No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JEFFREY T. GREEN
Co-Chair, Amicus Committee,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street, NW
12th Floor
Washington, DC 20036

NOAH A. LEVINE
Counsel of Record
ADAM P. ROMERO
THAILA K. SUNDARESAN
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8875
noah.levine@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST AND IDENTITY OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE NORTH CAROLINA SUPREME COURT'S RULE IS CONTRARY TO THE PRINCIPLES UNDERLYING THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE 3

II. THE NORTH CAROLINA SUPREME COURT'S RULE WILL CONDONE A BROAD SWATH OF INVESTIGATORY STOPS THAT OTHERWISE LACK ANY LEGAL JUSTIFICATION, AND PROVIDE IMPROPER INCENTIVES TO LAW ENFORCEMENT 11

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Page(s)

Brendlin v. *California*, 551 U.S. 249 (2007) 16

Brinegar v. *United States*, 338 U.S. 160 (1949) 9

Cheek v. *United States*, 498 U.S. 192 (1991) 11

Delaware v. *Prouse*, 440 U.S. 648 (1979) 4, 5, 6

Hilton v. *State*, 961 So. 2d 284 (Fla. 2007) 13

Illinois v. *Rodriguez*, 497 U.S. 177 (1990) 9

James v. *Illinois*, 493 U.S. 307 (1990) 16

Missouri v. *McNeely*, 133 S. Ct. 1552 (2013) 16

Olmstead v. *United States*, 277 U.S. 438 (1928) 11

Ornelas v. *United States*, 517 U.S. 690 (1996) ... 4, 7, 8, 10

People v. *Jones*, ___ N.E.2d ___, 2013 WL 6062086 (N.Y. 2013) 14

People v. *Williams*, 305 P.3d 1241 (Cal. 2013) 14

Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) 7

State v. *Anderson*, 683 N.W.2d 818 (Minn. 2004) 13

State v. *Lacasella*, 60 P.3d 975 (Mont. 2002) 13

State v. *Louwrens*, 792 N.W.2d 649 (Iowa 2010) 14

State v. *Webster*, 60 A.3d 259 (Conn. 2013) 14

Terry v. *Ohio*, 392 U.S. 1 (1967) 4, 5

Travis v. *State*, 959 S.W.2d 32 (Ark. 1998) 15

Union Pacific Railway Co. v. *Botsford*, 141 U.S. 250 (1891) 4

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Chanthasouxat*, 342 F.3d 1271 (11th Cir. 2003).. 14

United States v. *Cortez*, 449 U.S. 411 (1981) 4, 15

United States v. *Johnson*, 457 U.S. 537 (1982)............. 17

United States v. *Jones*, 132 S. Ct. 945 (2012)................ 10

United States v. *King*, 244 F.3d 736 (9th Cir. 2001) 13

United States v. *Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000).. 14, 16

United States v. *Martin*, 411 F.3d 998 (8th Cir. 2005) 13, 15

United States v. *McDonald*, 453 F.3d 958 (7th Cir. 2006)... 14

United States v. *Nicholson*, 721 F.3d 1236 (10th Cir. 2013)... 8, 13

United States v. *Washington*, 455 F.3d 824 (8th Cir. 2006)... 9

Whren v. *United States*, 517 U.S. 806 (1996) 6, 7, 8, 9, 10

OTHER AUTHORITIES

United States Department of Justice, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2008* (2011), *available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf. 16

TABLE OF AUTHORITIES—Continued

Page(s)

United States Department of Justice, Bureau of Justice Statistics, *Police Behavior During Traffic and Street Stops, 2011* (2013), *available at* http://www.bjs.gov/content/pub/pdf/pbtss11.pdf. 16

IN THE

Supreme Court of the United States

No. 13-604

NICHOLAS BRADY HEIEN,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST AND IDENTITY OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of ap-

[1] Consent of the parties to the filing of this brief has been filed with the Court. This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than amicus and its counsel contributed monetarily to its preparation or submission.

proximately 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 curiae 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 curiae in cases involving the Fourth Amendment, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests.

