make the decision. In  
15 this case Judge Thompson in Lago Vista agreed that some  
16 bond was required here.

17 QUESTION: I'm not sure that a proper  
18 articulable rule -- do you think that an acceptable  
19 articulable reason is that there's a breach of the peace  
20 in the more narrow sense? You know, the guy's really  
21 annoying people and getting boisterous and what not.

22 MR. GEORGE: No.

23 QUESTION: Because I mean it seems to me you  
24 don't necessarily have to take him in to stop that. You  
25 could go over and tell him, you know, you got a fine and

1 if you do it again you're going to get another fine. That  
2 might shut him up right away.

3 MR. GEORGE: I absolutely agree with that. And I  
4 don't think this Court has, at least if you read U.S. v.  
5 Watson, New York v. Payton, Judge White, Justice White's  
6 dissent in Welsh v. Wisconsin concurred in by the current  
7 Chief Justice all indicated as did the American Law  
8 Institute's model code referred to in U.S. v. Watson, all  
9 provided that the rule for arrest was, I see the person do  
10 it, in fact the ALI rule was, I saw a petty offense  
11 happening in front of the officer.

12 In this case, there were five such offenses,  
13 driving without the seat belts, no driver's license --

14 QUESTION: Their suggestion is there be another  
15 rule.

16 MR. GEORGE: I understand.

17 QUESTION: And the other rule would be what  
18 Justice O'Connor just said. And so my question would be  
19 the same, what's wrong with that? I thought frankly your  
20 answer to that would be what is the set of arrests to  
21 which that rule applies. And then I was going to suggest  
22 the set of arrests that are punishable by fine only.

23 MR. GEORGE: Well, I think that the same reason  
24 that there's something wrong with that --

25 QUESTION: Now, what's wrong with that.

1           MR. GEORGE: Well, it assumes that the officer  
2 knows enough facts at the time to make a determination of  
3 what the crime will ultimately be charged.

4           QUESTION: Well, as long as the officer has to  
5 have, doesn't the officer can arrest him only if he thinks  
6 he's breaking the law. So you say Mr. Policeman, what law  
7 was he breaking. And the policeman has to understand that  
8 if it's a law that's punishable by a fine only he has to  
9 have some reason for arresting the person rather than just  
10 citing.

11          MR. GEORGE: Well, as this Court decided not to  
12 adopt that rule in Berkimer.

13          QUESTION: My question is why not.

14          MR. GEORGE: The answer is, because for example,  
15 much conduct can be both felony and misdemeanor.

16          QUESTION: Well, that's absolutely fine, if the  
17 policeman thinks, forget felony/misdemeanor, I agree with  
18 you that felony/misdemeanor is not a workable rule. I  
19 don't know if others do or not. But felony/misdemeanor  
20 falls into the problem that different states define  
21 misdemeanor differently and it's so complicated nobody  
22 understands it. All right. So that's why I asked the  
23 rule that's been suggested by others, it's not mine  
24 originally, that if it's punishable by a fine only that's  
25 where Justice O'Connor's principle kicks in. Now, what

1 would be wrong with that?

2 MR. GEORGE: Because -- same reason. They don't  
3 know enough facts. For example, in Texas --

4 QUESTION: Is that your only reason, Mr. George,  
5 just that you're willing to argue this out on a  
6 case-by-case basis? I thought part of your argument was  
7 that when it says unreasonable seizures in the  
8 Constitution it has something in mind and doesn't leave it  
9 up to this Court to sit back and decide what's reasonable  
10 and unreasonable. I thought your argument was based on  
11 the fact that this has never been understood to be the  
12 constitutional rule. There has always been authority for  
13 the -- for policemen to conduct arrests of this sort.

14 MR. GEORGE: Absolutely.

15 QUESTION: Which, if they're abusive, the  
16 sheriff won't get reelected.

17 MR. GEORGE: That's exactly the basis of my  
18 argument.

19 QUESTION: Why don't you put that as your first  
20 line of defense and then argue on the, you know, on the --

21 QUESTION: If by chance the first line of  
22 defense was breached.

23 QUESTION: Mr. George is trying convince of us  
24 that that's the reason --

25 MR. GEORGE: Thank you Justice Scalia. Returning

1 to Justice Breyer. If the first line is breached, let me  
2 return to that response. The problem is illustrated by  
3 public intoxication in Texas as in other jurisdictions.  
4 The number of offenses, the times you have done it changes  
5 the penalty. No way to know on the roadside whether this  
6 is the first time or the fourth time, if it is the second  
7 time in Texas, you go to jail. I mean it's punishable by  
8 jail. If it's the first time, it's not.

