No. 13-604

IN THE

Supreme Court of the United States

NICHOLAS BRADY HEIEN, *Petitioner*,
v.
NORTH CAROLINA, *Respondent*.

On Writ of Certiorari to the
Supreme Court of North Carolina

Brief *Amicus Curiae* of Gun Owners Foundation, Gun Owners of America, Inc., U.S. Justice Foundation, The Lincoln Institute for Research and Education, Free Speech Coalition, Free Speech Defense and Education Fund, Western Journalism Center, The Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, Policy Analysis Center, Downsize DC Foundation, and DownsizeDC.org in Support of Petitioner

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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Free Speech Defense and Education Fund, Western Journalism Center, Conservative Legal Defense and Education Fund, Policy Analysis Center, and Downsize DC Foundation are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc., Free Speech Coalition, The Abraham Lincoln Foundation for Public Policy Research, Inc., and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, including programs to conduct research and to inform and educate the public on important issues of national concern, the proper construction of state and federal constitutions and statutes, questions related to human and civil rights secured by law, and related issues. Each organization has filed a number of *amicus curiae* briefs in this Court and other federal courts. With respect to the Fourth Amendment, many of these *amici* filed an *amicus curiae* brief in this Court at the petition stage as well as an *amicus curiae* brief on the merits in

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012), and an amicus curiae brief in United States v. Wurie, U.S. Supreme Court Docket No. 13-212.

SUMMARY OF ARGUMENT

The Supreme Court of North Carolina ruled that a traffic stop predicated on violation of traffic laws did not violate the Fourth Amendment, even though there was no actual violation of traffic laws, because the judges believed the traffic stop was "reasonable" based on the "totality of the circumstances." The Fourth Amendment allows for no such stops. Indeed, the rationale adopted by the court in crafting its own definition for the one word "unreasonable" in the Fourth Amendment demonstrates how a court decision can be superficially grounded in the "words" of a constitutional provision while at the same time being completely unfaithful to the context and Founders' meaning of the text. This decision is an outlier when compared to the decisions of several courts of appeals and the highest courts of other states, and cannot be allowed to stand.

This case also provides this Court an opportunity to revisit its Fourth Amendment jurisprudence, and establish clear guidance for lower courts as to its scope. Specifically, it invites this Court to apply the private property principles expressed in the Fourth Amendment to a traffic stop case, rather than to decide this case based on an atextual reasonable expectation of privacy test. This case also allows this Court to build on its recent cases which reaffirm the property basis of the Fourth Amendment, as done recently in

United States v. Jones, 565 U.S. __, 132 S.Ct. 945 (2012) and Florida v. Jardines, 569 U.S. __, 133 S.Ct. 1409 (2013).

A proper analysis of the traffic stop below based on the property principles of the Fourth Amendment exposes the absurdity of sanctioning an illegal stop even if the judges believe the police officer acted reasonably. The scope of the Fourth Amendment was established by the Founders, and cannot be diminished by modern judges who view traffic safety more important than property rights. The good faith or subjective impression of the officer, however "reasonable," is irrelevant to proper constitutional analysis.

ARGUMENT

On the morning of April 29, 2009, a deputy sheriff in Surry County, North Carolina made a traffic stop of a Ford Escort solely because one of its brake lights failed to illuminate. State v. Heien, 366 N.C. 271, 272 (N.C. 2012). North Carolina's decades-old statutes require only one such brake light, termed a "stop lamp," to be functional (State v. Heien, 214 N.C. App. 515, 518 (N.C. 2011)), and "[n]o North Carolina appellate court" has ever reached any other conclusion. Pet. Br. at 2-3. Although the record is unclear as to what the deputy sheriff actually knew, the Supreme Court of North Carolina assumed that he was unaware of this law, and viewed his ignorance of the traffic laws, which he was tasked to enforce, as a "mistake of law." 366 N.C. at 275. The officer's actions, through a series of events, led to a 40-minute search of the car

and charges being brought against the driver and passenger for drug possession. 366 N.C. at 279; Pet. Br. at 3-4. The passenger in the car, Heien, challenged the legality of the traffic stop.

