No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF NORTH CAROLINA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers, a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission. Letters granting blanket consent to the filing of amicus briefs are on file with the Clerk of Court.

accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL frequently appears as amicus in cases involving the Fourth Amendment, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is of central concern to Cato because the protections of the Fourth Amendment are part of the bulwark for liberty that the Framers set out in the Constitution.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more

than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court involving the meaning and scope of the Fourth Amendment, both as direct counsel and as amicus. Because this case directly implicates those questions, its proper resolution is a matter of concern to the ACLU and its members. The ACLU of North Carolina is a statewide affiliate of the national ACLU.

SUMMARY OF ARGUMENT

The Fourth Amendment prohibits searches and seizures, including traffic stops, absent "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). Yet Respondent asks this Court to affirm a rule condoning traffic stops based on suspicion of perfectly lawful conduct.

Amici submit this brief to emphasize two principal flaws in the North Carolina Supreme Court's approach: (1) It contradicts basic Fourth Amendment principles, improperly equating mistakes of fact with mistakes of law; and (2) if affirmed, it will have substantial negative consequences for both private citizens and law enforcement.

First, in contrast to the approach adopted by the majority of federal courts of appeals and state supreme courts to address the issue,[2] the North Carolina Su-

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[2] *See United States* v. *Nicholson*, 721 F.3d 1236, 1241-1242 (10th Cir. 2013); *United States* v. *McDonald*, 453 F.3d 958, 961-962 (7th Cir. 2006); *United States* v. *Chanthasouxat*, 342 F.3d 1271, 1279-1280 (11th Cir. 2003); *United States* v. *King*, 244 F.3d 736, 741-742 (9th Cir. 2001); *United States* v. *Miller*, 146 F.3d 274, 278-

preme Court's decision overlooks the important doctrinal and practical differences between mistakes of fact and mistakes of law.

From a doctrinal perspective, the court's approach neglects the distinct roles fact and law play in the Fourth Amendment analysis. The factual component of the analysis requires an empirical assessment and the exercise of judgment: Did the facts reasonably support the officer's belief that the suspected individual was engaged in criminal activity?

The legal component, meanwhile, is categorical: Was the suspected act a crime? The legal rule—the "infraction itself," *Whren* v. *United States*, 517 U.S. 806, 818 (1996)—is the indispensable objective basis against which law enforcement, and courts, must evaluate observed facts.

Conflating mistakes of fact and law not only threatens to undermine this basic framework, but raises other doctrinal concerns, including by destroying the symmetry between citizens (who are presumed to know the law) and law enforcement officials (who, under the North Carolina Supreme Court's approach, are not).

The decision of the North Carolina Supreme Court also overlooks the practical, real-world reasons why the Fourth Amendment treats fact and law differently. Because the facts confronting law enforcement officials are often ambiguous, unique in each instance, and analyzed "on the fly," this Court's Fourth Amendment ju-

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279 (5th Cir. 1998); *State* v. *Louwrens*, 792 N.W.2d 649, 652-653 (Iowa 2010); *Martin* v. *Kansas Dep't of Revenue*, 176 P.3d 938, 948 (Kan. 2008); *Hilton* v. *State*, 961 So. 2d 284, 297-299 (Fla. 2007); *State* v. *Anderson*, 683 N.W.2d 818, 823-824 (Minn. 2004); *State* v. *Lacasella*, 60 P.3d 975, 981-982 (Mont. 2002).

risprudence recognizes that such officials' judgments regarding the facts will not be accurate in every case. Enforceable legal rules, by contrast, possess none of these characteristics.

Second, the North Carolina Supreme Court's rule will have significant negative consequences, not only for private citizens charged with obeying the law, but also for government officials charged with enforcing it.

The rule creates new and unjustified burdens on private citizens by sanctioning an expansive new category of traffic stops, together with the "physical and psychological intrusion" such stops necessarily entail, *Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979), in every case where non-frivolous questions of statutory interpretation exist. Nor is there any reason to be confident that the effect of the North Carolina rule can be confined to traffic stops. Its logic extends equally to all cases involving government intrusions based on reasonable suspicion, and indeed all those based on probable cause.

