

IN THE SUPREME COURT OF THE STATE OF
VERMONT

DOCKET NO. 2017-284

GREGORY ZULLO
Appellant

v.

THE STATE OF VERMONT
Appellee

APPEAL FROM RUTLAND SUPERIOR
COURT DOCKET NO. 555-9-14 Rdev

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS ET AL. AS AMICI CURIAE IN SUPPORT
OF PLAINTIFF-APPELLANT

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ISSUE FOR REVIEW

Amici Curiae will address the significant role that race plays in influencing officers' perception of criminal behavior and the disparate impacts of policing on communities of color in Vermont. The severity of those impacts and the mechanisms by which racial bias affects officers' behavior are critical factors that this Court should take into consideration in determining the scope of Article Eleven and its application to the facts here.

INTEREST OF AMICI

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.¹ NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to

¹ No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Migrant Justice is a nonprofit human rights organization based in Burlington, VT, founded and led by immigrant farmworkers. Migrant Justice has organized the farmworker community and allies to advance and defend policies and programs that protect labor, housing, and civil rights. The organization is a named stakeholder in Vermont statutes requiring law enforcement agencies to create and adopt fair and impartial policing policies, and Migrant Justice has been integrally involved in the drafting of such policies. This case is relevant to the organization because of the discriminatory treatment that immigrant farmworkers face from law enforcement officers in the State.

Vermonters for Criminal Justice Reform works for a more effective and restorative criminal justice system in Vermont. Its vision is a criminal justice system that values the humanity in all people and uses incarceration as a last resort for public safety.

The Root Social Justice Center provides a physically and financially accessible space in Southern Vermont for social justice groups to meet and is a hub for racial justice organizing. The Root prioritizes People of Color leadership and shifting resources to People of Color-led racial justice work. It operates collectively to sustain a space that strives to be free of oppression, harm, and

injustice.

The Peace & Justice Center is a Vermont-based nonprofit membership organization. Its mission is to create a just and peaceful world. To this end, it works on the interconnected issues of economic and racial justice, peace, and human rights through education, advocacy, training, nonviolent activism, and community organizing.

Steffen Gillom is Chair of the Windham County National Association for the Advancement of Colored People (NAACP) Organizing Committee. Tabitha Pohl-Moore is a resident of Wallington and is President of the Rutland Area NAACP Branch. The mission of the NAACP is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination.

Justice For All is a Vermont-based racial justice nonprofit organization that identifies and dismantles institutionalized racism and facilitates healing in its communities.

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case as stated in the brief of Appellant, Mr. Gregory Zullo. As the lower court described, in the afternoon of March 6, 2014, former Vermont State Trooper Lewis Hatch pulled over Mr. Zullo, a young black man, allegedly because snow obscured the registration validation sticker on Mr. Zullo's rear license plate. *See* Ruling on Mot. Summ. J. at 1-2. The law Trooper Hatch relied on did not on its face apply to the validation stickers on

license plates, however. *See id.* at 15.

After pulling over Mr. Zullo, Trooper Hatch approached the vehicle. *Id.* at 2. Trooper Hatch claimed that he smelled “the faint odor of burnt marijuana,” and he ordered Mr. Zullo to get out of his car. *Id.* After a pat-down revealed no evidence, Trooper Hatch repeatedly asked Mr. Zullo to consent to a search of his vehicle. *Id.* at 2-3. When Mr. Zullo refused to consent, Trooper Hatch towed Mr. Zullo’s car back to the police barracks. *Id.* at 3. Mr. Zullo hitchhiked and walked the eight miles back to his home. *Id.* at 3; Compl. ¶ 1. Meanwhile, after searching the car, the officers found no items for which they could charge Mr. Zullo. *See* Ruling on Mot. Summ. J. at 3. Mr. Zullo paid the towing fee and reclaimed the car, but not before losing use of the car for the day. *Id.*

ARGUMENT

INTRODUCTION

The Court is tasked in this case with deciding whether Article Eleven of the Vermont Constitution grants police officers sweeping discretion to seize and search the people of Vermont, even in the face of officers’ incorrect understandings of the law and bare assertions of facts insufficient to support searches and seizures in Vermont. “Article Eleven plays a crucial role in th[e] plan” that “entrust[s] the judiciary with the primary responsibility in the preservation of th[e] constitutional order.” *State v. Wood*, 148 Vt. 479, 487–88, 536 A.2d 902, 907-908 (1987). That Article “is the authority upon which the judiciary acts to protect the people from unlawful searches and seizures, which are the means historically relied upon by a

government seeking to impose its will upon a reluctant people.” *Id.* at 488. In fulfilling its judicial role to protect the people from unlawful searches and seizures, this Court should bear in mind the systemic and pervasive role that race plays in the criminal justice system and in police officers’ perceptions of criminality.