It is well established that a police traffic stop of an automobile constitutes a Fourth Amendment seizure of the automobile and its occupants. *See* Whren v. United States, 517 U.S. 806, 809-10 (1996). A "bare majority of the North Carolina Supreme Court" believed the stop in this case to be based on a reasonable mistake of law by the police officer, and therefore valid. Pet. Br. at 2. The only question presented to this Court, then, is whether a police officer may engage in a Fourth Amendment seizure based on his mistaken belief that perfectly legal behavior is illegal, so long as courts later deem his mistake to have been "reasonable."

The state supreme court decision below is clearly an outlier[2] under the decisions of other federal and state

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[2] The case below is an outlier even within North Carolina. Erroneously characterizing the issue as one of "first impression for this Court," the state supreme court established what the dissent termed a sort of "'good faith exception' for stops conducted in contravention of the law...." 366 N.C. at 286. In a similar case, State v. Ivey, 360 N.C. 562 (N.C. 2006) (overruled on other grounds), an officer stopped a vehicle for failure to signal before making a turn, and a resulting search of the vehicle led to the discovery of an illegal firearm. *Id.* at 563. The Supreme Court of North Carolina held that "[i]n examining the legality of a traffic stop, the proper inquiry is not the subjective reasoning of the officer, but whether the objective facts support a finding that probable cause existed to stop the defendant." *Id.* at 564. The stop in Ivey violated the Fourth Amendment "[b]ecause failure to

courts, as demonstrated by Petitioner. *See* Pet. at 11-12. However, these *amici* focus on three related Fourth Amendment issues not addressed by Petitioner. As discussed in section I, *infra*, the rationale adopted by the Supreme Court of North Carolina demonstrates how a court decision can be superficially grounded in the "words" of a constitutional provision, while at the same time being completely unfaithful to the context and Founders' meaning of the "text." Section II addresses the odyssey this Court has followed in its Fourth Amendment jurisprudence, first embracing its atextual privacy tests, but recently returning to the Fourth Amendment's more robust property principles, as reaffirmed in United States v. Jones, 565 U.S. __, 132 S.Ct. 945 (2012) and Florida v. Jardines, 569 U.S. ___, 133 S.Ct. 1409 (2013). Lastly, section III argues that stopping an automobile on "reasonable suspicion" of activity that violates no law is *per se* unreasonable, in violation of the Fourth Amendment.

I. THE DECISION BELOW WAS BASED ON NO FIXED PRINCIPLE OF LAW, BUT RATHER ON THE SUBJECTIVE OPINION OF FOUR JUDGES AS TO WHAT THEY FELT "REASONABLE" UNDER THE "TOTALITY OF THE CIRCUMSTANCES."

The Supreme Court of North Carolina framed the Fourth Amendment issue presented as follows: "whether there was **reasonable suspicion** for the

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give a signal, in and of itself, does not constitute a violation [and] nothing in the record suggests Officer Rush had probable cause to believe any traffic violation occurred." *Id.* at 566.

stop that led to defendant's convictions...." 366 N.C. at 271 (emphasis added). The court explained that its determination as to the "reasonableness" of the officer's suspicion follows the court's review of the facts in the record, considering "the **totality of the circumstances**...." 366 N.C. at 276 (emphasis added). Indeed, the court stated its understanding that under the Fourth Amendment:

> [t]he question of whether **reasonable suspicion** exists has historically been answered by considering the **totality of the circumstances** present in each individual case rather than on the basis of **bright-line rules**. [*Id.* at 281 (emphasis added).]

"After reviewing the **totality of the circumstances**," the court "conclud[ed] that there was an objectively **reasonable basis to suspect** that illegal activity was taking place." *Id.* at 271-72. Indeed, the court found "the **primary command** of the Fourth Amendment [to be] that law enforcement agents act **reasonably**." *Id.* at 278 (emphasis added). True to this understanding, some variant of the word "reasonable" appears no fewer than 74 times in the court's opinion, followed by another 21 uses in the dissenting opinion.[3]

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[3] The analysis of the Fourth Amendment conducted by the three dissenting judges was only slightly better than that of the majority, as it also focused on the "reasonableness" of the stop, criticizing the majority only for "eviscerating the 'objectively reasonable' standard of the Fourth Amendment." *Id.* at 288.