9 QUESTION: The answer is, if you don't know, you  
10 have no articulable reason. That's the answer. That's  
11 easy.

12 QUESTION: If you don't know, you don't arrest.  
13 The burden is on the officer to be certain that it is the  
14 second offense or the third offense, whatever is  
15 necessary.

16 MR. GEORGE: Yes, Justice Souter, that --  
17 Justice Breyer asked me why -- what's wrong with the jail  
18 versus fine distinction. And in my view it is to put the  
19 burden on the officer requires too much of the officer and  
20 of course I have my first line of defense again, that is,  
21 that has never been --

22 QUESTION: I know, but in that instance why  
23 can't the officer just radio in? We have John Doe, he's  
24 intoxicated, does this guy have a record?

25 MR. GEORGE: This Court's opinion in Arizona v.

1 Evans in which the communications to the station and the  
2 computer system and they called down and they said he has  
3 an outstanding warrant but it turned out he didn't have an  
4 outstanding warrant. The problem is it assumes that in  
5 rural Texas or in other parts of this United States that  
6 there will be effective, prompt and accurate communication  
7 to --

8 QUESTION: Well, then you're going to have the  
9 same problem when he goes before the magistrate in this  
10 little town. They still don't know anything.

11 MR. GEORGE: I understand. But you have an  
12 independent nonadversarial determination of what the terms  
13 of release ought to be, because we're only talking about  
14 whether to release people on their own recognizance for  
15 appearance at trial as opposed to requiring some sort of  
16 financial security for those people to appear at trial.

17 QUESTION: Yes, but Judge Weiner's rule, it's  
18 important to keep in mind, it only kicks in if it's a  
19 fine-only offense in the first place, but if there is a  
20 reason such concern about appearance at trial, bingo,  
21 you're protected. I mean these situations do fall into  
22 certain large categories, one is the out-of-town speeders,  
23 you could always haul him to the station house, that's  
24 been settled for years and years and years as Justice  
25 Scalia points out. But what about those where there's

1 absolutely no plausible reason for saying I have to make a  
2 custodial arrest here. Will you give the officer total  
3 absolute discretion just because he doesn't like the  
4 person or something of that nature?

5 MR. GEORGE: Well, the discretion of the  
6 officer, the answer is no there's not absolute discretion  
7 because there's the limits of the equal protection clause,  
8 there's other kinds of constitutional limitations. He  
9 can't go around arresting only black people or Asian  
10 people or some other kind of arrangement, he cannot --

11 QUESTION: Or women with small children.

12 QUESTION: Can they be held for 48 hours as  
13 other arrestees can or do they have to be, do you  
14 acknowledge that that's part of your rule that he really  
15 does have to be brought before a magistrate immediately.

16 MR. GEORGE: Not in Texas, they can't. If I  
17 were in your shoes I would have agreed you for this case  
18 in County of Riverside v. --

19 QUESTION: But that wasn't the decision. People  
20 can be held a long time. What happened to the arresting  
21 officer in this case? Do you defend that as a reasonable  
22 decision?

23 MR. GEORGE: In this case?

24 QUESTION: Yes.

25 MR. GEORGE: On the basis, we're here on a

1 summary judgment where he has never been deposed and all  
2 we have is arrest reports.

3 QUESTION: Right.

4 MR. GEORGE: So the only thing I have is his  
5 arrest report. And on the basis of his arrest report, he  
6 says that he was -- she had violated the same statute and  
7 he was concerned.

8 QUESTION: Even knowing it was a mother with two  
9 small children in a small town and what happens to the  
10 children? I mean this is kind of an amazing case, but you  
11 think that's fine.

12 MR. GEORGE: Well, it would be a lot better that  
13 the children have to deal with having their mother taken  
14 before the magistrate than having to deal with the brain  
15 damage if they had -- she had stepped on the brake five  
16 minutes later, five minutes later, would that 5-year-old  
17 standing up in the front seat of a pick-up and she steps  
18 on the brake, it is a very serious incident, even at 15  
19 miles an hour, assuming that was the actual speed.