INTRODUCTION AND SUMMARY OF ARGUMENT

NACDL agrees with petitioner that certiorari is warranted here based on the entrenched, irreconcilable division among the federal courts of appeals and state courts of last resort on the question of whether a law enforcement officer's reasonable mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify an investigatory stop. *See* Pet. 7-12. This important issue warrants this Court's review because it is critical to the administration of justice. Clarification from the Supreme Court on whether mistakes of law can justify investigatory stops, and any resulting criminal or administrative proceedings, is necessary to provide guidance to law enforcement officers, courts, prosecutors, defense attorneys, legislative bodies, and the public at large. *See* Pet. 12-15.

NACDL also agrees with petitioner that review is warranted because the North Carolina Supreme Court's decision is erroneous. The Fourth Amendment prohibits traffic stops when an officer accurately perceives a driver's conduct but incorrectly believes that the conduct violates the law. *See* Pet. 16-25.

NACDL files this brief to make two important points: *First*, the North Carolina Supreme Court's rule is flatly inconsistent with the principles underlying this Court's Fourth Amendment jurisprudence. It has always been the province of the courts, not law enforcement, to determine and apply the law governing an investigatory stop. There is no basis under the Fourth Amendment for officers to conduct seizures based on nothing more than suspicion of conduct that violates no law. *Second*, the North Carolina Supreme Court's rule, if left undisturbed, will have substantial negative effects, including condoning a broad swath of searches unrelated to suspicion of any violation of any actual law, and reducing or removing important incentives for police officers to understand thoroughly the laws they are charged with enforcing.

ARGUMENT

I. THE NORTH CAROLINA SUPREME COURT'S RULE IS CONTRARY TO THE PRINCIPLES UNDERLYING THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment protects a person's right to be secure in her person, and against unreasonable intrusion by the government. "[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 au-

thority of law.'" *Terry* v. *Ohio*, 392 U.S. 1, 9 (1967) (quoting *Union Pac. Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891)). Moreover, "[t]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Id.* at 8-9.

In the context of investigatory stops, whether of vehicles or persons, the State may intrude on an individual's personal security and privacy, but only based on reasonable suspicion of *illegal* activity. The starting, and most basic, requirement for an investigatory stop, which runs throughout this Court's cases, is that there be a reasonable suspicion "that *criminal activity* may be afoot[.]" *Terry*, 392 U.S. at 30 (emphasis added); *see also Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) ("[Reasonable suspicion requires] 'a particularized and objective basis' for suspecting the person stopped of *criminal activity*[.]") (emphasis added) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981)). This Court has stated the same principle in the context of traffic stops: "[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist [has violated the law], stopping an automobile and detaining the driver . . . are unreasonable under the Fourth Amendment." *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979).

The rule that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in *criminal activity*" is an important limitation. *Cortez*, 449 U.S. at 417 (emphasis added). The State may not intrude on a person's security and privacy merely because an officer suspects activity that is wholly innocent. To be sure, an officer's *observance* of purely innocent activity can give rise to *reasonable suspicion* of criminal activity. This is

the case where, based on an officer's training and experience, "a series of acts, each of them perhaps innocent in itself, . . . taken together warrant[] further investigation." *Terry*, 392 U.S. at 22. But where innocent conduct gives rise only to a suspicion of further innocent activity, the Fourth Amendment forbids an investigatory stop and its accompanying severe intrusion on the privacy and security of an individual's person. *See, e.g.*, *Prouse*, 440 U.S. at 661-663 (holding an investigatory traffic stop, unlike a roadblock, requires individualized reasonable suspicion that the motorist is violating a law). An intrusion in these circumstances is simply unacceptable under the Fourth Amendment.

Yet this is what the North Carolina Supreme Court's rule (and the rule in other decisions on the same side of the split) condone. The rule allows stops, and the accompanying intrusion on individual security and privacy, where—as an objective matter—an officer's suspicion is only of activity that is entirely innocent. The rule thus expands the scope of permissible government intrusion beyond investigation of suspected criminal conduct and to some unidentified penumbra around such criminal statutes—conduct mistakenly believed to be covered, but not actually prohibited, by a statute. Individuals who seek to be spared the intrusion, anxiety, and inconvenience of an investigatory stop not only must avoid conduct that is actually prohibited by law—which laws they are presumed to know—but also must intuit and avoid the lawful conduct that officers might reasonably but wrongly believe is prohibited by statute.