In focusing on the reasonableness of the search, the court below created the impression that it was attempting to apply faithfully the text of the Fourth Amendment, which ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated...." (Emphasis added.) However, the court made no effort to identify what the Founders meant by that language, and what types of "searches and seizures" the Founders considered to be "unreasonable." By singling out one word, "unreasonable," without addressing any of the other words in the amendment, the justices erroneously assumed that the language as a whole invites them to determine which searches and seizures they believe to be reasonable, in much the same way as a common law jury might decide an automobile accident case. Based on that understanding, the Supreme Court of North Carolina felt justified in eschewing any principled basis for (or "bright-line rule" governing) its decision, giving force instead to what the judges felt was reasonable for the officer to have done in the situation.

Freed from any contextual constraint, the lower court concluded that, even though the stop was **illegal**, the stop was **constitutional**, because "there was an objectively **reasonable** basis **to suspect** that illegal activity was taking place." 366 N.C. 271-72 (emphasis added).[4] This conclusion appears to be based on the

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[4] The Supreme Court of North Carolina cited Terry v. Ohio, 392 U.S. 1 (1968), for the proposition that "the reasonable suspicion standard does not require an officer actually to witness a violation of the law before making a stop." 366 N.C. at 279. Of course, one

misconception that the Fourth Amendment is only concerned that police act reasonably (*id.* at 279) and, if they do, it does not matter that their actions were illegal. The court held that in this case, although the officer was mistaken about the law, his mistake was reasonable, and that it was reasonable to be mistaken about the law.[5] In other words, according to the decision below, it can be reasonable for Fourth Amendment purposes for the police to act illegally.

The Supreme Court of North Carolina's opinion justified the traffic stop because the court was "particularly concerned for maintaining safe roadways."[6] 366 N.C. at 279. It explained that

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important fact the lower court omits is that Terry dealt with an officer who had reasonable suspicion of actual illegal activity, not activity erroneously assumed to be illegal.

[5] The dissent notes that this holding "endorse[s] '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.'" *Id.* at 288. Indeed, in a criminal case, a mistake of fact is sometimes a defense, while a mistake of law is not. North Carolina, by imputing knowledge of the law to criminal defendants, would require laymen to be masters of the universe of state laws and regulations, but at the same time would lift that same responsibility from the police, even though officers receive substantial training as to what the laws are, and are paid to know that subject well.

[6] The Supreme Court of North Carolina went so far as to make the curious claim that "it seems to us that most motorists would actually prefer to learn that a safety device on their vehicle is not functioning properly." 366 N.C. at 279. These observations about traffic stops reveal that judges may not be in the best position to explain how they are viewed by ordinary Americans. Certainly,

"narrowly interpret[ing] our traffic safety statutes ... would undermine our officers' important efforts in keeping our roads safe." 366 N.C. at 279-80. Thus, it described the circumstances of the stop as "a routine traffic stop" when the officer "was observing traffic" when he noticed the brake light in the car in which Heien was riding "failed to illuminate." 366 N.C. at 272. Actually, this description of the circumstances of the stop is at significant variance with the opinion of the North Carolina Court of Appeals (214 N.C. App. at 515) and the record which reveals that the traffic stop of Heien had almost no relation to establishing "safe roadways."[7]

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it would be unrealistic to assume that police treat judges during traffic stops the same way they treat ordinary citizens. *See, e.g.*, "Stephens County judge pulled over for speeding," KSWO News (Dec. 5, 2008). http://www.kswo.com/story/9467402/stephens-county-judge-pulled-over-for-speeding; "T. Haeck, "Snohomish County judge avoids DUI charge," MyNorthwest.com (Oct. 30, 2012). http://mynorthwest.com/11/2016981/VIDEO-Snohomish-County-judge-avoids-DUI-charge.

[7] The state supreme court erroneously described the stop as "a routine traffic stop" where the officer "was observing traffic ... when he noticed" that the brake light in the car in which Heien was riding "failed to illuminate," at which point he "decided to stop" the car. 366 N.C. at 272. In fact, the record reveals that on the day in question the officer was not focused on highway safety, but rather was engaged in "criminal interdiction" "looking for criminal indicators of drivers, of passengers also." J.A. 13-14, 26. *See* Pet. Br., p. 43.