20 QUESTION: You don't have to think it's fine to  
21 think it's not unconstitutional, do you.

22 MR. GEORGE: No, as I understood --

23 QUESTION: There are a lot of really stupid  
24 things that aren't unconstitutional.

25 MR. GEORGE: Being a jerk is not



1 unconstitutional. And assuming that Officer Turek is a  
2 jerk, let's just give them that position, and he was a  
3 jerk in this instance, that does not create a  
4 constitutional violation.

5 QUESTION: It's true, in trying to think this  
6 through, and I'm having a difficult time working on this  
7 and I'm trying to think it through, and it seemed to me  
8 the strongest argument against the Weiner position is that  
9 it would lead to writing volume 7 of the treatise on the  
10 Fourth Amendment which would have an infinite number of  
11 rules in it about when the Terry stop-type justification  
12 is enough or isn't enough. And rather than write -- it  
13 seems to me we ought to reserve that for there being a  
14 real problem. But is there a real problem here? That's  
15 why anything you could say in respect to the, what you've  
16 read, in doing research for this, as to the scope and  
17 nature of the problem in general would be helpful to me.

18 MR. GEORGE: No, there is no real problem.

19 QUESTION: I know you think that, but I wondered  
20 if you've come across some things that you could refer me  
21 to.

22 MR. GEORGE: No. The only things we have come  
23 across are the racial profiling issues. We have the New  
24 Jersey experience and we have some of the amici on the  
25 other side presenting that problem to this Court and this

1 is a prophylactic solution to racial profiling because you  
2 never have custodial arrests for traffic violations. It  
3 is our judgment if that is the problem, if that's the only  
4 problem presented here, we deal with that problem by  
5 dealing with the equal protection violation it presents  
6 rather than creating, in my opinion, a whole lot more work  
7 for this Court and the lower Federal courts on deciding  
8 what the appropriate standard would be for this new  
9 variation away from probable cause.

10 QUESTION: Mr. George, one of your arguments is  
11 the difficulty-of-administration argument, and you said  
12 earlier that when we're dealing with a level of offense in  
13 which it may be difficult to tell on the side of the road  
14 whether this would be subject to arrest or not subject to  
15 arrest, the -- in effect the benefit of the doubt should  
16 be given to the officer and we shouldn't come up with a  
17 rule that in effect would penalize the officer. But why  
18 should the benefit of the doubt be given to the officer?  
19 Why should the burden of uncertainty, if we're going to  
20 draw a line, be a burden that falls on the police rather  
21 than -- a burden that falls on the citizen rather than on  
22 the police? Why would she make that choice?

23 MR. GEORGE: My first response is that probable  
24 cause has been the line that's drawn on all crimes in this  
25 country since 1791. And that is -- ought to remain the

1 line because it has worked.

2 QUESTION: I realize that. But you were making  
3 a different argument when you addressed the possibility of  
4 drawing the line differently, your response to that was  
5 that may be difficult in some cases, and the burden of  
6 that difficulty should not fall on the police. And my  
7 question is, assuming a different line were to be drawn,  
8 why should the burden fall on the citizen rather than the  
9 police? Why shouldn't we simply say, look, if it's going  
10 to be -- if there's any question about applying this line,  
11 we'll assume that the burden of doubt should be for the  
12 benefit of the potential arrestee rather than for the  
13 benefit of the police?

14 MR. GEORGE: The answer is, because the  
15 difficulty of articulating all the reasons that would be  
16 adequate. Now, we can have a --

17 QUESTION: But that's the premise of the  
18 question. We're assuming that the reasons would be hard  
19 to articulate. But assume that we feel there is a need on  
20 reasonableness grounds to draw such a line, why isn't the  
21 answer to the uncertainty of application the answer that  
22 was suggested earlier, and that is if the police are not  
23 certain in applying this rule, that they have a right to  
24 arrest, they should not arrest, and that's the answer to  
25 the uncertainty problem.

1           MR. GEORGE: Truthfully, I see no reason, if  
2     you're going to go down the road of trying to carve out  
3     some other exception to probable cause, that the burden of  
4     proof not remain on the government. The burden of proof  
5     is -- on probable cause is that the police officer has to  
6     be able to -- there has to be objective facts that would  
7     cause probable cause, a specific violation of a specific  
8     statute. The Terry stop, we put the burden on the  
9     government. If it's burden shifting, if we're going down  
10    this road, if this Court should determine that there needs  
11    to be a new volume five for the Fourth Amendment  
12    jurisprudence and that this is a problem of some moment in  
13    the country and needs that remedy, then I can not  
14    articulate a reason why we should bury the burden of  
15    proof.

