No. 13-604

In The Supreme Court of the United States

NICHOLAS BRADY HEIEN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the
North Carolina Supreme Court

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE IN SUPPORT OF THE 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 *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)[2], and *Safford Uniform School District No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the right to be free from prosecution and conviction based on evidence obtained from unconstitutional traffic stops.

SUMMARY OF THE ARGUMENT

Reduced to its core, the issue that confronts this Court is simple: may this country's citizens be

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with this Court consenting to the filing of *amicus curiae* briefs.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for The Rutherford Institute as *Amicus Curiae*).

held to an all-knowing standard of what the law is whereby if they are wrong—despite their objectively reasonable belief to the contrary—they are subject to criminal liability (including possible incarceration), but the government is allowed to benefit from its agents' own mistakes of law?

Because there is no legal, principled, or logical basis for treating citizens differently from government agents, it is not surprising that the distinct majority of courts that have faced the issue presented in this case have held that a traffic stop based on a mistake of law violates the Fourth Amendment. *See, e.g.*, *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) ("Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional.")[3] This premise is particularly justified under contemporary circumstances. The increased professionalism of law enforcement personnel, combined with the array of technology available to officers to determine substantive law, negates any purported justification for permitting traffic stops based on officers' mistakes of law.

Moreover, empirical evidence demonstrates that if the decision of the North Carolina Supreme

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[3]*See also United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000) ("[An officer's] belief based on a mistaken understanding of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop."); *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006) ("when no violation actually occurred, it is not objectively reasonable"); *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.") (emphasis in original).

Court is upheld, there will be little benefit to public safety; to the contrary, the privacy and security of our nation's citizens will be significantly harmed. Furthermore, these effects will almost certainly be felt disproportionately by those groups historically discriminated against, who will have little, if any, recourse. As such, the decision of the North Carolina Supreme Court should be reversed.

ARGUMENT

I. The Increased Professionalism Of Law Enforcement And Technological Advances Militate Against Allowing Traffic Stops Based On Mistakes Of Law

The Fourth Amendment serves, in part, to guard against the abuses of the Colonial era "general warrant," which allowed officers of the English Crown to "search where they pleased." *Stanford v. Texas*, 379 U.S. 476, 482 (1965). Since then, a long line of cases—from the nineteenth, twentieth, and twenty-first centuries—have repeatedly recognized that the government may not benefit from its agents' mistakes of law. *See, e.g.*, *Malcomson v. Scott*, 23 N.W. 166, 168 (Mich. 1885) ("An officer of justice is bound to know what the law is, and if the facts on which he proceeds, if true, would not justify action under the law, he is a wrong-doer."); *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (noting "the fundamental unfairness of holding citizens to the 'traditional rule that ignorance of the law is no excuse,' . . . while allowing those 'entrusted to enforce' the law to be ignorant of it") (citation

omitted). Indeed, if Justice Holmes could justify the "larger interests on the other side of the scales" for refusing to excuse the mistakes of law of laypersons, the scales must tip overwhelming against the government when its agents make similar mistakes. OLIVER WENDELL HOLMES, THE COMMON LAW 41 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). This is particularly so because the criminal law's audience is primarily law enforcers, not laypersons. *See* William J. Struntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) ("Criminal codes therefore do not and cannot speak to ordinary citizens directly. . . . For the most part, criminal law regulates actors in the legal system, while popular norms—morals—regulate the conduct of the citizenry.").

Partly as a result of judicial decisions restricting certain police practices (including prohibiting traffic stops based on mistakes of law), our nation's law enforcement departments have become increasingly professional and knowledgeable of the law. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (finding a lessened need for the exclusionary rule given "the increasing professionalism of police forces" and "wide-ranging reforms in the education, training, and supervision of police officers.") (internal citation and quotation marks omitted). For example, today it is common for law enforcement agents to have tools (including dashboard computers) providing access to the pertinent law, including direct communication with personnel versed in the law. *See, e.g.*, Michelle Perin, *Big Stuff in a Small Package*, LAW ENFORCEMENT TECH., Apr. 2010, at 26 (discussing

the use of mobile computers by police on street patrol).

Such progress should not be undermined by providing officers any incentive to eschew best practices. As the California Supreme Court recognized over thirty years ago, doing so "would provide a strong incentive to police officers to remain ignorant of the language of the laws that they enforce and of the teachings of judicial decisions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct." *People v. Teresinski*, 640 P.2d 753, 758 (Cal. 1982) (in bank).[4] Nothing has changed so significantly since this decision which would warrant this Court in condoning traffic stops based on officers' mistakes of law. To the contrary, police officers are far better equipped to know or determine the law than they were at the time *Teresinski* was decided. As such, mistake-of-law traffic stops are even less justifiable today.