The supposed "criminal indicators" (*i.e.*, suspicious behavior) identified by the officer during trial were that the driver "appeared very stiff and nervous as he drove by me. So I pulled out." J.A. 15. The officer explained that the reason for this conclusion about the driver was that he "was gripping the steering

In truth, the Supreme Court of North Carolina engaged in what could best be described as interest balancing — pitting the Fourth Amendment rights of the individual against the benefit of allowing the government to violate them. The court asserted that a traffic stop pursuant to baseless suspicion of wrongdoing is "not a substantial interference with the detained individual and is a minimal invasion of privacy." 366 N.C. 271 at 279. Balanced against "society's countervailing interest in keeping its roads safe" (*id.*), it is no wonder that the interests of the individual would be required to bend. Justice Scalia

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wheel at a 10 and 2 position, looking straight ahead." J.A. 15. Neither the Supreme Court of North Carolina nor the North Carolina Court of Appeals addressed the absurdity of finding such behavior suspicious. For many years, driver's education courses have taught the "10 and 2" hand positioning for driving, and teach drivers to keep their eyes on the road. In essence, the officer testified under oath that in his professional judgment it is suspicious for drivers to drive too well. **Only after the officer found the driver suspicious and decided to follow, did the officer notice an issue with the brake light**. *Id.*

Based on the officer's admission that his assignment that day was "criminal interdiction," not traffic safety, combined with his admission that he began following the car because the driver exhibited "criminal indicators," one could reasonably conclude that the real reason for this stop was not the car's stop light, but rather was pretextual. Of course, this Court has approved pretextual traffic stops for an observed traffic violation, even though the officer's real (subjective) reason for making the stop was wholly unrelated to safety. *See* Whren v. United States, 517 U.S. 806 (1996). Should this Court now agree with the Supreme Court of North Carolina and not even require law enforcement to have a pretext for a traffic stop, it would be difficult to conceive of a traffic stop which would be barred by the Fourth Amendment. Indeed, it would be tantamount to a declaration by this Court that the Fourth Amendment does not apply to traffic stops.

has accurately described such tests as "judge-empowering."[8]

But the Fourth Amendment standard of reasonableness is not an amorphous standard in which judges may find infinite shades of gray. It does not prescribe a subjective inquiry into what a group of judges think seems reasonable to them. Rather, it calls for an objective inquiry into whether a certain action is or is not "reasonable" based on the specific rights embodied in the text and context of the Fourth Amendment.

II. THE FOURTH AMENDMENT QUESTION IN THIS CASE SHOULD BE ANALYZED AND RESOLVED ON THE BASIS OF OBJECTIVE PROPERTY RIGHTS, NOT SUBJECTIVE NOTIONS OF REASONABLENESS.

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." In its opinion below, the Supreme Court of North Carolina never analyzes the relevant text of that Amendment, preferring to speak in generalities such as "the primary command of the Fourth Amendment [is] that law enforcement agents act reasonably." 366 N.C. at 278.

It is not surprising that the state supreme court's opinion had the central focus on "reasonableness" that it did. Indeed, much of that focus comes from this

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[8] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

Court's search and seizure cases which, for many years, strayed far from the constitutional text.

In 1996, Supreme Court Chief Justice Rehnquist penned the line that "the 'touchstone of the Fourth Amendment is reasonableness."[9] It is true that the word "unreasonable" does appear in the Fourth Amendment, but it appears in a specific context. In identifying the "touchstone" of "reasonableness," Chief Justice Rehnquist treated "unreasonable" as the only word that really matters, rendering the rest of the Amendment superfluous, as if the Fourth Amendment could simply have said "The police must act reasonably when conducting searches and seizures." This approach violates the canon of construction that "the text must be construed as a whole." *See* A. Scalia & B. Garner, Reading Law, Thompson/West (2012), p. 168. *See also* Holmes v. Jennison, 39 U.S. 540, 570-1 (1840) ("every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added").

As the Court began in the 1960's to read the word "reasonableness" in isolation, to mean whatever judges believed was reasonable under the circumstances, what was "reasonable" became linked to whether the court believed a person's "right to privacy" had been violated. Although the term "privacy" is not found anywhere in the Constitution, a privacy standard was embraced by the Court in the cases of Warden v.

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[9] Ohio v. Robinette, 519 U.S. 33, 39 (1996).

Hayden, 387 U.S. 294 (1967), and Katz v. United States, 389 U.S. 347 (1967).

Indeed, Warden v. Hayden explicitly stated that "[t]he premise that property interests control the right of the Government to search and seize has been discredited ... the principal object of the Fourth Amendment is the protection of privacy rather than property, and [we] have increasingly discarded fictional and procedural barriers rested on property concepts."[10] *Id.*, 387 U.S. at 304.