Indeed, from the individual's perspective, there is no difference between the stop approved by the North Carolina Supreme Court here and, for example, the discretionary spot checks that this Court rejected in

Prouse. In both circumstances, the individual has done nothing that violated any motor vehicle law nor anything that even gives rise to suspicion of a violation of an actual law. *See Prouse*, 440 U.S. at 650 ("[T]he patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity[.]"). The scope of the *individual's* right to be free from government seizure should be the same in each instance; it should not vary based on *another person's* understanding or misunderstanding of the law.

Contrary to the North Carolina Supreme Court's approach, this Court's cases make clear that a correct application of the Fourth Amendment requires measuring the facts perceived by the officer, plus the officer's expert and rational inferences from those facts, against an *objective* legal standard. For example, in *Whren* v. *United States*, 517 U.S. 806, 813-815 (1996), this Court held in plain, explicit terms that the constitutional reasonableness of a traffic stop does not depend on the actual motivations of the officers. *See id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").[2] Nor does the constitutional analysis depend on a seemingly objective standard tied to the particular circumstances of the officer who conducts a stop, something this Court characterized in *Whren* as a "virtual subjectivity" analysis. *See id.* at 815 ("[O]rdinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called *vir-*

---

[2] While the NACDL submitted an amicus brief in *Whren* opposing the result that the Court reached, the principles set forth in the Court's decision necessarily reject the North Carolina Supreme Court's rule here.

tual subjectivity." (emphasis added)). Rather, the governing principle in this Court's cases, the *Whren* Court observed, is "that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. Reasonableness is measured against an objective standard. That should be the case whether the question is whether the Fourth Amendment allows, *or disallows*, police activity.

Furthermore, this Court's cases make clear that the objective standard against which an officer's observed facts are measured is the *actual* criminal law, not the officer's perception of the law. In *Ornelas*, this Court explained the methodology for Fourth Amendment inquiries:

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. . . . "[T]he historical facts are admitted or established, *the rule of law is undisputed*, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether *the rule of law* as applied to the established facts is or is not violated."

517 U.S. at 696-697 (emphasis added) (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982)).

Contrary to this methodology, under the North Carolina Supreme Court's approach, courts must measure the facts as observed by the officer, together with

expert inferences from those facts, against not only the actual criminal law but also against any other reasonable interpretation of law by the officer that, while incorrect, might justify the stop. *See, e.g.*, *United States* v. *Nicholson*, 721 F.3d 1236, 1244 & n.8 (10th Cir. 2013). That approach is erroneous because, as this Court's cases make clear, the objective legal standard to be applied is the actual criminal law—not a prohibition of some penumbra of broader conduct mistakenly believed to be covered, but not actually prohibited, by a statute. An officer's mistake about the content of the actual law—whether the mistake is reasonable or unreasonable—is irrelevant.

As the Court explained in *Ornelas*, there is a good reason why Fourth Amendment analysis proceeds in this manner. On undifferentiated facts, the result under the Fourth Amendment should be the same from case to case. *See Ornelas*, 517 U.S. at 697 ("Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable."). The Court made the same point in *Whren* when it rejected an approach under which courts would need to evaluate "police enforcement practices" when determining reasonableness. Because law enforcement practices "vary from place to place and from time to time . . . [w]e cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Whren*, 517 U.S. at 815 (internal citations omitted). The approach adopted by the North Carolina Supreme Court and other courts on its side of the split not only lays the foundation for disparate outcomes across location and time on the same set of facts, it also contravenes *Whren* by implicitly calling for the examination of local law enforcement practices to determine

whether an officer's interpretation of the law was reasonable. *E.g.*, *United States* v. *Washington*, 455 F.3d 824, 828 (8th Cir. 2006) (noting that "evidence of police manuals or training materials, state case law, legislative history, or any other state custom or practice" bear on the question of whether an officer's misreading of a statute was reasonable).

