SUPREME COURT OF NEW JERSEY
DOCKET NO. 084074 (A-67-19)

STATE OF NEW JERSEY, Plaintiff-Respondent, v. **MIGUEL A. ROMAN-ROSADO,** Defendant-Appellant.	CRIMINAL ACTION On Appeal From The Final Judgment of the Superior Court of New Jersey, Appellate Division. Sat Below: Hon. Thomas W. Sumners, Jr., Hon. Richard J. Geiger, and Hon. Arnold L. Natali, Jr., J.J.A.D.

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

New Jersey's appellate court decisions have been unwavering about the principle that a search or arrest predicated on a mistake-of-law by a police officer renders that stop unconstitutional. In holding fast to this precept, New Jersey courts have made clear that suppressing evidence gathered from such a search serves as a foundational check on police error and misconduct, both protecting the Constitutional rights of the accused in each individual case and generally preventing future misconduct by police. The issues in the case now before this Court incriminate efforts to validate mistakes-of-law by officers and undermine this foundational check. This Court should not legitimize these efforts. The adoption of such a standard would subvert the rights of the individual, undermine scrutiny of police misconduct and the efforts to combat it, and provide judicial cover for officers who fail or refuse to learn the laws even through their work is, ontologically, about the knowing enforcement of laws. This case further exposes how traffic stops based on an officer's mistake-of-law can become deliberately abused tools used to justify arbitrary and discriminatory invasions into the privacy rights and bodily integrity of New Jerseyans, whether or not actual motor vehicle violations have, in fact, occurred. Both concerns demand reaffirmation of the rights of the accused in light of New Jersey's own long-standing jurisprudence and the current cultural moment.

As discussed further below, this Court should find that Officer Warrington's traffic stop of Mr. Roman-Rosado for an alleged violation of N.J.S.A. 39:3-33 was unreasonable and unconstitutional and led to the collection of tainted evidence which the lower court incorrectly failed to suppress. In this brief, the American Civil Liberties Union of New Jersey ("*Amicus"*) focuses on the unreasonable and unconstitutional nature of the stop. Even if this Court finds the stop to have been reasonable, *Amicus* also discusses why the United States Supreme Court's holding in Heien v. North Carolina, 574 U.S. 54 (2014) is inapplicable here and why this Court should decline to follow its edicts in line with New Jersey's longstanding and vigorous dedication to maintaining private individuals' constitutional protections. (Point I). *Amicus* then discusses the potential unconstitutionality of N.J.S.A. 39:3-33 and how the statute could never be the basis for a reasonable stop. *Amicus* examines how the use of legal vagueness in motor vehicle violations regulations—now potentially condoned with the viability of a Heien mistake-of-law excuse—are too often used as the basis for discriminatory and capricious traffic stop prosecution and to blur the lines between motor vehicle stops and criminal investigations under the guise of mistake-of-law. (Point II). Read collectively, these actions historically have and continue to disproportionately affect people of color, particularly Black people, leading to demonstrable harms to those communities and individuals, both psychically and/or physically.

This Court should reverse the lower court's findings and recommit to impeding the steady creep undermining the protections of the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution by removing the abuse of power checks inherent in the exclusionary rule, and requiring accountability of law enforcement regarding their knowledge of the laws they are tasked with administering. Mistake-of-law defenses should not be allowed to infringe on the liberty of New Jerseyans, and the evidence gathered as the result of a mistake-of-law stop should be suppressed as fruit of the poisonous tree.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus accepts and incorporates the statement of facts and procedural history contained within Defendant-Appellants' briefs in support of this appeal. This brief accompanies a Motion for Leave to Participate as Amicus Curiae. *R*. 1:13-9(e).

ARGUMENT

Law enforcement must be held to their obligations under both the State and Federal Constitutions; failure to do so would result in an infinite expansion of the legality of pretextual traffic stops, undermining the constitutional safeguards protecting New Jerseyans from invasion into their bodily integrity and privacy rights and the unconstrained threat of unreasonable searches and seizures.