II. Traffic Stops Based On Mistakes Of Law Endanger Constitutional Rights And Do Not Serve A Societal Benefit

Allowing law enforcement wide latitude to make mistakes of law will also have the effect of encouraging and increasing the number of legally baseless searches. *See* Eugene Volokh, *The*

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[4] *See also* Pet'r's Br. at 10 ("Most notably, police departments would be discouraged from using resources at their disposal to ensure that officers on patrol have an accurate understanding of the law.").

Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026, 1105–14 (2003) (discussing "small change tolerance slippery slopes"). Law enforcement personnel would be incentivized to stop citizens in the hope of finding damning evidence. In return, an officer would simply have to come up with a *post hoc* rationale to demonstrate that he or she was mistaken.

The concerns are particularly acute given the potential rewards—including professional advancement—associated with the discovery of evidence. *See Johnson v. United States*, 333 U.S. 10, 14 (1948) (police officers are "engaged in the often competitive enterprise of ferreting out crime"). Consequently, it is imperative that significant checks are in place to prevent overzealous policing. *See Davis v. United States*, 131 S. Ct. 2419, 2435 (2011) (Sotomayor, J., concurring) ("[W]hen police decide to conduct a search or seizure in the absence of case law (or other authority) . . . exclusion of the evidence obtained may deter" violations of law).

Such checks are particularly important given that law enforcement personnel can already, in effect, effectuate a stop—pretextual or otherwise—for a vast array of offenses. These range from the legitimate to the absurd. *See* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L. J. 69, 109 n.266 (2011) (noting that "[s]ince *Whren* [*v. United States*, 517 U.S. 806 (1996)], courts have upheld pretextual stops based on nonmoving violations, including those related to parking.") (citations omitted). It is already common practice for law enforcement personnel to stop individuals for minor offenses (especially traffic offenses) to secure evidence related to more serious crimes for which they do not have a valid basis to

justify a stop. *See generally* Wayne A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1247-48 (2010).

Such concerns are not hypothetical. In 2006, for example, the most common justification cited by New York City police for stopping individuals was presence in a "high crime area" (whatever that might mean). *See* Logan, *Police Mistakes of Law*, 61 EMORY L. J. at 109 n.271 (citing Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1495 (2010)). If that is not enough cause for concern, an additional 32% of stops were based on the time of day, and 23% of police stops were for an unspecified reason. *Id.* Such policing techniques should not be further encouraged by allowing officers free rein to make stops based on reasonable—however arbitrarily and haphazardly decided—mistakes of law.

Moreover, such policing techniques cannot be dismissed as a cost of improving public safety that has limited impact upon the rights of individuals. The North Carolina Supreme Court's suggestion that a traffic stop "is not a substantial interference with the detained individual" fails to pay sufficient heed to realities. *State v. Heien*, 737 S.E.2d 351, 357 (N.C. 2012). To the contrary, encounters with law enforcement—even in the context of a traffic stop—are significant experiences. *See Terry v. Ohio*, 392 U.S. 1, 25 (1968) (acknowledging that police stops can be "annoying, frightening, and humiliating"); *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (noting that traffic stops "create substantial anxiety" and "interfere with freedom of movement, are inconvenient, and consume time."). Furthermore, "even a limited search of the person is a substantial

invasion of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (citing *Terry*, 392 U.S. at 24-25).

Not only are traffic stops a significant deprivation of liberty and privacy, they undermine the right to travel unimpeded. *See Carroll v. United States*, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable . . . [to] subject all persons lawfully on the highways to the inconvenience and indignity of such a search."); *People v. Arthur J.*, 238 Cal. Rptr. 523, 527 (Ct. App. 1987) ("One of our most cherished freedoms is the right to go about our lives without unjustified interference. We safeguard that right by requiring that the police know what the law is in order to arrest someone for a violation of it."). As such, searches incident to arrest for minor traffic offenses are better viewed as vestiges of the general warrants of the Colonial era rather than temporary encumbrances. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989).

If the effects of traffic stops on the individual stopped and these constitutional concerns are not enough, traffic stops based on mistakes of law are unlikely to produce a reciprocal benefit to society. For example, only 4% of more than a half million individuals stopped, questioned, and searched in New York City in 2006 were actually arrested. *See* Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. at 1490 n.161. Additionally, another field study indicates that only 3% of unconstitutional searches revealed evidence, obviating the likelihood of a motion to suppress in

the balance (97%) of cases. *See* Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 332 (2004). Without effective deterrents (including a prohibition on traffic stops based on an officer's mistake of law), law enforcement personnel will likely take advantage of their freedom to stop and search more individuals in the hope of uncovering incriminating (and admissible) evidence.

Put simply, upholding the legality of seizures and ensuing searches based on mistakes of law would result only in an increase of negative effects. *See Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("[I]nvasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating . . . ."); *Illinois v. Wardlow*, 528 U.S. 119, 133 n.8 (2000) (Stevens, J., concurring in part and dissenting in part) (asserting that high rates of stops not resulting in arrest "indicate that society as a whole is paying a significant cost in infringement on liberty").