For all of these reasons, under established Fourth Amendment principles, an officer's mistake of law cannot provide the individualized suspicion necessary for an investigatory stop. It matters not that the permissibility of a Fourth Amendment search or seizure is premised on *the facts* as observed by the officer. *E.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 184 (1990) (holding officers' reasonable mistake of fact regarding consent does not invalidate a warrantless entry). As the Court correctly recognized in *Rodriguez*, officers are expected to exercise expert judgment as to inferences to be gleaned from observed facts. *Id.* Moreover, because an officer cannot anticipate in advance the facts she will encounter in the course of her duties, but must often make swift decisions based on ambiguous circumstances, "'room must be allowed for some mistakes'" of fact by officers. *Id.* at 186 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949)).

None of these observations is true when it comes to the scope of the governing law. Determining the meaning of that law is the province of the judiciary, not police officers. This Court's decisions have never held to the contrary. Were that not the case, then the right of someone in petitioner's shoes in this case to be free of unreasonable seizures would depend on just the type of "virtual subjectivity" analysis that this Court rejected in *Whren*, 517 U.S. at 814-816, and impermissibly lead to different interpretations of the scope of Fourth

Amendment rights in different cases, *id.* at 815. *See also Ornelas*, 517 U.S. at 697-98 ("[P]roviding law enforcement officers with a defined set of rules . . . in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." (internal quotation marks omitted)).

The impropriety of injecting an officer's reasonable beliefs about the law into a Fourth Amendment analysis can be seen most clearly when one considers the law-declaring function of a court when it comes to determining whether police conduct constitutes a search or seizure. When making such determinations, it has never been relevant to this Court whether the officer on the street reasonably believes, for example, that the investigatory conduct was not a search under applicable law. Take the use of GPS before the time this Court decided *United States* v. *Jones*, 132 S. Ct. 945 (2012). At that earlier point in time, courts were split on whether law enforcement's attaching of an electronic-tracking GPS device to a vehicle, and then use of that device to monitor the vehicle's movements, constituted a search under the Fourth Amendment. As a result, an officer in a jurisdiction yet to have addressed that issue might reasonably have argued that she, in turn, reasonably believed that use of GPS was not a search. That would not, and could not, be relevant, though, to whether the Fourth Amendment was or was not violated. If such interpretations of the law by officers are irrelevant to whether conduct is a search or seizure in the first instance, they also must be irrelevant to a court's determination of the law against which reasonable suspicion is measured for purposes of analyzing an investigatory stop.

The rule adopted by the North Carolina Supreme Court not only conflicts with precedent of this Court, it is fundamentally unfair to defendants in a directly relevant way. Under the North Carolina rule, the State may rely on officers' mistakes of law in investigating and amassing evidence for prosecution of a crime. However, at the same time, defendants generally may *not* rely on *their* ignorance or mistakes of law as a defense to criminal liability. *See Cheek* v. *United States*, 498 U.S. 192, 199 (1991) (collecting cases) ("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."). The reason for this "deeply rooted" rule is the accepted notion that, because the law is "definite and knowable," every person knows the law. *Id.* (collecting additional cases). There is no reason why any different notion should be applied to law enforcement officers conducting investigatory stops. Even more than the general citizenry, police officers have a professional duty to know and comprehend the laws they enforce. They should accordingly, at minimum, be held to the same standard as laypersons. *See, e.g.*, *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("[D]ecency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.").

II. THE NORTH CAROLINA SUPREME COURT'S RULE WILL CONDONE A BROAD SWATH OF INVESTIGATORY STOPS THAT OTHERWISE LACK ANY LEGAL JUSTIFICATION, AND PROVIDE IMPROPER INCENTIVES TO LAW ENFORCEMENT

Under the North Carolina Supreme Court's rule, law enforcement may lawfully stop persons to investigate suspected conduct that does *not* violate any law, so

long as the officer reasonably believes the suspected conduct is prohibited. For each such seizure, if the police officer knew the correct bounds of the criminal law at the time of the investigatory stop, the officer could not lawfully stop the individual. There would be no valid law enforcement reason for the stop. The only justification for the stop under the North Carolina rule is, accordingly, a misunderstanding of the law.