I. OFFICER WARRINGTON'S TRAFFIC STOP OF MR. ROMAN-ROSADO WHILE DRIVING MS. WHITEHOUSE'S VEHICLE[1] WAS UNREASONABLE.

Under the Fourth and Fourteenth Amendments, an automobile can be stopped only when there is at least an articulable and reasonable suspicion that the motorist is unlicensed or an automobile unregistered, or that the vehicle or occupant is otherwise subject to seizure for violation of the law. Delaware v. Prouse, 440 U.S. 648, 663 (1979); see also Florida v. Royer, 460 U.S. 491, 497-99 (1983) (investigatory motor vehicle stop valid only if officer has articulable, reasonable basis for suspicion that offense has been or is being committed). Under Article I, par. 7 of the New Jersey Constitution, an investigatory stop of an automobile is valid only if the officer has a particularized suspicion based upon an objective observation that the person stopped has been or is about to engage in a violation of the code. State v. Davis, 104 N.J. 490, 504 (1986). Under both standards, particularized articulable and reasonable suspicion must be present to justify a stop and to meet an objective standard, evaluated in light of the totality of circumstances facing the officer making the stop. See Prouse, 440 U.S. at 654;

[1] As a preliminary matter, taken to its logical extension, Officer Warrington's interpretation of N.J.S.A. 39:3-33 places an untenable burden on defendants like Appellant-Defendant who do not own the car they were stopped in. If the car was borrowed, rented, or leased with a license frame identical to the one at issue here, a driver—even one lacking ownership status—would be liable for an infraction unless they exhibited huge amounts of effort to change the frame every time they got behind the wheel.

Davis, 104 N.J. at 504; see also State v. Carpentieri, 82 N.J. 546, 549 (1980) (expressly adopting Prouse standard).

Such constitutional protections exist to impose a standard of reasonableness on the exercise of discretion by government officials and to protect persons against arbitrary invasions into the constitutional guarantee. State v. Maristany, 133 N.J. 299, 304 (1993). Accordingly, the constitutionality of a search and seizure turns on whether the conduct of the law-enforcement officer who undertook the search was objectively reasonable. State v. Bruzzese, 94 N.J. 210, 217 (1983).

A. The State did not carry its burden to demonstrate the reasonableness of the motor-vehicle stop.

While the concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules, to determine whether the development of suspicion was reasonable requires a totality of the circumstances evaluation, a clear-eyed look at the entire picture. Drake v. County of Essex, 275 N.J. Super. 585, 589-90 (App. Div. 1994). This is a complex analysis peculiarly dependent on the facts involved. State v. Zapata, 297 N.J. Super. 160, 171 (App. Div. 1997), quoting State v. Anderson, 198 N.J Super. 340, 348 (App. Div. 1985.). The State need not prove that the suspected motor-vehicle violation occurred, but the burden is on the State to prove the stop was lawful. State v. Locurto, 157 N.J. 463, 470 (1999); State v. Williamson, 138 N.J. 302, 304 (1994). While the evidentiary burden is considerably less than a preponderance of the evidence, it must be more

than a mere hunch. State v. Gamble, 218 N.J. 412, 428 (2014) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989), then quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

A mistake-of-law, however, should never be relevant in considering reasonableness. Where, as here, a police officer misunderstands what a law proscribes, his reliance on a mistaken view of the law is unreasonable and the stop violates Article I, Paragraph 7. Further, the unconstitutionality of the stop justifies the suppression of the seized evidence and ensures that officer error and wrongdoing remain unrewarded and that the spoiled fruits of the stop do not impede upon the rights of the accused. State v. Witt, 435 N.J. Super. 608, 615-616 (App. Div. 2014).[2]

1. *Officer Warrington failed to provide sufficient evidence that his suspicion was objectively reasonable.*

N.J.S.A. 39:3-33's essential purpose is to ensure that license plates are readable. See State v. Donis, 157 N.J. 44, 55 (1998) ("the very purpose of [N.J.S.A. 39:3-33] is to identify the owner of a car should the need arise from his or her license plate."[3]). As this Court has maintained for decades, "where a literal

[2] This Court later held that the Appellate Division erred in addressing the constitutionality of the stop because it had not been raised below. State v. Witt, 223 N.J. 409, 450 (2015). No such issue exists here.

[3] While Donis specifically examines the display of license plates, it cites to the entirety of N.J.S.A. 39:3-33 to discuss the issue, which indicates that each separate section of the statute is meant to assist in determining the identity of the owner or

interpretation will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter." New Jersey Builders, Owners, & Managers Assn v. Blair, 60 N.J. 330, 338 (1972). "Statutory construction will not justly turn on literalism, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." Perrelli v. Pastorelle, 206 N.J. 193, 200 (2011) (citing Jersey City Chapter P.O.P.A. v. Jersey City, 55 N.J. 86, 100 (1969)). This is true both for the courts' interpretation of the law and for the law enforcement officers who are tasked with enforcing those laws. Using the letter of a motor vehicle law to unjustly gin up criminal investigations threatens to render Article I, Paragraph 7 purely academic, eliminating its spirit in its entirety. Where, as here, a literal construction produces results inconsistent with the overall purpose of the statute, that interpretation should be rejected. Hubbard v. Reed, 168 N.J. 387, 392-93 (2001) (citing Turner v. First Union Nat. Bank, 162 N.J. 75, 84 (1999)).