At the same time, the North Carolina Supreme Court's rule threatens to undermine law enforcement. It understates the importance of legal training for law enforcement officials, as well as diminishing the public perception of law enforcement officials' knowledge and authority. By contrast, the majority rule imposes no significant burden on law enforcement: It simply applies to law enforcement officials the same obligation to know and obey the law that applies to all citizens.

"[A]s this Court has always recognized, '[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear

and unquestionable authority of law.'" *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891)). The North Carolina Supreme Court's rule authorizes government intrusions based on no law at all, and this Court should reject it.

ARGUMENT

I. THE NORTH CAROLINA SUPREME COURT'S RULE IGNORES FUNDAMENTAL DIFFERENCES BETWEEN MISTAKES OF FACT AND MISTAKES OF LAW

The decision below treats police mistakes of law and of fact as functionally equivalent under the Fourth Amendment. In so doing, it ignores the important doctrinal and practical differences between the two.

A. Treating Mistakes Of Fact And Law "The Same" Under The Fourth Amendment Contravenes Well-Established Legal Doctrine

In requiring courts to treat all law enforcement mistakes "the same," the North Carolina Supreme Court "decline[d] to create" what it apparently saw as a novel distinction between fact and law. Pet. App. 18a. Recognition of the fundamental distinction between fact and law, however, is a critical element of this Court's Fourth Amendment jurisprudence. Ignoring the distinction disturbs that framework and raises important doctrinal concerns.

In *Brinegar* v. *United States*, 338 U.S. 160, 177 (1949), this Court explained that police may not stop "traveler[s] along the public highways" based on "whim, caprice, or mere suspicion." *Brinegar* applied a "probable cause" standard, under which the "'facts and circumstances within [a law enforcement official's]

knowledge'" must give rise to a particularized suspicion that "an offense has been or is being committed." *Id.* at 175, 176. Since *Brinegar*, the Court has clarified that the constitutional standard governing traffic stops is "reasonable suspicion," but the basic analysis is the same: "[B]rief investigative stops" are permitted when, based on the "'totality of the circumstances,'" a law enforcement official "has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Navarette* v. *California*, 134 S. Ct. 1683, 1687 (2014) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981)).[3]

Subsequent decisions clarify the two-part test used to determine whether reasonable suspicion (or probable cause) exists. The first element focuses on identifying the facts and circumstances known to the officer. *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996); *see also Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004) ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."). Once the relevant facts have been "'admitted or established,'" the second step involves weighing the facts against the pertinent legal standard, which is presumed to be "'undisputed,'" and determining whether those facts permitted law enforcement officers reasonably to suspect a violation. *Ornelas*, 517 U.S. at 696 (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982)).

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[3] The "only difference" between the probable cause and reasonable suspicion standards is "the level of suspicion that must be established." *Alabama* v. *White*, 496 U.S. 325, 330-331 (1990). Under the reasonable suspicion standard, the "likelihood" of criminal activity need not be as high as required for probable cause. *See United States* v. *Arvizu*, 534 U.S. 266, 274 (2002).

The legal standard against which the facts and circumstances are judged does not depend upon what was known to the officer. Instead, it is based on the "infraction itself." *Whren* v. *United States*, 517 U.S. 806, 818 (1996); *accord Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979) ("Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law."). The question is not whether the facts could have caused a law enforcement official to perceive a violation of a law he reasonably believed to exist; it is whether the facts could have given rise to reasonable suspicion of a violation of an actual law. *See*, *e.g.*, *Cortez*, 449 U.S. at 417 ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."); *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979) ("When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis [for a stop.]" (footnote omitted)).

To say, as the North Carolina Supreme Court has, that an officer may lawfully base a stop on his own mistaken interpretation of the law—no matter how well-intentioned or reasonable—offends this Court's precedents. That approach disregards *Whren*'s dictate that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U.S. at 813. It further contravenes this Court's rule that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Devenpeck*, 542 U.S. at 153. And it undercuts the Court's goal of avoiding a rule that would allow the

Fourth Amendment's protection to "vary from place to place and from time to time." *Whren*, 517 U.S. at 815.