It may have been that a privacy standard originally was adopted in order to fill a gap created by this Court's earlier decision that individuals had no property interest in their electronic communications.[11] Over the years, however, this newly minted privacy concept failed to expand Fourth Amendment protection, but rather operated to reduce it.[12]

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[10] The prohibition against "unreasonable searches and seizures" was never intended to give judges completely unrestrained and open-ended power to ignore the Fourth Amendment if they (personally) believed government agents acted reasonably — by, for example, determining whether the police had violated any subjective "expectation of privacy" that "society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967).

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

[12] *See* H. Titus & W. Olson, "U.S. v. Jones: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE SCHOOL OF LAW JOURNAL OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Jan. 2013), pp. 252-59, http://lawandfreedom.om/site/publications/Case%20Western%20Law%20Review.pdf

Gradually, evolving notions of what level of privacy was deemed "reasonable" had the effect of authorizing more and more intrusive government searches and seizures deemed "reasonable," even though they constituted clear violations of property rights.[13]

In Delaware v. Prouse, 440 U.S. 648 (1979), Justice White viewed the inquiry into the reasonableness of a traffic stop as revolving around "privacy," to be "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654. Although Prouse invalidated a suspicionless stop ostensibly to check a license and registration, it did so only based on the particular "totality of the circumstances," by balancing the intrusiveness of the stop against the governmental interests which the Court did not believe would be furthered by the

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[13] *See, e.g.*, Oliver v. United States, 466 U.S. 170, 178, 183 (1984) (a person has no expectation of privacy in his "open fields," and thus government agents may trespass in their investigation, since "[t]he existence of a property right is [now] but one element in determining whether expectations of privacy are legitimate."); Smith v. Maryland, 442 U.S. 735, 741 (1979) (police are permitted to capture the numbers dialed by a person on his phone because he voluntarily conveyed them to the telephone company for the express purpose of placing a call); United States v. Miller, 425 U.S. 435, 442 (1976) (police can obtain a person's bank records from the bank because he voluntarily conveyed the information for the express purpose of banking); California v. Greenwood, 486 U.S. 335, 40 (1988) (police permitted to search garbage bags that were placed at the curb "for the express purpose of conveying it to a third party...."); United States v. Hedrick, 922 F.2d 396, 398 (7th Cir. 1991) (police permitted to seize and search trash placed in cans on a person's property within the curtilage of his home).

violation. Not surprisingly, the Supreme Court of North Carolina cited Prouse for the proposition that "the purpose of the Fourth Amendment 'is to impose a standard of reasonableness upon the exercise of discretion by government officials ... in order to safeguard the privacy ... of individuals against arbitrary invasions.'" 366 N.C. at 278-79 (notes omitted).

In Prouse, Justice White was careful not to prohibit **all** suspicionless stops, stating that "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663. The idea here was apparently that violating **one** motorist's rights is impermissible, but violating **every** motorists' rights is perfectly fine. This *dicta* from Prouse has later been used to justify all sorts of intrusive checkpoints by police that are based not on warrants, probable cause, or even "reasonable suspicion."[14]

Beginning in the 1990's, Justice Scalia began to lead the Court in a different direction. In Whren v. United States, 517 U.S. 806 (1996), Justice Scalia recited the Court's practice that "every Fourth Amendment case ... turns upon a 'reasonableness' determination, involves a balancing of all relevant factors." *Id.* at 817. However, Justice Scalia decided Whren as a case of black and white. He first stated that "[a]s a general matter, the decision to stop an automobile is reasonable where the police have

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[14] *See, e.g.*, Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoints); Illinois v. Lidster, 540 U.S. 419 (2004) (information gathering checkpoints).

probable cause...." *Id.* at 810. Then, he noted that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. Refusing to balance the state versus individual interests, Justice Scalia determined that, since "the officers had probable cause," that in and of itself "rendered the stop reasonable under the Fourth Amendment...." *Id.* at 819.

Finally, after 45 years of privacy-focused Fourth Amendment jurisprudence, the Court in United States v. Jones took a fresh look at the issue when it considered whether the warrantless use of a GPS tracking device on a vehicle violated the Fourth Amendment, without regard to the reasonableness of any expectation of privacy. 132 S.Ct. 945, 949, 953-54. The Court stated that "Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Id.* at 950. Rather, the Court announced a return to the property rights foundation of the Fourth Amendment which the Court stated had been for a time displaced — but not replaced — by privacy considerations. *Id.* at 952 ("[T]he Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test"). Justice Scalia recognized that "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise ... the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *Id.* at 949.