While Officer Warrington may have articulated his suspicion that Mr. Roman-Rosado violated N.J.S.A. 39:3-33, he failed to demonstrate how that suspicion was reasonable. Officer Warrington was well aware of the stated purpose

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status of the vehicle, not to implement aesthetic requirements entirely unrelated to an officer's ability to secure information.

of the statute; when asked directly about the function of a license plate, his answer was "[t]o be able to identify the car." T1 19:10.[4] This makes the stop all the more troubling and, indeed, all the more pretextual. Officer Warrington knew the purpose and spirit of the law, but chose instead to ignore that fundamental knowledge to make a stop that does not even support the mistake-of-law he relied upon for the stop.

For example, Officer Warrington testified that all of the letters and numbers making up the identifying information and the tag were clearly visible, allowing him to successfully identify the car. T1:15:4-23. He admitted that even with the bottom 10 percent of Garden State covered, the words were still legible, just less readable. T1 17:13-14. As such, there was never a concern about his ability to identify the car and the 10 percent covering of the Garden State motto fails to present an articulable public safety concern. See Witt, 435 N.J. Super at 616 n.8 ("such a holding—that what a police officer believes is abnormal constitutionally authorizes a stop or detention of a motorist otherwise operating his vehicle in a proper manner—would come dangerously close to suggesting that a police officer may stop an individual operating a motor vehicle at any time for any reason. We find that argument utterly foreign to well-established constitutional principles.") This is precisely why mistakes of law cannot provide an objectively reasonable

[4] T1 refers to the transcript of the October 18, 2017 Transcript of Plea Retraction.

basis to justify a stop. As the Appellate Division has explained, "[i]f officers were permitted to stop vehicles where it is objectively determined that there is no legal basis for their action, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive." State v. Puzio, 379 N.J. Super 378, 384 (App. Div. 2005) (quoting United States v. Lopez-Soto, 205 F.3d 1101, 1105-06 (9th Cir. 2000)).

This is precisely what happened here. Given his awareness, the lower court's ruling deeming that a 10 percent plate obstruction was a N.J.S.A. 39:3-33 violation that permitted the stop allows the law to substitute Officer Warrington's hunch for an objectively grounded legal justification. Puzio, 379 N.J. Super. at 384 (quoting United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998). That is unconstitutional.

B. Even if the stop were objectively reasonable, which it is not, this Court should maintain its higher Article I, Paragraph 7 protections and reject the holding articulated in Heien.

Even if, however, the Court believes that the articulated suspicion was based on a reasonable mistake-of-law, this Court should decline to adopt the holding in Heien. A failure to do so would allow ignorance to override the essential legal knowledge required of law enforcement to correctly perform their duties and allow the use of that ignorance to justify the infringement of the constitutional rights of New Jerseyans.

1. *New Jersey's Appellate Courts have committed to safeguarding the Fourth Amendment and Article I, Paragraph 7 rights of New Jersey residents.*

In Heine, the Supreme Court transposed the mistake-of-law defense to the exclusionary rule context by expanding the good-faith exception into the realm of ignorance of law. Adopting the acceptability of a police officer's mistake-of-law as reasonable to justify a stop, however, would be to upend this Court's long-established rejection of the assertion of good faith belief as a substitute for reasonable suspicion. State v. Novembrino, 105 N.J. 95 (1987).

To this point, State v. Puzio remains instructive. In Puzio, the police officer mistakenly believed that the defendant was driving a commercial vehicle without a placard displaying the driver's name and business address, in violation of N.J.S.A. 39:4-46a, and stopped Puzio on that basis. Puzio, 379 N.J. Super. at 380. Passenger vehicles, like the car Puzio was driving, are exempt from the placard requirement. Puzio was nonetheless stopped and subsequently issued a summons for driving under the influence and a violation of N.J.S.A. 39:4-46a.

At trial, Puzio argued that evidence establishing his guilt of DUI should be suppressed because of the officers' mistaken belief that N.J.S.A. 39:4-46a had been violated, thus rendering the stop unlawful. Both the municipal court and Law Division denied the motion to suppress, determining that the officer's good faith belief that the statute was violated was enough to justify the stop. Puzio, 379 N.J.

Super. at 381. The Appellate Division reversed, concluding the stop was based on an entirely erroneous reading of the statute, id. at 382, and therefore no probable cause existed to justify it. Id. at 383. The Appellate Division noted that even under the good faith exception rejected in Novembrino, where an officer has an incorrect understanding of the law, the stop was unconstitutional and to hold otherwise would be to deride the basic protections of the Constitution:

> To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey.' If officers were permitted to stop vehicles where it is objectively determined that there is no legal basis for their action, 'the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.' We cannot countenance an officer's interference with personal liberty based upon an entirely erroneous understanding of the law.
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> [Id. at 383-84 (internal citations omitted) (emphasis supplied); see also United States v. Lopez-Valdez, 178 F.3d 282, 289 (5th Cir. 1999).]