The North Carolina Supreme Court's equation of fact and law also destroys the symmetry between the expectations placed on police officers and citizens. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). This rule is perhaps nowhere more rigorously enforced than in the context of traffic violations, as citizens are presumed to know and understand the laws in every jurisdiction in which they drive. Thus, the North Carolina Supreme Court's rule exempts police officers from the ambit of the presumption exactly when it is most likely to vindicate constitutional protections.

B. There Are Important Practical Distinctions Between Mistakes Of Fact And Mistakes Of Law

There are sound practical reasons for the different roles played by law and fact in determining whether reasonable suspicion existed for a stop. Courts' more flexible approach to mistakes of fact is grounded in several considerations: the ambiguous nature of the facts confronting law enforcement officials as they investigate suspected criminal activity; the uniqueness of the facts presented in any given case; the necessity for law enforcement officials to make factual judgments "on the fly"; and the relative expertise law enforcement officials possess in making such judgments. None of these considerations supports adopting a similarly flexible approach to mistakes of law.

First, the Fourth Amendment is not offended by a law enforcement official's reasonable mistake of fact

because factual scenarios are often "more or less ambiguous." *Brinegar*, 338 U.S. at 176. Officers must judge each such scenario based on "conclusions of probability." *Id.* In doing so, they aggregate countless factual observations, make credibility determinations, and assess the intricacies of human behavior.[4] That such probabilistic judgments will result in the investigation of some innocent behavior is unfortunate, but unavoidable. *See id.*; *see also Illinois* v. *Gates*, 462 U.S. 213, 232 (1983) (officers must "assess[] … probabilities in particular factual contexts"); *Cortez*, 449 U.S. at 418 ("Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.").

The interpretation of criminal statutes, by contrast, requires no such probabilistic assessment or subtle behavioral analysis. Rather, the law is considered to be "definite and knowable." *Cheek*, 498 U.S. at 199. Indeed, when a criminal law is not sufficiently definite, it is unconstitutional. *See generally Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

Second, reasonable mistakes of fact occur in part because of the uniqueness of the "myriad factual situations" in which they arise. *Cortez*, 449 U.S. at 417. The reasonableness of any particular search or seizure is

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[4] For example, in *Cortez*, officers discovered and then followed a series of footprints in the desert near the Mexican border to a highway, and then, layering factual observations, information from their own experience about the area, common-sense inferences about patterns of human behavior, and observations of passing vehicles, concluded that a particular van was likely transporting undocumented aliens. 449 U.S. at 419-421.

"completely dependent on the specific and usually unique circumstances presented by each case." *United States* v. *Chanthasouxat*, 342 F.3d 1271, 1277 (11th Cir. 2003); *see also Terry* v. *Ohio*, 392 U.S. 1, 15 (1968) ("[n]o judicial opinion can comprehend the protean variety of the street encounter"). In light of the endless variability of factual scenarios, it is unrealistic to expect officers to assess the facts accurately in every case. *See Illinois* v. *Rodriguez*, 497 U.S. 177, 185-186 (1990).

In contrast, the meaning of a criminal statute does not change depending on the facts to which it is applied. Thus, while different officers may reasonably draw different inferences in various factual scenarios, officers must apply the same understanding of the law to the facts they encounter. *See United States* v. *Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) ("failure to understand the law by the very person charged with enforcing it is *not* objectively reasonable"); *United States* v. *Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (police should "properly understand the law that they are entrusted to enforce and obey"). To be sure, circumstances will occasionally arise that test an officer's understanding of a statute, but the correct course in that situation is for the officer to clarify that understanding, not to excuse himself from the duty to know the law he is enforcing. *See United States* v. *Nicholson*, 721 F.3d 1236, 1243 (10th Cir. 2013) (stating that "one would hope that a law enforcement official would clarify his understanding of any unclear provision before bringing the full force of the law upon an unsuspecting citizen").

Third, reasonable mistakes of fact are a consequence of the reality that officers are frequently required to make factual determinations under significant time pressure. As this Court has explained in applying the Fourth Amendment reasonableness standard to a

police officer's use of force, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989). Similarly, in the case of traffic stops, officers often must make factual determinations in a split second as cars speed past. *See, e.g.*, *United States* v. *Cashman*, 216 F.3d 582, 586-587 (7th Cir. 2000) (observing cracked windshield in passing car).