While the North Carolina Supreme Court portrayed its holding as a limited one, affecting only those instances where officers cannot forecast a novel interpretation of the law, it will have a much broader effect. The occasions for misunderstanding of the law extend far beyond the circumstances in this case. If not reversed, the North Carolina Supreme Court's holding will have a significant effect, reducing important incentives for police departments to train officers to know and understand well the law they enforce and equally critical incentives for individual officers to know the law and exercise restraint when they do not.

First, the scope of the North Carolina Supreme Court's rule is much broader than that court acknowledges. While the mistake in this case involved a question of first impression regarding the motor vehicle code, the holding is not so limited. Rather, the decision holds that an investigatory stop unrelated to any violation of any actual government prohibition may be justified solely by an error of law, so long as the error is reasonable. The holding would accordingly condone searches in a broad swath of circumstances in which an officer may misunderstand the law he suspects to have been violated. As the dissenting justices of the North Carolina Supreme Court recognized, the rule "will also apply . . . when the officer acts based on a misreading of a less innocuous statute, or an incorrect memo or train-

ing program from the police department, or his or her previous law enforcement experience in a different state, or his or her belief in a nonexistent law." Pet. App. 22a; *see also id.* 27a (noting rule's application when mistakes "arise from simple misreadings of statutes, improper trainings, or ignorance of recent legislative changes"). The North Carolina Supreme Court's rule not only sets the stage for stops in these circumstances, it also increases the likelihood of their occurrence.

Take, for example, officers' "simple misreadings" of statutes. Pet. App. 27a. There may be many statutes that courts would have little trouble interpreting but that an officer on the street—lacking the same legal training as judges and lawyers—might reasonably read differently. There is no valid law enforcement reason for stopping an individual to investigate conduct that violates only the misunderstood version of the law. Yet, under the North Carolina Supreme Court's rule, investigatory stops based on "simple misreadings" are permissible. *E.g.*, Pet. App. 18a-19a; *United States* v. *Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (holding though law was clear under a "close textual analysis . . . we think the level of clarity falls short of that required to declare Officer Grube's belief and actions objectively unreasonable under the circumstances"). If this Court accepts that reasonable mistakes of law can justify investigatory stops, the number of cases based solely on an officer's "simple misreading" would likely be significant. *E.g.*, *United States* v. *Nicholson*, 721 F.3d 1236, 1239-1241 (10th Cir. 2013); *United States* v. *King*, 244 F.3d 736, 739-742 (9th Cir. 2001); *Hilton* v. *State*, 961 So. 2d 284, 287-293 (Fla. 2007); *State* v. *Anderson*, 683 N.W.2d 818, 821-822 (Minn. 2004); *State* v. *Lacasella*, 60 P.3d 975, 978-979 (Mont. 2002).

Moreover, every year the nation's courts confront a number of cases involving the construction and application of criminal and other statutes, with each such case necessarily involving a disagreement among lawyers (and sometimes among judges and courts too) about the meaning and scope of the statute. *E.g.*, *People* v. *Williams*, 305 P.3d 1241, 1250 (Cal. 2013) (rejecting appellate court's and attorney general's interpretation of robbery statute); *State* v. *Webster*, 60 A.3d 259, 266 (Conn. 2013) (rejecting appellate court's and defendant's interpretation of narcotics statute); *People* v. *Jones*, __ N.E.2d __, 2013 WL 6062086, at *2-3 (N.Y. 2013) (rejecting trial court's and defendant's interpretation of firearm statute). Each such disagreement represents a potential ground for an officer to have reasonably misunderstood a law. Investigatory stops based on "simple misreadings" are thus likely to be far more prevalent than the narrow question-of-first-impression example at issue here. They are likely to increase too, once officers learn that such reasonable differences in view about the scope of a statute can provide a perfectly *legal* reason to conduct an investigatory stop.