Under this Court's long-standing jurisprudence, New Jersey offers additional protections for its residents that do not allow such mistakes by law enforcement to serve as justification for illegitimate stops or for the use of evidence gathered during those stops. Indeed, this Court has prided itself on recognizing that its duty to protect New Jerseyans' Constitutional rights may outpace the Federal judiciary's interest in doing so: "although the United States Supreme Court may be a polestar

that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us." See e.g. State v. Hempele, 120 N.J. 182, 196 (1990). Further, the exclusionary rule is closely connected to the creation of procedural justice, which bolsters confidence in the administration of parity and equity and thus, in turn, reduces citizen complaints about policing.[5]

2. *This Court should not reward law enforcement for being ignorant of the law.*

For the private citizen, strong public policy maintains that ignorance of the law is no excuse. Recognizing that it is unrealistic to expect an individual to know every law and understand its complexities, statutory protections for a good faith defense based on ignorance of the law exist. N.J.S.A. 2C:2-4(c)3. However, to call on those protections, the private citizen must have first diligently tried "by all means available" to ascertain the meaning of the law. Id. Further, "the proof standard is by clear and convincing evidence" in circumstances in which a "law-

[5] David B. Rottman, Adhere to Procedural Fairness in the Justice System, 6 Crim. & Public Pol'y 835, 836 (2007) (quoting John D. McCloskey, Police Requests for Compliance: Coercive and Procedurally Just Tactics 91 (2003)); David Gray, Megan Cooper & David McAloon, The Supreme Court's Contemporary Silver Platter Doctrine, 91 Tex. L. Rev. 7, 14 (2012).

abiding and prudent person" would also so conclude. State v. Guice, 262 N.J. Super. 607, 616 (Law Div. 1993). Read together, the statute designates "a strong policy against permitting ignorance of the law as a justification, and place[s] a heavy burden on the defendant to prove his defense." Id. at 616-17.

It would be logically consistent, then, that law enforcement be held to an even higher standard than the layperson with regard to ignorance of the law. Through their training and experience, law enforcement officers are better situated to know the law; as their title axiomatically describes, their entire role is to enforce it. As the Supreme Court once noted:

> Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it. If their knowledge is not comprehensive, state officials know or should know when they pass the limits of their authority, so far at any rate that their action exceeds honest error of judgment and amounts to abuse of their office and its function. When they enter such a domain in dealing with the citizen's rights, they should do so at their peril, whether that be created by state or federal law.
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> [Screws v. United States, 325 U.S. 91, 129-30 (1945) (emphasis added).]

Adopting Heien would allow officers to claim "justified" ignorance of the law while enforcing absurdist applications to it that shrink an individual's rights to self-determination and debase their constitutional rights. An adoption of Heien would

also disincentivize officers from learning about the law in a way that would help inform the accurate performance of their duties. Heine's approval of police ignorance as justification to avoid suppression of evidence provides no motivation for officers to truly know the law; rather, it provides wide berth for law enforcement officers to retrofit farcical interpretations of law into a mistake-of-law defense.

3. *Adoption of Heine would contradict the rule of lenity.*

Where a statute has both criminal and noncriminal applications, the rule of lenity applies. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004). Given that Title 39 motor vehicle laws are, by definition, quasi-criminal in nature, and persons prosecuted under Title 39 are entitled to the same protections as criminal defendants, (see State v. Toussaint, 440 N.J. Super. 526, 535 (App. Div. 2015) (citing State v. Widmaier, 157 N.J. 475, 494 (1999))), even if Officer Warrington's interpretation of N.J.S.A. 39:3-33 was deemed reasonable, it should have been rejected because such overly expansive readings are typically precluded by the rule of lenity, which generally requires interpreters to "strictly construe" ambiguity in criminal laws against the State and in favor of defendants. See State v. Crawley, 187 N.J. 440, 463 (2006); see United States v. Valle, 807 F.3d 508, 523 (2d Cir. 2015) (The rule of lenity ensures that criminal statutes will . . . minimize . . . the

risk of selective or arbitrary enforcement, and strikes the appropriate balance between the legislature and the court in defining criminal liability.).