III. Traffic Stops Disproportionately Affect Discrete and Insular Minorities

Low-level offenses involving motor vehicle violations affect millions of citizens each year. It is at this same point of contact between the

government and the individual, however, where the legal system's discretion is at its apex. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 233 (Macmillan Coll. Publ'g Co. 3d ed. 1994) (1966) ("Police work constitutes the most secluded part of an already secluded [criminal justice] system and therefore offers the greatest opportunity for arbitrary behavior.").[5]

Given the discretionary nature of law enforcement—particularly regarding traffic stops—the potential for selective enforcement is high. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."). Even if police officers do not act out of discriminatory intent, enforcement has a disparate impact. For example, a 1999 study by the New Jersey Attorney General found that African-Americans and Hispanics were the subjects of the overwhelming majority of searches (77.2%). *See* PETER VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 27 (1999) (reviewing racial profiling allegations in New Jersey, and providing empirical data and recommendations

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[5] *See also* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 222 (1969) ("[T]he police are among the most important policy-makers of our entire society. And they make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.") (footnote omitted).

for New Jersey law enforcement).[6] Whatever dispute there might be over statistical evidence, one theme is constant: studies overwhelmingly show with statistical significance that it is our nation's discrete and insular minorities who bear the brunt of discretionary traffic stops. As such, legal rulings that have the potential to increase this phenomenon must be limited.

The societal harms associated with the disparate impact of selective enforcement of the law cannot be underestimated given "[t]he real harm . . . [that] arises from the indignity of being publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers." William J. Struntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995). These concerns are aggravated when the subjects are members of groups historically discriminated against. Indeed, statistical and legal analyses demonstrate that "each encounter that an 'innocent' or non-offending [racial minority] has with the police increases their sense of alienation, resentment, and disregard for the police and for the criminal justice system." Oscar H. Gandy, Jr., *Journalists and Academics and the Delivery of Race Statistics: Being a Statistician Means Never Having to Say You're Certain*, 4 RACE & SOC'Y 149, 157 (2001).

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[6] *See also* Dan Eggen, *Official in Racial Profiling Study Demoted*, WASH. POST, Aug. 25, 2005, at A7 (discussing an April 2005 Bureau of Statistic survey of 80,000 people that indicated that minority drivers were three times more likely to have their vehicles searched following traffic stops than white drivers).

In addition, Equal Protection Clause guarantees will be undermined (even if not *per se* violated) if mistake-of-law traffic stops are permitted. This is particularly important because inquiry into the subjective intent of police officers in reviewing a traffic stop under the Fourth Amendment is prohibited. *Whren*, 517 U.S. at 806. This concern is magnified by the lack of meaningful redress available to individuals who believe they are the victims of official discrimination. Following this Court's decision in *Whren*, individuals do not have redress under the Fourth Amendment for race-based traffic stops when there is also an objectively reasonable basis for the stop. *See id.* at 813-16 (holding that a Fourth Amendment challenge is not viable so long as there is at least another independent justification for the search in addition to race, and noting that few police officers would ever state that the vehicle occupant's race was the sole basis for the stop). Consequently, the only recourse an individual has is under the Equal Protection Clause. *See id.* at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

Actually bringing a successful Equal Protection Clause claim for racial profiling, however, is exceeding difficult. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.") (emphasis added).

Consequently, to succeed on a claim under the Equal Protection Clause in the context of selective enforcement of traffic stops, a plaintiff must show not only that the police officer's action has a disparate impact on the plaintiff's racial group, but also that the practices constitute an intentional pattern of discrimination. This effectively insurmountable discriminatory intent requirement acts as a complete bar to equal protection claims based on racial profiling. *See generally* Sarah Oliver, Atwater v. City of Lago Vista*: The Disappearing Fourth Amendment and Its Impact on Racial Profiling*, 23 WHITTIER L. REV. 1099, 1113-14 (2002). Indeed, plaintiffs have failed to meet this standard "even if they alleged that only black and Hispanic residents were subjected to suspicionless stops." *Nat'l Cong. For P.R. Rights v. City of New York*, 75 F. Supp. 2d 154, 167 (S.D.N.Y 1999).[7]

The likely discriminatory impact on discrete and insular minorities, combined with the virtually insurmountable hurdle of proving discriminatory intent required to succeed in a racial profiling claim, therefore further militates against upholding the decision of the North Carolina Supreme Court. To permit otherwise would undermine the concept of equality of citizenship.

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[7] *See also United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1153-63 (D. Kan. 2004) (finding that statistical evidence that Hispanic and African-American drivers were stopped more frequently than white drivers for similar traffic violations, but that this was insufficient to establish discriminatory intent).

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the North Carolina Supreme Court.

Respectfully submitted,

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