Other instances where the North Carolina Supreme Court's rule would have similar deleterious effects, as the dissenting justices recognized, are instances where an officer misinterprets the governing law due to faulty training (*e.g.*, *United States* v. *Chanthasouxat*, 342 F.3d 1271, 1274 (11th Cir. 2003); *United States* v. *Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000)); incomplete police guidebooks (*e.g.*, *United States* v. *McDonald*, 453 F.3d 958, 959-960 (7th Cir. 2006)); an incorrect assumption about which jurisdiction's law governs (*e.g.*, *State* v. *Louwrens*, 792 N.W.2d 649, 650 (Iowa 2010)); an incorrect belief based on "common

knowledge" (*e.g.*, *Martin*, 411 F.3d at 1001); an incorrect belief about another jurisdiction's law (*e.g.*, *Travis* v. *State*, 959 S.W.2d 32, 34 (Ark. 1998)); an incorrect assumption that an earlier version of a law still governs; or simply a lack of experience in the relevant area of law. Absent the North Carolina rule, police departments will have every incentive to ensure that their training is comprehensive, correct, and up to date, while police officers will have equally important incentives to ensure that they know and understand well the laws of the particular jurisdictions in which they operate. Affirmance of the decision below would have exactly the opposite effects: it would reduce the incentives for police forces to be well trained in the law, resulting in increasing numbers of investigatory stops that lack any legal basis apart from the officer's misunderstanding of the law.

Indeed, there is good reason to fear that North Carolina's rule will cause an exponential increase in such stops. Under existing law, courts accord substantial deference to police officers conducting investigatory stops regarding the officers' factual observations and expert inferences based on those facts. *See, e.g.*, *Cortez*, 449 U.S. at 418-420. Under the North Carolina Supreme Court's rule, officers would also be accorded considerable leeway with respect to their legal judgments, but for the opposite reason—that the officer *lacks* the requisite legal expertise to understand the law at issue. When combined with existing law governing investigatory stops, then, the North Carolina rule places substantial discretion in the officer, allowing the officer in the first instance to justify every such search based on his own factual and legal judgments. And, because the scope of a permissible investigation expands in inverse relation to the officer's knowledge and ex-

pertise of the law, the North Carolina rule "would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *Lopez-Soto*, 205 F.3d at 1106.

Already, nearly 63 million Americans have one or more face-to-face contacts with the police over the course of a year. U.S. Dep't of Justice, Bureau of Justice Statistics, *Police Behavior During Traffic and Street Stops, 2011*, at 1 (2013), *available at* http://www.bjs.gov/content/pub/pdf/pbtss11.pdf. Of this group, nearly 13 million interact with the police in the context of a traffic stop. *Id.* at 2. Of those drivers whom officers elect to search, be it their person or vehicle, only 1 of 10 drivers are found to possess illegal items. U.S. Dep't of Justice, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2008*, at 10 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf. For the reasons explained above, North Carolina's rule is likely to make these statistics worse—more stops justified by nothing more than a legal misunderstanding, with fewer such stops resulting in any law enforcement benefit.

This Court frequently takes into account the real-world effects of contrasting views of disputed constitutional criminal procedure rules.[3] The same accounting

---

[3] *See, e.g.*, *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1563 (2013) (exigency dependent on time between arrest and administration of blood test would "distort law enforcement incentives" by discouraging officers from expediting the warrant process); *Brendlin* v. *California*, 551 U.S. 249, 263 (2007) (if car passenger were not considered "seized" during traffic stop, it would invite police to stop cars regardless of reasonable suspicion and create "powerful incentive" for police to run "roving patrols"); *James* v. *Illinois*, 493 U.S. 307, 318 (1990) (rejecting state's proposed expansion of impeachment exception to allow impeachment of defendants with

here strongly supports a grant of certiorari to reverse the decision of the North Carolina Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEFFREY T. GREEN
Co-Chair, Amicus Committee,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street, NW
12th Floor
Washington, DC 20036

NOAH A. LEVINE
Counsel of Record
ADAM P. ROMERO
THAILA K. SUNDARESAN
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8875
noah.levine@wilmerhale.com

DECEMBER 18, 2013

illegally obtained evidence, noting that "police misconduct will be encouraged" by such expansion); *United States* v. *Johnson*, 457 U.S. 537, 561 (1982) ("If . . . all rulings resolving unsettled Fourth Amendment questions should be non-retroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior.").