Such strictness ensures that unlimited discretion by police officers to, as Officer Warrington put it, "try and develop criminal investigations" (T1 14:13-16) is not assisted by inexact legislative drafting and contorted interpretations of the law. Indeed, "[s]tatutes frequently . . . require some effort to connect the dots. If reasonable mistakes of law were permitted on this basis alone (without showing concomitant ambiguity), virtually no mistakes of law would be unreasonable, given the often dense and inartful structure of such statutes, writ large." Flint v. Milwaukee, 91 F.Supp. 3d 1032, 1059 (E.D. Wi. 2015).

That is most certainly demonstrated here where the Legislature has tried, multiple times, to clarify and amend the statute by expressly stating that no violation has occurred where the license frame is not obscuring identifying information. Indeed, the Legislature has introduced several bills to amend N.J.S.A. 39:3-33 in an effort to make explicit its statutory purpose in response to concerns around the number of tickets issued for alleged license frame infractions. See A. 1531 (2020) ("[n]o person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures the numbers or letters of the registration certificate of the vehicle imprinted upon the vehicles registration plate or identifying information set forth on any insert . . .")

(emphasis added); A. 5079 (2018) (same); A. 4631 (2018) ("this provision shall not apply to any license plate frame or identification marker holder provided that the frame or holder does not conceal, obscure, or in any way encroach upon the registration numbers and letters set forth on the motor vehicles license plates.") (emphasis added); A. 4099 (2020) (amending so that the provision is inapplicable "to any license place frame or identification marker holder that has been issued to a motor vehicle owner . . . by a dealer authorized to engage in the business of buying, selling, or dealing in motor vehicles in this state . . . provided that the frame or holder does not conceal, obscure, or in any way encroach upon the registration numbers and letters set forth on the motor vehicles license plates."); A. 2136 (2018) (same); see also Larry Higgs, Nearly 120K people received a ticket last year for this common license plate violation, NJ.com (Apr. 10, 2018), https://www.nj.com/traffic/2018/04/your_personalized_piece_of_plastic_could_get_you_a.html.

Adopting Heine, under these facts, would, effectively, grant the rule of lenity to Officer Warrington, and not to Mr. Roman-Rosado, by ignoring the clear rationale behind the statute and construing N.J.S.A. 39:3-33 in the officer's favor. In this instance, Officer Warrington was not only admittedly clear about the purpose of N.J.S.A. 39:3-33, but the Legislature is aware that officers are using the ambiguity to enforce pretextual stops. Providing judicial sanction to this sort of

behavior by adopting Heine's "oh well it happens sometimes" mistake-of-law defense pooh poohs the real and adverse effects these sorts of policies have on the lives of New Jersey residents. Pretextual stops are not mistakes, and, as discussed in greater detail *infra*, pretextual stops cost lives, particularly Black and Brown ones.

II. N.J.S.A. 39:3-33 IS VOID FOR VAGUENESS BECAUSE THE OVERBROAD LANGUAGE AROUND LICENSE PLATE FRAMES ENCOURAGES ARBITRARY AND DISCRIMINATORY APPLICATION BY LAW ENFORCEMENT.

N.J.S.A. 39:3-33 reads in pertinent part:

> No person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration plate or any part of any insert which the director, as hereinafter provided, issues to be inserted in and attached to that registration plate or marker.

A law is void as a matter of due process if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983). New Jersey courts will, when possible, adopt legal interpretations that avoid constitutional infirmity. N.J.S.A. 39:3-33, however, uses language so overinclusive and vague that it threatens due process by materially impacting the rights of New Jersey citizens to be free from unreasonable searches and seizures under the Fourth Amendment and Article I, Paragraph 7 of the Federal and State constitutions.

Indeed, using N.J.S.A. 39:3-33, Officer Warrington stopped Mr. Roman-Rosado for a violation of the statute although nothing about the plate frame impeded the officer's ability to identify the car or read the license plate, and only 10 percent of the writing on the bottom edge of the plate—which is changeable and without legal meaning—was obscured. See Da027-031.

Vagueness is a procedural due process concept grounded in notions of fair play. State v. Lashinsky, 81 N.J. 1, 17 (1979). A basic element of the rule of law is that a person must be able to know beforehand, with some reasonable degree of certainty, whether or not a particular act will violate the law. "A legislative act, whether a statute or ordinance, must not be so vague that a person of ordinary intelligence is unable to discern what it requires, prohibits, or punishes." Brown v. Newark, 113 N.J. 565, 572-73 (1989). N.J.S.A. 39:3-33 is written so broadly it criminalizes what is, essentially, an aesthetic choice unrelated to public safety. It is unclear if one would receive a ticket for covering one percent, four percent or 10 percent of a plate with a frame, and it is also unclear if the majority of people with license frames that cover any fraction of a plate are repeatedly ticketed for the infraction. Accordingly, to survive a "vagueness" challenge:

> 'The vagueness test' demands that a law be sufficiently clear and precise so that people are given notice and adequate warning of the law's reach. A penal statute should not become a trip for a person of ordinary intelligence acting in good faith, but rather should give fair notice of conduct that is forbidden.
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> A defendant should not be obliged to guess whether his conduct is criminal. Nor should the statute provide so little guidance to the police that law enforcement is so uncertain as to become arbitrary.
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> [Brown, 113 NJ at 577 (emphasis supplied).]