Officers also often face imminent danger in the field—danger they do not face at the station house or in the courthouse. *See Terry*, 392 U.S. at 28 (officer "in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger"). Demanding factual perfection in such circumstances is not merely unrealistic, but potentially dangerous.

In contrast, officers do not (or at least should not) arrive at legal conclusions "on the scene." *Graham*, 490 U.S. at 396. Rather, it is presumed that officers will have an opportunity to study the law in advance of enforcing it and will do so. *See Nicholson*, 721 F.3d at 1244 (officer could have "learn[ed] a definitive meaning [of the law] before acting"). Legal interpretations, unlike factual conclusions, are a function of diligent prior study and training—not split-second decision-making.

Fourth, and finally, law enforcement officials are permitted to proceed based on reasonable, probabilistic factual judgments because they are presumed to have special expertise in formulating such judgments. When an officer draws deductions from facts that might be "meaningless to the untrained," he is engaged in precisely "the kind of police work often suggested by judg-

es and scholars as examples of appropriate and reasonable means of law enforcement." *Cortez*, 449 U.S. at 419.

This rationale does not extend to legal judgments. Indeed, the North Carolina Supreme Court appears to have reached its decision on precisely the opposite ground, noting that officers are "'not legal technicians,'" Pet. App. 16a (quoting *Ornelas*, 517 U.S. at 695), *i.e.*, *not* experts on the law. Under its approach, police officers would be permitted to make reasonable mistakes of fact because they, and not the courts, are experts on the facts, and would be permitted to make reasonable mistakes of law because they, unlike courts, are *not* experts on the law—a nonsensical result.

II. THE NORTH CAROLINA SUPREME COURT'S RULE WOULD HAVE NEGATIVE CONSEQUENCES FOR BOTH INDIVIDUAL CITIZENS AND LAW ENFORCEMENT

This Court has recognized that "determinations of 'reasonableness' under the Fourth Amendment must take account of … practical realities." *Wyoming* v. *Houghton*, 526 U.S. 295, 306 (1999). If permitted to stand, the rule adopted by the North Carolina Supreme Court will have negative practical consequences for individual citizens charged with obeying the law and for government officials charged with enforcing it.

A. The North Carolina Supreme Court's Rule Will Have Negative Consequences For Individual Liberty

The North Carolina Supreme Court's rule in practice will enable an expansive new category of government intrusions. If the Fourth Amendment inquiry hinges on the reasonableness of police officers' beliefs about the law, such intrusions may be justified based on

all manner of innocent conduct, so long as the state raises, post-hoc, a non-frivolous question of statutory interpretation.

This concern is particularly pressing in the context in which the rule arises: traffic stops, which already affect millions of Americans every year. In 2011, more than 20 million Americans (about 10 percent of all drivers over the age of 16) were stopped by law enforcement while driving. Langton & Durose, *Police Behavior during Traffic and Street Stops, 2011* at 3 (Sept. 2013), *available at* http://www.bjs.gov/content/pub/pdf/pbtss11.pdf. Such encounters occur against a backdrop of extensive legal rules. As this Court has noted, motorists are subject to a "multitude of … traffic and equipment regulations." *Prouse*, 440 U.S.at 661; *see also Nicholson*, 721 F.3d at 1243 (noting the "vast number of local, state, and federal laws [that can] trigger criminal liability"). The North Carolina Supreme Court's rule threatens to complicate the backdrop still further, and increase the already vast number of traffic stops, by permitting motorists to be stopped based not only on unlawful conduct, but also based on *lawful* conduct that might reasonably be thought to violate any of these multitudinous regulations.