Race-based inequities, which are a well-documented feature of criminal justice systems across the country, are also an entrenched part of Vermont law enforcement. Despite having been at the forefront of many movements for equality, Vermont has some of the worst rates of racial disparities in law enforcement in the Nation. The Vermont Legislature has recognized the significance of this problem. In fact, the Legislature has mandated the collection of data on these issues, and studies of that data have clearly demonstrated racially-discriminatory enforcement in the context of traffic stops and searches.

While no one factor can fully explain these disparities, decades of social science research has underscored the significant role of implicit racial bias. Implicit bias among law enforcement officers, even those that harbor no explicit racial prejudice, results in those officers disproportionately targeting and focusing on racial minorities. The research also explains how implicit racial bias impacts officers’ ability to accurately perceive and identify dangerous and criminal behavior. A legal rule giving increased discretion to police officers to conduct searches and seizures, and allowing officers to base such seizures on erroneous understandings of the law, would exacerbate already unfair and disproportionate impacts on communities of color. Such targeting is not only ineffective policing, but it

fundamentally undermines confidence in our legal system and erodes the protections guaranteed by Article Eleven of the Vermont Constitution.

I. **Expanding police discretion would exacerbate the racial inequities entrenched in Vermont’s criminal justice system in general, and its traffic enforcement practices in particular**

That our Nation’s criminal justice system is plagued by systemic racial bias and discrimination is a well-documented and increasingly-recognized reality. *See* Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 820-21 (2017) (“A large body of research finds that, for similar offenses, members of the African American and Hispanic communities are more likely to be stopped, searched, arrested, convicted, and sentenced to harsher penalties.”). As a study of racial disparities in Vermont’s traffic enforcement notes, “Vermont is perceived to be a political outlier in the United States” as a state that has been at the forefront of movements for equality and progressive social policies. Nancy Brooks & Stephanie Seguino, *Driving While Black and Brown in Vermont* at iii (January 9, 2017). Many thus assume that the systemic racial bias that infects the criminal justice system elsewhere in the country would be no problem here. *Id.* That, unfortunately, is far from the truth. In fact, across many metrics, Vermont has some of the *highest* rates in the country of racial inequity in the criminal justice system. *See, e.g.*, Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 5-6 (The Sentencing Project, 2016) (Vermont has the *highest* rate of adult black male incarceration in the

Nation, the third-highest black incarceration rate, and a rate of black imprisonment that is more than *ten* times the white imprisonment rate).

Directly relevant to this case, a study of legislatively-mandated² data collected from law enforcement demonstrates that Mr. Zullo's story is but one example of a striking pattern of racially disparate traffic stops and searches occurring all over Vermont. In Vermont, black and Hispanic drivers are subject to higher stop rates relative to their percentage of the driving population than either white or Asian drivers. *Driving While Black and Brown in Vermont* at iv, 3. Statewide, black drivers are about four times more likely, and Hispanic drivers about three times more likely, than white drivers to be searched after a stop. *Id.* at iv; *see also id.* at 11. This is despite the fact that “Black and Hispanic drivers are *less* likely than White or Asian drivers to be found with contraband that leads to a citation or an arrest.” *Id.*; *see also id.* at 13-14.

Notably, the study in question focused on discretionary stops, rather than stops generated via warrant-based arrests or by third-party information (e.g., a 911 call or a “Be on the Lookout” Alert from a law enforcement agency). *Driving While Black and Brown in Vermont* at 2; *see also* Nancy Brooks & Stephanie Seguíno, *Racial/Ethnic Disparities in Traffic Stops: Analysis of Vermont State Police Data, 2010-15* (June 2016) at 3 n.3. The conclusions thus indicate the disparate results that occur when “police were in a position to make independent decisions

² Vt. Stat. Ann. tit. 20 § 2366(e)(1) (West 2017) (requiring all Vermont law enforcement agencies to collect roadside stop data that includes, inter alia, the race of the driver, the reason for the stop, and the outcome of the stop).

concerning whom to stop, search, ticket, or arrest.” *Driving While Black and Brown in Vermont* at 2. In other words, they occur when officers exercise their discretion – the same discretion that Trooper Hatch exercised here. Moreover, the disparate impact of traffic stops and searches on black and Hispanic drivers is not the result of a few officers’ actions, but rather points to a pervasive pattern of discriminatory behavior in Vermont law enforcement. *Id.* at v, 21.