It is clear from the circumstances of the instant case that the vagaries written into the statute are used with the specific purpose of "stop[ping] a lot of cars for motor vehicle infractions . . . [to] then try and develop criminal investigations . . ." 1T 14:9-19. Nothing about the words at the top or bottom of the plate assist law enforcement in identifying the vehicle's owner or with public safety, yet in 2017, nearly 120,000 New Jerseyans—a little over 1 percent of the State's population—received a ticket for license frames covering the slightest part of the plate.[6]

[6] This percentage may still have an outsized impact on communities of color as New Jersey enjoys the dubious distinction of having some of the highest racial disparities in the criminal legal system, including incarceration in its prisons and in the use of force from its police officers. Disha Raychaudhuri & Stephen Stirling, Black people in N.J. say they're more likely to be punched, kicked by cops. Now, data backs that up, NJ.com (Dec. 17, 2018, last updated Sep. 24, 2019), https://www.nj.com/news/erry-2018/12/69f209781a9479/black-people-in-nj-say-theyre.html. Discrepancies in traffic stops in the state—from the stops themselves to the treatment of the motorist by the officers—show similar disparities, an issue playing out within the state and nationwide. Jennifer Eberhardt, et al., "Language from police body camera footage shows racial disparities in officer respect," Proceedings of the National Academy of Sciences, Jun 2017, 114 (25) 6521-6526,

This, despite the fact that residents with a license plate in New Jersey and the law enforcement officers who make motor vehicle stops, know the words "Garden State" adorn the bottom of the vast majority of New Jersey licenses. T1 17:15-18 ("Q: But you could still clearly see that it was Garden State, the words, correct? A: Yeah, through familiarity of the license plate, yeah. I could see that it said Garden State.").

N.J.S.A. 39:3-33 has been used to subject New Jerseyans to the virtually unlimited discretion of the police, to whom the statute gives no guidance. Accordingly, N.J.S.A. 39:3-33 violates the guarantees of constitutional due process under Due Process Clauses of the United States Constitution and the New Jersey Constitution.

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available at https://www.pnas.org/content/114/25/6521; James E. Lange, Kenneth O. Blackman, and Mark B. Johnson, Speed Violation Survey of the New Jersey Turnpike: Final Report, submitted to the Office of the Attorney General of New Jersey 2001; National Institutes of Justice, Racial Profiling and Traffic Stops (Jan. 9, 2013), available at https://nij.ojp.gov/topics/articles/racial-profiling-and-traffic-stops; Sharon LaFraniere & Andrew W. Lehren, The Disproportionate Risks of Driving While Black, N.Y. Times (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html ("As the public's most common encounter with law enforcement, [traffic stops] largely shape perceptions of the police. Indeed, complaints about traffic-law enforcement are at the root of many accusations that some police departments engage in racial profiling. Since Ferguson erupted in protests in August last year, three of the deaths of African-Americans that have roiled the nation occurred after drivers were pulled over for minor traffic infractions: a broken brake light, a missing front license plate and failure to signal a lane change.")

A. The vagueness of N.J.SA. 39:3-33 encourages and gives sanction to capricious and discriminatory stops by law enforcement that disproportionately affect people of color.

The Supreme Court has long held that it is reasonable, legal, and harmless for police to use minor pretextual traffic stops to "fish" for evidence of a larger criminal enterprise. Whren v. United States, 517 U.S. 806 (1996).

In Whren, while patrolling a "high drug area," an officer noticed two young Black occupants in a dark Pathfinder truck. Whren, 517 U.S. at 808. The young men aroused the officer's suspicion simply because the driver was looking at the passenger's lap while waiting at a stop sign. Id. After the truck stopped at the stop sign for "an unusually long time—more than 20 seconds," the officer turned back to follow the truck. Id. The truck turned without signaling. Id. While stopping the truck to give a warning about the traffic violations, the officer stated he saw bags of drugs in the car. Id. at 809. While the officer's observations of where the driver was looking provided no understanding of how looking into the passenger's la created reasonable suspicion of criminal activity, the Court rejected the defendant's argument about the officer's reasonableness in conducting the stop.