16           QUESTION: There's a point, a procedural point,  
17    that I'm curious about, this case was begun by the  
18    plaintiffs in the state court, and the police officer,  
19    police chief and the city removed it to the Federal court,  
20    is there a reason why they did that?

21           MR. GEORGE: I wasn't trial counsel at that time  
22    and I do not know the reason. I agree with your earlier  
23    question about qualified immunity. I don't believe -- I  
24    think there is immunity both for the city and for the  
25    individuals here as a matter of law. I grant you that the

1 Fifth Circuit did not address that issue. But I think  
2 this is a largely academic exercise in here and at this  
3 point, I'll reserve the balance of my time for Mr. Taylor,  
4 thank you.

5 MR. CHIEF JUSTICE: Very well, Mr. George. Mr.  
6 Taylor.

7 ORAL ARGUMENT OF ANDY TAYLOR

8 AS AMICI CURIAE SUPPORTING RESPONDENT

9 MR. TAYLOR: Mr. Chief Justice, and may it  
10 please the Court:

11 This Court's teachings has been clear that  
12 warrantless arrests of traffic offenders based on probable  
13 cause is reasonable, and is a reasonable intrusion under  
14 the Fourth Amendment. The court has taught us that in  
15 Robinson, in Gustafson, in Wren, and in Knowles, because  
16 the question from the constitutional perspective is  
17 whether or not probable cause to believe an arrest under  
18 that local law has occurred, and once that is met, then  
19 all the other questions become policy judgments that the  
20 50 states should decide.

21 QUESTION: Let me suggest this, again, going  
22 back to, as you can guess, I'm rather intrigued with the  
23 descending standard. Basically the descending standard  
24 is, if the decision to make a custodial arrest rather than  
25 citation is wholly arbitrary, if there's no plausible

1 reason or articulable reason can be given for it, then  
2 it's arbitrary. Now it seems to me that anything is  
3 arbitrary cannot be reasonable within the meaning of the  
4 Fourth Amendment. Now why am I wrong about that?

5 MR. TAYLOR: The reason why that premise is  
6 incorrect Justice Stevens is this Court's teachings in  
7 *Gerstein v. Pugh* and reaffirmed in *County of Riverside v.*  
8 *MacLaughlin*, once you have probable cause this Court's  
9 teachings have been not only can you engage in a full  
10 custodial arrest, but likewise you're entitled for a  
11 temporary detention for the purpose of administering the  
12 paperwork so that this individual can be booked and then  
13 released once a probable cause determination has been made  
14 by a magistrate. This Court has rejected the notion that  
15 there must be some second reason based on some mini-trial  
16 based on the facts presented as to whether or not that  
17 decision of that time to bring into custody is  
18 appropriate.

19 All three options to a police officer are  
20 reasonable under the Fourth Amendment. The first is to  
21 issue a warning, whether it be in writing or oral. Second,  
22 to actually arrest and bring into custody, or third to  
23 issue a citation instead of actually engaging in a full  
24 custodial arrest. This Court has taught us that all three  
25 options are equally reasonable under the floor, the

1 minimum guidelines and protections that the Fourth  
2 Amendment and the federal constitution give, and then it  
3 becomes a matter of policy.

4 QUESTION: But you're saying there is no  
5 standard that constrains the officer's decision on whether  
6 or not to give a citation as opposed to make a custodial  
7 arrest.

8 MR. TAYLOR: There is no constitutional  
9 standard, it is a policy judgment Justice Stevens, and the  
10 different states have approached it in different ways. As  
11 you will note some of the amici here have said that it's  
12 appropriate under state law to engage in a full custodial  
13 arrest. Indeed, if arguing whether or not the state  
14 governmental interest is one that should be given credence  
15 by this Court, the state of Texas has spoken in the  
16 statute, even though the statute in question, the seat  
17 belt offense law does not provide for punishment in the  
18 form of jail time. They have likewise determined that it  
19 is appropriate to have a full custodial arrest in order to  
20 enforce the government's interest in that particular law.  
21 Therefore, that jurisdiction has made that policy choice.  
22 Those policy choices are subject to political  
23 accountability.

24 QUESTION: That's set forth specifically in the  
25 seat belt law?

1           MR. TAYLOR: The traffic rules of the road is a  
2     certain codification of state law that includes seat belt  
3     offenses and there is a statute in Texas on the books that  
4     says for any offense in this traffic code, full custodial  
5     arrest is appropriate, save two exceptions, one is for  
6     speeding, and two is for the open container law which were  
7     the results of political judgments made in the local  
8     jurisdiction.