These statewide racial disparities in law enforcement traffic stops also are evidenced in stops by the Vermont State Police. Two separate studies of Vermont State Police traffic stop data over a five-year period (2010-2015) found significant racial disparities in stop and search rates. Both studies documented that black drivers were stopped at higher rates given their share of the population than were white drivers. *See Racial/Ethnic Disparities in Traffic Stops: Analysis of Vermont State Police Data, 2010-15* at 5-6; Institute on Race and Justice, *Vermont State Police: An Examination of Traffic Stop Data, July 1, 2010-December 31, 2015* at 9 (Northeastern Univ. May 2016). More significantly, both studies also concluded that Vermont State Police officers were more likely to search black and Hispanic drivers than white drivers, despite the fact that those drivers of color were *less* likely to be found with contraband than white drivers. *See Racial/Ethnic Disparities in Traffic Stops: Analysis of Vermont State Police Data, 2010-15* at 10-12 (“What is notable then is that the hit rates [percentage of searches in which police find contraband] are lowest for the two racial/ethnic groups with the highest search rates.”); Institute on Race and Justice at 23, 28 (showing that black drivers

were five times more likely to be searched and Hispanic drivers four times more likely to be searched than white drivers, despite the former being less likely to be found with contraband). As one study concludes, these results indicate that Vermont State Police officers systematically over-search black and Hispanic drivers. *Racial/Ethnic Disparities in Traffic Stops: Analysis of Vermont State Police Data, 2010-15* at 12. Not only are minority drivers disproportionately searched, incriminating evidence is less likely to be found in those searches.

The data paints a clear picture: in exercising their discretion to stop and search, Vermont law enforcement officers disproportionately target black and brown individuals. A legal rule further expanding officers' already-significant discretion to stop and search would only exacerbate these practices and undermine the protections guaranteed by Article Eleven.

II. Implicit racial bias impacts police officer behavior and perceptions of what constitutes criminal behavior

Decades of social science research demonstrate that one of the significant factors behind the racial disparities discussed above is “unconscious,” or “implicit,” bias. Implicit bias fundamentally distorts officers' perceptions, making them more likely to see black and brown individuals as engaging in criminal behavior. This Court should thus be particularly wary of a rule that would expand officer discretion to include mistakes concerning what qualifies as unlawful conduct, since implicit bias directly affects that analysis.

As social psychology research has shown, implicit bias grows out of the human tendency to categorize objects and individuals. Specifically, we tend to

categorize people into groups and attribute group stereotypes to those individuals. *See* Fair & Impartial Policing, LLC, *Fair and Impartial Policing*, at 1 (January 2017). Unfortunately, the result is that cultural stereotypes, notably those associating people of color with criminality, fundamentally affect individuals' perceptions and actions. *See id.* at 1-2. As one study explained over a decade ago, social psychologists have documented “[t]he stereotype of Black Americans as violent and criminal . . . for almost 60 years.” Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 6, at 876 (APA, 2004); *see also* Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in *Racial Divide: Racial and Ethnic Bias in the Criminal Justice System* 39, 41-43 (2008) (discussing and documenting the “considerable and growing literature” on implicit bias). That association of black people with criminality is “consistent and frequent,” despite seemingly being automatic and unintentional. Eberhardt, at 876.

The consequences of such “automatic stereotyping” are dramatic. The psychological study found that, regardless of their conscious racial attitudes, individuals' associations between black people and criminality actually affect their visual perceptions, leading them to focus on black faces in the criminal context and vice-versa. *Id.* at 877. As the study concluded, individuals saw more criminality and evidence of crime in a given time period when exposed to a black face than a white one. *See id.* at 881 (“In comparison with White faces, Black faces triggered a form of racialized seeing that facilitated the processing of crime-relevant objects,

regardless of individual differences in racial attitudes.”). Conversely, people primed to think about crime and criminality were more likely to be drawn to and pay attention to black faces, especially those of black men, than white ones. *Id.* at 882; *see also id.* at 883 (“Not only are Blacks thought of as criminal, but also crime is thought of as Black.”). Notably, the study demonstrated that police officers are no exception to this pattern. *Id.* at 887-88. In fact, when officers were explicitly directed to identify who “looked criminal,” they picked more black faces than white ones. *Id.* at 888-89.