Case law reveals a wide variety of lawful conduct that has been wrongly (though perhaps reasonably) determined to violate such regulations, serving as the basis for a traffic stop. Examples include the lawful use of a turn signal, *United States* v. *McDonald*, 453 F.3d 958, 960-962 (7th Cir. 2006); *United States* v. *Miller*, 146 F.3d 274, 277-278 (5th Cir. 1998), the lawful use of headlamps during the daytime, *United States* v. *DeGasso*, 369 F.3d 1139, 1143-1144 (10th Cir. 2004), a lawful turn or U-turn, *Nicholson*, 721 F.3d at 1240; *State* v. *Louwrens*, 792 N.W.2d 649, 650 (Iowa 2010), the lawful

placement of a rearview mirror, *see Chanthasouxat*, 342 F.3d at 1278, the lawful placement of a license plate or registration sticker, *United States* v. *Southerland*, 486 F.3d 1355, 1359 (D.C. Cir. 2007); *Lopez-Soto*, 205 F.3d at 1106-1107, and the lawful use of mud flaps, *Tibbetts*, 396 F.3d at 1138 & n.4. Under the North Carolina Supreme Court's approach, any of these perfectly legal activities could support a finding of reasonable suspicion for a stop.

Such stops not only constitute a "physical and psychological intrusion," *Prouse*, 440 U.S. at 657, but also commonly lead (as in the case at bar) to other, more serious consequences, *e.g.*, searches and seizures. Thus, expanding the power of the state to conduct traffic stops beyond the boundaries established under the majority approach (*i.e.*, based on reasonable suspicion of a violation of an actual law) will enable a new class of liberty-burdening intrusions, none of them justified.

Moreover, the North Carolina Supreme Court's rule has the potential to reach beyond vehicle stops. In principle, it can apply in *all* cases where reasonable suspicion is required. *Cf. Whren*, 517 U.S. at 818-819 (refusing to create a Fourth Amendment rule specific to traffic stops). Courts also might apply the rule in cases involving far more profound state intrusions (*e.g.*, arrests) based upon legally incorrect determinations of probable cause. There is no principled distinction between the structure of the reasonable suspicion and probable cause standards: They simply require different levels of proof. *See supra* n.3. Thus, if reasonable suspicion of conduct that is not actually unlawful could justify a vehicle stop, then probable cause to believe the same lawful conduct is occurring arguably would too—and indeed, courts have already adopted this view. *See, e.g.*, *United States* v. *Washington*, 455 F.3d

824, 827 (8th Cir. 2006) ("In our circuit, if an officer makes a traffic stop based on a mistake of law, the legal determination of whether probable cause or reasonable suspicion existed for the stop is judged by whether the mistake of law was an 'objectively reasonable one.'"). Under the North Carolina Supreme Court's rule, objectively innocent conduct may lead not only to vehicle stops, but to searches, arrests, and interrogations—all arising from conduct not prohibited under any applicable law.

Wherever mistakes of law are tolerated under the Fourth Amendment, the result will be a heavy burden on private citizens' liberty. Citizens who wish to avoid the intrusion of police searches or seizures will be compelled not only to obey the law, and not only to avoid arousing suspicion of a violation through conduct that appears unlawful, but also to avoid arousing suspicion of any activity that could reasonably be *construed* as illegal. The task will be a difficult one because mistakes of law arguably are at their most "reasonable" in the context of low-level, *malum prohibitum* offenses (*e.g.*, motor vehicle regulations) as to which "the wrongfulness of behavior is not self-evident, [and] the only recourse for citizens is to generally familiarize themselves with the … codes." Logan, *Police Mistakes of Law*, 61 Emory L.J. 69, 91-92 (2011). Permitting mistakes of law by police officers, as the North Carolina Supreme Court has done, "neutralizes even this basic planning possibility." *Id.* at 92.

To be sure, the Fourth Amendment contemplates that citizens sometimes will bear the burden of government intrusions based on reasonable suspicion (or probable cause) even though no crime has occurred. *See, e.g.*, *Terry*, 392 U.S. at 21 (balancing the government's "'need to search'" against the intrusion on the

individual); *see also Illinois* v. *Wardlow*, 528 U.S. 119, 126 (2000). The Fourth Amendment allows such intrusions based on reasonable suspicion, even where such suspicion is based on a mistake of fact, because the burden such intrusions impose on citizens is deemed justified as a means of avoiding the social cost of unlawful conduct. But *lawful* conduct by definition imposes no such social cost, and no societal interest is served by preventing citizens from engaging in activity that neither actually nor apparently violates any law.