A year later, the Court continued what it began in Jones in Florida v. Jardines, 569 U.S. ___, 133 S.Ct.

1409 (2013). The Court ruled that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Id.* at 1417.

The court below never gives any consideration to the private property principles that form the basis of the Fourth Amendment. Instead, the court's opinion is based on notions of "reasonableness" and interest balancing — ideas that were not relied upon by this Court in Jones and Jardines.

Rather than being a fluid concept left to the judgment of judges, the word "unreasonableness" has a fixed meaning, and its application is to be ascertained by fixed principles. The reasonableness or unreasonableness of a search or seizure is determined by evaluating whether it violates a property right in "persons, houses, papers, and effects." If a property right is violated, the search is *per se* unreasonable. *See* Jardines, 133 S.Ct. at 1414-1417.

III. STOPPING AN AUTOMOBILE ON "REASONABLE SUSPICION" OF ACTIVITY THAT VIOLATES NO LAW IS *PER SE* UNREASONABLE, A VIOLATION OF THE FOURTH AMENDMENT.

The Founders determined that the property rights recognized in and secured by the Fourth Amendment are inviolate against any form of compromise by government. *See* Boyd v. United States, 116 U.S. 616, 626 (1886). Congress may not enact laws diminishing

these rights; executive officers, including the police, may not conduct any search or seizure which compromises these rights; and judges may not sanction unconstitutional searches or seizures for any reason, and certainly not in support of a general interest in "roadway safety." The Fourth Amendment could not be clearer on this point. It protects "[t]he right of the people to be secure" first and foremost "in their persons" but also in their "houses, papers, and effects, against unreasonable searches and seizures...." These rights "shall not be violated." *See, e.g.*, Jardines, 133 S.Ct. at 1414-15.

As to protection of "persons," by the law of nature, "every man has a property in his own person: this no body has any right to but himself." II J. Locke, Treatise of Government § 27, pp. 287-88 (P. Laslett, ed., Cambridge Univ. Press 1988). Additionally, each person has a right to the fruits of the labor of his body, to acquire and dispose of his possessions, generally described as his houses, effects and papers. *Id.,* pp. 287-88. Therefore, no ruler can justly deprive a man of his property (including his person, houses, effects, and papers), unless it is for violation of some law to which he has by civil covenant consented. *See id.*, p. 287, n. §27.

Thus, any attempt by the government to intrude upon a man's person or other property by search or seizure depends first upon whether the person has engaged in an activity that would be against the criminal law — if the facts are as the government official reasonably believes those facts to be. *See* Ornelas v. United States, 517 U.S. 690, 696 (1996);

Delaware v. Prouse, 440 U.S. 648, 663 (1979). Only if an individual driving or riding in a car actually has violated a law can he be detained for that reason. Absent such activity, the government can have no property claim on a driver, passenger, or automobile superior to the property interests secured by the Fourth Amendment guarantee. The government having acquired no superior property interest in the person or the automobile, it has no right to stop the car.

The state supreme court decided the case based on the assumption that the officer incorrectly assumed that the statutes of North Carolina required a vehicle to have two functioning brake lights, not one. Pet. Br. 15. There was no claim whatsoever, nor could there have been, that the government had any superior property interest in either the automobile or its occupants. Thus, the officer lacked the essential legal predicate upon which to stop petitioner's automobile and to interfere with the automobile occupants' freedom of movement. If a police officer has no legal authority for stopping a person, he is no different from a common law trespasser, just as the FBI and D.C. Metropolitan Police Department were treated by this Court in Jones. *See* Jones at 949.[15]

The North Carolina officials contend that there was no violation of the Fourth Amendment because the

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[15] *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.").

officer's mistake was a reasonable one. But the Fourth Amendment standard of reasonableness is most assuredly not, as the state supreme court claimed, "a fluid concept" gauged by a "totality of the circumstances" standard of negligence, as if this were a personal injury tort case. 366 N.C. at 281. Rather, the reasonableness of a Fourth Amendment search or seizure is to be measured by whether the government official had a sufficient factual basis giving it a property interest superior to the private property interest of the person whose person, house, effects, or papers are being searched and/or seized. There being no such valid legal claim in this case, the seizure of the automobile was objectively and *per se* unreasonable under the Fourth Amendment.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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