Beyond being well-documented in decades of social science literature, this connection between implicit bias and racial disparities in policing is well-recognized in Vermont-specific studies and reports. The aforementioned statewide study of racial disparities in traffic stop data explained that “[n]egative stereotypes and implicit bias against Blacks and Hispanics are likely factors that . . . contribute to [racial] disparities [in traffic stops and searches].” *Driving While Black and Brown in Vermont* at 25. Likewise, a report by the Vermont Attorney General’s Working Group recognized the key role that implicit bias plays in causing racially-disparate traffic stops. *See Attorney General’s Working Group on Law Enforcement Community Interaction, Report and Recommendations* 5, 8 (Dec. 2016). As that report noted, the racial disparities in Vermont’s traffic-stop data “illustrate[] the need for training that addresses implicit bias. The data will also serve as a useful tool for that training and helping officers understand how implicit bias affects them.” *Id.* at 8.

The Vermont Legislature has even established a panel to “review and provide recommendations to address systemic racial disparities in statewide systems of criminal and juvenile justice.” Vt. Stat. Ann. tit. 3 § 168(f) (West 2017). As part of those duties, the Legislature required the panel to provide recommendations based on “the latest social science research and best practices in law enforcement and criminal and juvenile justice . . . to recognize and address implicit bias.” *Id.* § 168(f)(2).

Indeed, these conclusions about the effects of implicit bias in Vermont mirror national recognition of the significant role such bias plays in shaping police interactions with communities of color. *See, e.g.*, National Initiative for Building Community Trust and Justice, *Implicit Bias* (Office of Community Oriented Policing Services, U.S. Department of Justice, 2015). A publication by the United States Department of Justice, for example, explained that “implicit bias has been shown to have significant influence in the outcomes of interactions between police and citizens.” *Id.* at 1. Specifically, implicit bias “can distort one’s perception and subsequent treatment . . . of a given person or group. In policing, this has resulted in widespread practices that focus undeserved suspicion on some groups and presume other groups innocent.” *Id.*

The powerful role that race plays in law enforcement should further caution this Court against expanding police discretion to allow officers to stop and search individuals when there is a lack of evidence of unlawful behavior. Beyond this serious general concern, however, lies a more specific one: the mechanisms by

which implicit bias manifests itself should particularly counsel against adopting a rule that would allow an officer's mistake of law to justify a seizure or search. The research on implicit bias makes it clear that such bias distorts the way officers see and process behavior, making them more likely to erroneously perceive the behavior of black and brown individuals as criminal. That bias thus goes to the heart of whether Article Eleven allows a reasonable mistake of law to justify a search and seizure. Put simply, implicit bias results in officers being more likely to mistake the behavior of black and brown individuals as violations of the law. To bless such mistakes as providing a sufficient basis for a search and seizure is to facilitate the erosion of the rights guaranteed by Article Eleven.

CONCLUSION

This Court has a duty “to give effect to the design of Article Eleven and decline to follow parallel federal law . . . which tends to derogate the central role of the judiciary in Article Eleven jurisprudence.” *State v. Berard*, 154 Vt. 306, 310, 576 A.2d 118, 120 (1990). To fulfill that charge, the Court must take into account the realities of law enforcement in Vermont. Given the well-documented impacts of implicit racial bias in the State, a rule further expanding officer discretion to stop and search Vermonters, and especially allowing officers to do so based on mistaken interpretations of the law, would undercut the protections guaranteed by Article Eleven and the role of courts in securing those protections.

DATED at Burlington, Vermont, this 12th day of February, 2018.

Respectfully submitted,


A handwritten signature in black ink, appearing to read "Jeff Dickson", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

I, Jeffrey T. Dickson, certify that the BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ET AL. AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT complies with the word count limit in V.R.A.P. 32(a)(7)(C). According to the Microsoft Word processing software used to prepare this brief, the text of this brief contains 3,333 words.



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