Citizens who wish to engage in activities that are highly regulated or otherwise likely to attract police attention may face state intrusion even if they carefully research when, where, and how they are permitted to conduct their desired activity. Even more casual activities, though legal, may form the basis for stops, searches, and seizures:

- A man is standing on a public sidewalk and "leaning against a wall" of a building. An officer mistakenly believes that leaning against the wall violates an anti-loitering ordinance, never before interpreted by a court. In fact the ordinance bars only the specific acts identified in a sign on the premises, such as sleeping in the building's doorway. The man is stopped and searched. *United States* v. *Hammond*, 2010 WL 1998691, at *1-4 (N.D. Cal. May 18, 2010).

- A man is lawfully holding an open, partially full beer bottle and walking from his house to a trash can in order to throw the bottle out. Two officers incorrectly believe that the city's open container law prohibits "carrying open alcoholic beverages in public"; it does not. The man is

stopped and searched. *United States* v. *Tyler*, 512 F.3d 405, 407-408, 410-411 (7th Cir. 2008).

- A man is lawfully walking down a street that has no sidewalk. An officer mistakenly believes that walking in the street violates an ordinance prohibiting jaywalking. The man is stopped and searched. *United States* v. *Davis*, 692 F. Supp. 2d 594, 596-597, 600-601 (E.D. Va. 2010).

Under the North Carolina Supreme Court's rule, *none* of these scenarios violates the Fourth Amendment. The mistake-of-law rule will diminish the Fourth Amendment, allowing state intrusions upon private citizens in a broad range of cases where citizens are suspected of conduct erroneously believed to be criminal.[5]

Respondent has suggested that the North Carolina Supreme Court's rule does not apply where an officer's understanding of the substantive law is contradicted by the "plain and easily understood language of a statute" or the statute's meaning has been "decisively address[ed]" by the courts. Opp. 19. Even so construed, however, the rule extends to a wide array of cases: all those where objectively reasonable legal arguments exist regarding the proper interpretation of a statute. Petitioner's case illustrates why. The brake light statue at issue here was neither insolubly ambiguous nor unconstitutionally vague; rather its meaning was held to be clear as a matter of plain text. Pet. App. 34a ("[T]he plain language of subsection (g) requires only one stop lamp on a vehicle."). Like countless state and

[5] The impact of a rule condoning mistakes of law will be greater in light of the fact that mistakes of law are often widely repeated. In *Chanthasouxat*, for example, an officer issued "over 100 tickets" for a non-existent traffic offense. 842 F.3d at 1278.

federal criminal statutes, and presumably most motor vehicle code provisions, the brake light statute simply had not been interpreted by an appellate court. A definition of ambiguity that encompasses the brake light statute here will encompass any statute as to which interpretive questions might remain outstanding.

As Justice Story explained, "[t]here is scarcely any law which does not admit of some ingenious doubt." *Barlow* v. *United States*, 32 U.S. (7 Pet.) 404, 411 (1833). Or, as Justice Frankfurter put it: "Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947). A rule that "only" applies where there are objectively reasonable arguments about statutory interpretation is a rule that will apply very frequently and will as a consequence expand dramatically the state's police power at the expense of citizens' liberty.

The North Carolina Supreme Court's rule works no better if confined to only truly ambiguous statutes. *First*, as just explained, that characterization does not match the facts of this case, where the "stop lamp" statute's meaning was plain—it just required a technical reading of the statute. *Second*, and in any event, requiring some unspecified degree of ambiguity would do little to cabin a mistake-of-law rule because it would still allow (and encourage) any and all mistake-of-law arguments, forcing judges to make a standardless determination about how much ambiguity is required to permit an objectively reasonable legal mistake in a given case. *Third*, the idea that a mistake-of-law rule only applies to the most ambiguous criminal statutes effec-

tively sanctions unconstitutional vagueness. *See Papachristou*, 405 U.S. at 162.[6]

B. The North Carolina Supreme Court's Rule Will Undermine Law Enforcement

The substantial burden imposed on individuals under the North Carolina Supreme Court's rule will not be justified by any benefit to law enforcement. The majority approach imposes the same straightforward and time-honored obligation on police officers and private citizens alike: knowledge of and obedience to the law. In contrast, the North Carolina Supreme Court's rule, by allowing state intrusions that have no basis in law, undermines the legitimacy of law enforcement and threatens officer safety.