9           Other states have decided that in certain  
10    circumstances they will allow the issuances of citation  
11    rather than a full custodial arrest based on the  
12    circumstances presented to that officer, and he has that  
13    discretion to make that judgment call. But if he picks  
14    wrong in the view of the folks that have to review it  
15    later, in other words, we don't think he made the best  
16    decision among all of his options, so long as those  
17    options are equally reasonable under the Federal  
18    Constitution, then that mistake does not drive a  
19    constitutional decision of reasonableness because you  
20    can't put that in front of the decision. And so, whereas  
21    here, the commission of an offense witnessed personally by  
22    the police officer gives rise to probable cause then the  
23    constitutional inquiry ends and the policy judgments and  
24    decisions will begin.

25           And that's why it would be unworkable as this



1 Court in several questions has asked whether or not we can  
2 draw lines between fine only and jailable time. In fact,  
3 in Welsh v. Wisconsin, one of those offenses in that case  
4 was for DWI, but under that jurisdiction's law it was only  
5 for jail -- for a fine. Similarly, in United States v.  
6 Watson, when dealing with the Prohibition cases, that  
7 particular, actually -- Carroll v. United States, that  
8 particular case dealt with bootlegging, and that was a  
9 misdemeanor fine-only offense. You cannot determine the  
10 constitutional question based on the penalty that is  
11 associated with a crime, but rather based on whether or  
12 not there is an offense for the specific facts that have  
13 occurred. If we let the penalty --

14 QUESTION: I suppose that misdemeanor violators,  
15 traffic violators, seat belt and all that stuff, french  
16 fries eaters, unlike felons, they're probably not a  
17 discreet and into a minority, are they?

18 MR. TAYLOR: That's correct.

19 QUESTION: I mean they're a lot of them out  
20 there. I myself have never been guilty of any  
21 misdemeanors. But I am told that there are a lot of  
22 people out there. And so you can probably expect the  
23 political system to be able to protect that category a lot  
24 better than you can expect them to protect felons. Is  
25 this sheriff still in office, do you know?

1                   MR. TAYLOR: To my knowledge --

2                   QUESTION: When you say he's been dismissed, I  
3                   assume that means he's been dismissed from the case.

4                   MR. TAYLOR: I meant the former and not the  
5                   latter. But the point is, Justice Scalia, your question  
6                   demonstrates that these decisions well, under these  
7                   circumstances what's the best policy choice is just that,  
8                   a policy choice and not part of the constitutional rubric  
9                   of the Fourth Amendment. Those extra protections are for  
10                  the state's to decide. But the minimum guarantees of  
11                  liberty in the Fourth Amendment are for this Court to  
12                  decide, and I would submit that this Court has made it  
13                  very clear that the decision must be pledged and looked to  
14                  in terms of probable cause.

15                  QUESTION: Mr. Taylor, do you know why local  
16                  officials took this case out of the hands of Texas courts  
17                  and put it in the hands of Federal court?

18                  MR. TAYLOR: I do not, Your Honor, and the  
19                  record does not indicate why. One hypothetical suggestion  
20                  could simply be that the Federal courts would be  
21                  well-equipped to know the differences between the Federal  
22                  constitutional floor and the policy ceiling lights that  
23                  the states may accord on situations such as this. But  
24                  clearly whereas here probable cause existed, then there  
25                  was no constitutional infirmity, and this Court has

1 rejected time and time again in Berkimer, and in United  
2 States v. Robinson and other cases, that we cannot allow  
3 the punishment rather than the conduct to give rise to the  
4 constitutional infirmity or lack thereof, because  
5 otherwise we're going to have conduct which in one state  
6 will result in an unconstitutional situation, and in other  
7 state a constitutional one. And we cannot have a rule  
8 which differs all fifty jurisdictions.

9 QUESTION: Well you have that now on the  
10 felony/misdemeanor distinction. Felonies differ, some  
11 states classify them as misdemeanors, some classify  
12 certain offenses as felonies. It depends -- on your  
13 theory, that would make a difference in whether there  
14 could be an arrest without a warrant.

15 MR. TAYLOR: Justice Souter, no, the fact that  
16 you do not draw a line is why it doesn't matter whether  
17 they're felonies or misdemeanors or --

18 QUESTION: You draw a line on the warrant  
19 requirement, I assume you accede to that.

20 MR. TAYLOR: Yes --

21 QUESTION: Sure.

22 MR. TAYLOR: -- you would have to have a  
23 warrant, absent probable cause.

24 QUESTION: So you've got -- so you've got a  
25 variation from state to state, even under the scheme that

1     you would advocate.