However, significant social research shows that these "pretextual" traffic stops—stops that are purportedly legitimated by traffic or vehicle infractions that are often without reasonable suspicion or probable cause—result in disparate impact on communities by race, providing cover to effectuate discriminatory traffic

stops with the imprimatur of the State. Accordingly, this Court should consider how upholding a purported "mistake-of-law" by a police officer based on an unconstitutionally vague law can impact and sustain the continued subjugation of Black and Brown New Jerseyans who are routinely subjected to unjustified pretextual stops every day.

Pretextual stops in the United States generally and in New Jersey in particular, are fraught with racial bias and discrimination.[7] See infra at n.4. Both anecdotal and quantitative data show that nationwide, the police wield the discretionary power of the pretextual stop primarily against African Americans and Latinx populations.[8]

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[7] David Kocieniewski, Study Suggests Racial Gap In Speeding In New Jersey, N.Y. Times (Mar. 21, 2002), https://www.nytimes.com/2002/03/21/nyregion/study-suggests-racial-gap-in-speeding-in-new-jersey.html.

[8] See also Jaeah Leejul, We Crunched the Numbers on Race and Traffic Stops in the County Where Sandra Bland Died, Mother Jones (Jul. 24, 2015), http://www.motherjones.com/politics/2015/07/traffic-stops-black-people-waller-county (studying traffic stop rates in Texas); Sharon Lafraniere & Andrew W. Lehren, The Disproportionate Risks of Driving While Black, ("And black motorists who were stopped were let go with no police action—not even a warning—more often than were whites. Criminal justice experts say that raises questions about why they were pulled over at all and can indicate racial profiling."); Frank R. Baumgartner, Derek Epp, & Kelsey Shoub, Analysis of Black-White Differences in Traffic Stops and Searches in Roanoke Rapids, NC, 2002-2013, available at https://www.unc.edu/~fbaum/TrafficStops/Reports2014/RoanokeRapidsTrafficStopsBaumgartner-4October2014.pdf (concluding that a thirteen-year study of traffic stops in North Carolina revealed disproportionate number of non-whites being

For example, the Stanford Open Policing Project—a partnership between the Stanford Computational Journalism Lab and the Stanford Computational Policy Lab—has, to date, collected and standardized over 200 million records of traffic stop and search data from around the country. The study of those records concluded that "relative to their share of the residential population, we find that black drivers are, on average, stopped more often than whites." See Emma Pierson, et al., A large-scale analysis of racial disparities in police stops across the United States, Nature Human Behavior, available at https://doi.org/10.1038/s41562-020-0858-1. Similarly, in one report submitted to the New Jersey Attorney General, among individuals who were subjected to traffic stops in New Jersey, 77.2 percent were Black or Latinx.[9] As recently as May of this year, however, an audit

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stopped and search); Lauren Kirchner, The Racial Imbalance In Traffic Stops Persists, Pacific Standard (Apr.16, 2015), https://psmag.com/news/the-racial-imbalance-in-traffic-stops-persists (reporting on results of study by Baumgartner et. al); University of Vermont, Analysis of Traffic Stops and Outcomes in Vermont Shows Racial Disparities (Jul. 1, 2006) (concluding after a five-year study that police disproportionately stop black drivers); David Montgomery, Data Dive: Racial Disparities in Minnesota Traffic Stops, Pioneer Press, (Jul. 9, 2016), http://www.twincities.com/2016/07/08/data-dive-racial-disparities-in-minnesota-trafficstops/ (reporting on racial disparity in 2003 in Minnesota traffic stops); Greensboro Police Department, Eleazer Hunt, Karen Jackson, Jan Rychtar, & Rahul Singh, Analysis of Traffic Stop and Search Data, available at http://www.greensboronc.gov/modules/showdocument.aspx?documentid=30373; Press Release, RTI International, Black Male Drivers Disproportionately Pulled Over in Traffic Stops by Durham Police Department, Study Finds, available at https://durhamnc.gov/DocumentCenter/View/9593.