In rejecting the majority approach, the North Carolina Supreme Court asserted that expecting law enforcement officers to know the law amounts to requiring "omniscien[ce]." Pet. App. 16a. It would indeed require omniscience to presume that law enforcement officials have perfect knowledge of the *facts*, which is why state intrusions based on reasonable mistakes of fact may occur without violating the Fourth Amendment. But presuming knowledge of the law requires

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[6] In analogous circumstances, the principle of lenity requires that criminal prohibitions whose meaning is uncertain be construed in favor of individual defendants. *See United States* v. *Bass*, 404 U.S. 336, 347-348 (1971). Under the North Carolina Supreme Court's rule, by contrast, ambiguity in a criminal statute may be used *against* an individual defendant—as occurred in the case at bar. *Cf. Chanthasouxat*, 342 F.3d at 1278-1279 (rejecting mistake-of-law rule: "Even if the statutes were ambiguous, that ambiguity could not help the government's case. This is because the government asks us to use the alleged ambiguity of a statute *against* a defendant.").

only that a basic presumption applicable to all citizens apply equally to those who enforce the law.

The majority approach also creates positive incentives that are consistent with that presumption. "Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Davis* v. *United States*, 131 S. Ct. 2419, 2429 (2011). By making clear to officers that the Fourth Amendment protects individuals from government intrusions not actually authorized by the law, the majority approach provides incentives for police officers to achieve and maintain familiarity with the law, and encourages those who train and otherwise inform police officers of legal requirements to convey information that is clear, correct, and current. It also eliminates any incentive for police officers and departments to exploit circumstances in which the correct interpretation of a law is clear but subject to reasonable misinterpretations. *Cf. Brendlin* v. *California*, 551 U.S. 249, 263 (2007) (rejecting rule that would "invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal"); *United States* v. *Johnson*, 457 U.S. 537, 561 (1982) (refusing a rule that would "'encourage police … to adopt a let's-wait-until-it's-decided approach.'" (quoting *Desist* v. *United States*, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting))).

In contrast, the North Carolina Supreme Court's rule could have negative consequences for law enforcement, undermining law enforcement legitimacy and potentially endangering officer safety. *First*, the rule diminishes incentives to ensure that law enforcement officials receive thorough and up-to-date training in the law. *See Nicholson*, 721 F.3d at 1242 ("Permit-

ting officers to excuse their mistakes of substantive law as 'reasonable' 'would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey.'" (quoting *Lopez-Soto*, 205 F.3d at 1106)). *Second*, the rule may damage the public perception of law enforcement's knowledge and authority, discouraging citizens from obeying or cooperating with police and alienating law enforcement officials from those they serve. *See* Bayley, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 Criminology & Pub. Policy 133, 141-142 (2006) ("[V]iolating the rule-of-law lessens the willingness of the public to assist the police in carrying out their assigned role."); Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 323 (2003) ("Evidence suggests that a core element to the creation and maintenance of [appropriate] social values is the judgment that legal authorities exercise their authority following fair procedures."). These negative consequences may even impact officer safety, by encouraging citizens to dispute the law with officers who are no longer presumed to understand it. *Cf. Bad Elk* v. *United States*, 177 U.S. 529, 537-538 (1900) (describing historical common law right to resist unlawful arrest).

Citizens are entitled to trust that government intrusions upon their privacy are grounded in the law. Such an intrusion, though based on a mistake of fact, may be justified based on law enforcement officials' need to investigate crime in an uncertain and rapidly changing environment. No similar rationale supports a lenient approach to legal errors. The North Carolina Supreme Court's rule ignores the important distinction between fact and law, sanctioning a wide range of im-

permissible and harmful intrusions. This Court should reject that approach.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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