2                 MR. TAYLOR: Well, even where a warrant may be  
3     desired this Court has not stated as a matter of Fourth  
4     Amendment principles that a warrant is required in all  
5     circumstances, Gerstein says an on the scene assessment by  
6     a police officer of probable cause is enough under our  
7     constitutional interpretations of the Fourth Amendment.  
8     And then it would be --

9                 QUESTION: If the officer is not -- the point is  
10    that when an arrest is made for an offense that is not  
11    committed in the officer's presence, then a warrant is  
12    going to be required depending on the gravity of the  
13    offense, and I presume that is true under the system that  
14    you advocate.

15                MR. TAYLOR: Yes, in certain circumstances a  
16    warrantless arrest would not be appropriate because  
17    there's not probable cause. But that's the touchstone.  
18    If there's probable cause, then the arrest is appropriate  
19    in all circumstances. In Wren v. United States, this  
20    unanimous Court held that the balancing test of the  
21    government and the individual is when a probable cause  
22    exists always tipped in the constitutional scale for the  
23    government. And then only in extraordinary circumstances  
24    like warrantless intrusions into homes or serious bodily  
25    injure or deadly force do we then have any additional

1 concerns. In Knowles v. Iowa this Court made clear that  
2 what carried the day in that case was that they hadn't  
3 actually arrested the individual. I understand Mr. Chief  
4 Justice my time is up.

5 MR. CHIEF JUSTICE: Correct. Thank you. Mr. De  
6 Carli, you have three minutes remaining.

7 REBUTTAL ARGUMENT OF ROBERT C. DE CARLI

8 ON BEHALF OF PETITIONERS

9 MR. DE CARLI: Mr. Chief Justice, may it please  
10 the Court:

11 What is interesting about this case as some  
12 members of this Court have pointed out, is respondents do  
13 not defend the reasonableness of the conduct of the  
14 officer in question here, instead they attack the  
15 workability of potential rules and raise -- and allege  
16 that this is not a recurring problem. Two points -- well,  
17 a third point also they characterize decisions of this  
18 Court far beyond their holdings. The first point, the  
19 reoccurrence problem, since certiorari has been taken by  
20 this case and I know this is anecdotal, we have received  
21 call after call of problems of this sort and to limit it  
22 to publically reported incidents, just within the past  
23 month, before this argument, a DPS officer arrested a  
24 passenger in a vehicle, the passenger was a 17-year-old  
25 boy with his mother, and that boy then -- the officer

1     asked the boy, do you have ID? Well that boy lived in a  
2     small town that did not have driver's ed. He had no  
3     driver's license, so that was then used as a justification  
4     for arrest. The arrest presumably would be one that would  
5     not be treated as a brief one. He spent the night in jail  
6     in a holding cell with crack dealers and people accused of  
7     violent crimes. I submit that it is a recurring problem  
8     and perhaps more on point, if the conduct in this case is  
9     condoned, it will be much more likely to be a recurring  
10    problem.

11                 Secondly, boundaries, Judge Weiner's boundary as  
12    some members of the Court have suggested is just as  
13    workable as the Terry boundary. It's not going to require  
14    a new volume of any treatise -- for one thing it's already  
15    a couple pages in Blackstone, which has been around for  
16    some time. It's just going to be a footnote. But under  
17    either standard, no matter what the standard is, if it's  
18    reliance on the probable cause, or, excuse me, reliance on  
19    the common law rule or a balancing of the competing  
20    interests or any of the rules proposed by petitioners  
21    amici, petitioners win. This was unreasonable. And that  
22    leads to the fact that again they have offered no  
23    explanation for why this arrest furthered any legitimate  
24    law enforcement interest.

25                 Finally, probable cause as the touchstone, I

1     have not, I admit I have not read every Fourth Amendment  
2     decision that this Court has written. However, I have  
3     never come across a decision saying that probable cause  
4     and not reasonableness is the touchstone of the Fourth  
5     Amendment. And no decisions have held that anything other  
6     than a public felony arrest -- thank you.

7                 MR. CHIEF JUSTICE: Thank you, Mr. De Carli, the  
8     case is submitted.

9                 (Whereupon, at 12:04 p.m., the case in the  
10    above-entitled matter was submitted.)

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