[9] N.J. Att'y Gen., Interim Report of the State Review Team Regarding Allegation of Racial Profiling, 26 (1999), available at

conducted by the New Jersey Comptroller's office noted that New Jersey State Police are still failing to keep accurate data on these racial imbalances.[10]

Indeed:

> [P]olice stops . . . divide Americans into two groups. On the one side are people for whom police stops are the signal form of surveillance and legal racial subordination. This group is populated largely by African Americans and other racial minorities. On the other side are people for whom police stops are annoyances that, at worst, yield expensive traffic tickets, but which also reaffirm the driver's place as a full citizen in a rule-regulated society. This group is populated largely by whites.[11]

Where that first group drives, a police officer can stop a driver for any reason, or none at all.[12] The hard truth that the current moment has laid bare is that no person

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https://www.state.nj.us/lps/intm_419.pdf. Nearly ten years later, the New Jersey Attorney General's office, with the assistance of the Office of Law Enforcement Professional Standards, issued another report regarding police traffic Enforcement Activities. Plate and registration infractions by Black motorists make up nearly a quarter of moving violation stops, which is alarming given that Black people make up just over 13% of New Jersey's population. N.J. Att'y Gen., Aggregate Report of Traffic Enforcement Activities of the New Jersey Police (Aug. 2018), available at https://www.nj.gov/oag/oleps/pdfs/OLEPS-2018-Fifteenth-Aggregate-Report_TEA_njsp.pdf.

[10] Blake Nelson, N.J. State Police must improve tracking possible racial profiling in traffic stops, audit says, (May 15, 2020), NJ.com, https://www.nj.com/news/2020/05/nj-state-police-must-improve-tracking-possible-racial-profiling-in-traffic-stops-audit-says.html.

[11] Charles R. Epp, Steven Maynard-Moody & Donald P. Haider-Markel, Pulled Over: How Police Stops Define Race and Citizenship, 150 (John M. Conley & Lynn Mather eds., 2014) (hereinafter, Epp, Pulled Over).

[12] "[W]ith the traffic code in hand, any officer can stop any driver any time." David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme

of color is safe from this treatment anywhere, regardless of their obedience to the law, their age, the type of car they drive, or their station in life; drivers of color are simply more likely to be subjected to investigatory, discretionary stops because of their race.[13] What is more, these stops can have dire consequences. Instead of getting a ticket that merely ruins their day, a person of color stopped on the road may get a bullet that takes their life. The deaths of Philando Castile, Matthew Allen, Samuel DeBose and Walter Scott bear witness to this reality.[14]

This Court should make clear that the Constitution does not support these unjust and disparate outcomes. For decades, courts have recognized the potential for Whren and the good-faith exception to facilitate pretextual stops. As the Fifth Circuit posited over twenty years ago, "[u]nder the general rule established in

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Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 559 (1997) (internal punctuation omitted).

[13] Epp, Pulled Over, 72-73, 155 (2014)

[14] Jamiles Lartey & Jon Swaine, Philando Castile shooting: officer said he felt in danger after smelling pot in car (June 20, 2017), https://www.theguardian.com/us-news/2017/jun/20/philando-castile-shooting-marijuana-car-dashcam-footage; Matthew Allen, Family seeks answers in shooting death of unarmed Black man during routine traffic stop, (June 7, 2020), https://thegrio.com/2020/06/07/nj-state-trooper-kills-unarmed-black-man/; Associated Press, Samuel DuBose shooting: second mistrial declared in officer's murder trial (June 23, 2017), https://www.theguardian.com/us-news/2017/jun/23/samuel-dubose-shooting-ray-tensing-trial-mistrial; Michael S. Schmidt & Matt Apuzzo, South Carolina Officer Is Charged With Murder of Walter Scott (Apr. 7, 2015), https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html.

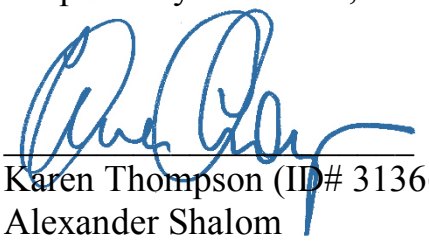
Whren, a traffic infraction can justify a stop even where the police officer made the stop for a reason other than the occurrence of the traffic infraction. But if the officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive." Lopez-Valdez, 178 F.3d at 289.

That is precisely the situation presented here, but now with the potentially new shelter of mistake-of-law. As society can no longer ignore the injustices such rules create, neither can this Court. By allowing law enforcement to use N.J.S.A. 39:3-33 to create a generalized reasonable suspicion, there is no basis upon which a person of color can actively refute racial animus or bias. Even if there is some indication that the officer's subjectivity was informed by racism, the vagueness of the statute can be deployed as a shield as surely as it has already been deployed as a sword, and allow in tainted evidence.

CONCLUSION

For all these reasons, and in consideration of the profound effect this holding will have on the lives and well-being of Black and brown New Jerseyans, *Amicus* ask the court to reverse the lower court's decision, find that Officer Warrington's stop of Mr. Roman-Rosado was unreasonable, and suppress the evidence gathered as a result of that stop. Should this Court find that the stop was, in fact, reasonable based on N.J.S.A. 39:3-33, *Amicus* also asks the court to decline to adopt Heine's holding.

Respectfully submitted,



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