

In the
Supreme Court of the United States

JUSTIN HAWKINS,

Petitioner,

v.

OHIO,

Respondent.

**On Petition for a Writ of Certiorari
to the Ohio Supreme Court**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a report that a car's color is different from the color listed on the car's registration—without any additional facts—gives a police officer reasonable suspicion that the car is stolen.

RELATED PROCEEDINGS

Ohio Supreme Court: *State v. Hawkins*, No. 2018-1177

Ohio Court of Appeals, Twelfth District: *State v. Hawkins*, No. CA2017-07-013

Fayette County Court of Common Pleas: *State v. Hawkins*, No. CRI20160145

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PETITION FOR A WRIT OF CERTIORARI

Justin Hawkins respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The opinion of the Ohio Supreme Court (App. 1a) will be published at --- N.E.3d ---. It is available at 2019 WL 5197687. The opinion of the Ohio Court of Appeals (App. 17a) is published at 101 N.E.3d 520.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on October 16, 2019. The Ohio Supreme Court denied a motion for reconsideration on December 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides in relevant part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

STATEMENT

When a car is one color, but the police believe that the car’s registration lists a different color, does this mismatch—without any additional facts—create reasonable suspicion that the car is stolen? Until this case, every federal court of appeals and state supreme court to address this question has answered “no.” These courts have recognized that few states, if any, require the owner of a car to report a color change to the state motor vehicle bureau. They have

acknowledged that there are many good reasons a car's registration might not reflect its current color, including most obviously that the car has been repainted. These courts have accordingly concluded that a color mismatch by itself does not constitute reasonable suspicion that a car is stolen.

The Ohio Supreme Court has now broken with this consensus. In the decision below, the court held that a discrepancy between a car's color and a police officer's understanding of the color on the car's registration is enough to create reasonable suspicion that the car is stolen, thus allowing the police to conduct a warrantless *Terry* stop of the car. As a result, anyone driving in Ohio in a car that has been repainted a different color, or in a car whose color has been erroneously recorded in its registration, can be stopped by the police at any time.

The decision below is simply wrong. As many courts have acknowledged, a color discrepancy combined with other facts suggesting that the car is stolen may be enough to constitute reasonable suspicion. But a color discrepancy by itself is not.

1. In the early morning hours of May 20, 2016, police officer Jeffery Heinz heard a beep from the automated license plate reader in his patrol car. App. 2a. The beep was not unusual. It sounds every time the reader captures a license plate, which occurs for approximately 75 percent of the vehicles that pass by. Tr. 25. The beep indicated that nothing was amiss. If the vehicle or the license plate had been reported stolen, or if the owner of the vehicle had an outstanding arrest warrant, the sound would have been a siren instead. *Id.*

Although there was nothing suspicious about Hawkins' car or his license plate, Heinz contacted a police dispatcher and reported the license plate number. App. 2a. The dispatcher responded that the license plate was registered to a white 2001 GMC Yukon sport utility vehicle. *Id.* Hawkins' car was indeed a 2001 GMC Yukon sport utility vehicle, but it was black, not white. *Id.*

As Heinz later learned, the dispatcher was mistaken. The Yukon has always been correctly registered as black. Tr. 37. But Heinz decided to investigate. App. 2a. He sped off at 90 miles per hour (the speed limit was 35) in pursuit of Hawkins. Tr. 116-17. When he caught up, he initiated a traffic stop. App. 3a. The lawfulness of this stop is the only issue in this case.

After stopping Hawkins, Heinz explained that "the color discrepancy was the reason for the stop." *Id.* He asked to see Hawkins' identification. *Id.* Hawkins told Heinz that he did not have his identification with him. *Id.* Meanwhile, Heinz checked the car's vehicle identification number and verified that the car's license plate had not been stolen, as the VIN on the car matched the VIN associated with the car's license plate. *Id.*

Despite this verification, Heinz continued to ask Hawkins for a form of identification. *Id.* Hawkins provided his true name and date of birth, along with a false Social Security number. *Id.* When Heinz observed that the Social Security number did not correspond with his name, Hawkins provided a second Social Security number, which was also false. *Id.* Hawkins reported being low on gas, so Heinz followed Hawkins to a gas station. *Id.*

While Heinz was following Hawkins, he radioed Hawkins' name and date of birth to the police dispatcher, who advised that Hawkins lacked a valid driver's license and that he had an outstanding arrest warrant in another county. *Id.* When Heinz informed Hawkins of the warrant, Hawkins tried to drive away, but he crashed his car. *Id.* at 4a. He was arrested. *Id.* The police inventoried the car and found two credit cards that had been reported stolen. *Id.*

Hawkins was charged with two counts of receiving stolen property (for possessing the two credit cards) and one count of failing to comply with the order of a police officer (for trying to drive away). *Id.* He was not charged with any offense regarding the car, which was properly registered and not stolen.

2. Hawkins moved to suppress all evidence relating to the traffic stop on the ground that Heinz lacked reasonable suspicion of criminal activity. *Id.* at 19a. Heinz was the only witness to testify at the suppression hearing. *Id.* at 20a. He explained that the dispatcher's report of a color discrepancy between the car's registration and the car itself caused him to suspect that the car was stolen and that the license plates actually belonged to a different car, of the same make and model but a different color. *Id.* "In years past, with my experience," Heinz recalled, "if someone would steal a vehicle, they would just go through a parking lot anywhere and find a vehicle that would match the vehicle in which they were driving. Throw that [plate] on there and then drive around." *Id.* The prosecutor asked a clarifying question: "[H]ave you had that experience personally

with vehicles that have been stolen?” *Id.* Heinz admitted that he had not. *Id.* “However,” he continued, “in our city, yes. We have license plates [that] have been taken off and done that, yes.” *Id.*

On cross-examination, defense counsel asked Heinz how many car thefts he had investigated in his career. *Id.* “[Q]uite a few,” Heinz replied. *Id.* at 21a. Defense counsel asked whether Heinz had ever been involved in a case in which a car thief had stolen a license plate from another car of the same make and model as the car the thief had stolen. *Id.* Heinz conceded that he had never been involved in such a case. *Id.* Heinz nevertheless confirmed that the color discrepancy was the “sole reason” he stopped Hawkins’ car. *Id.*

The trial court denied the motion to suppress. *Id.* at 4a. Hawkins was convicted of failure to comply with the order of a police officer. *Id.* He was acquitted of both counts of receiving stolen property. *Id.* at 4a-5a. He was sentenced to 36 months in prison. *Id.* at 5a.

3. The Ohio Court of Appeals affirmed. *Id.* at 17a-28a.

The Court of Appeals observed that “[t]his court has not previously addressed the issue of whether the discrepancy between the color of a defendant’s vehicle and the color listed in registration records accessed by a police officer provides the officer with reasonable suspicion.” *Id.* at 25a. The court noted that “[c]ourts that have considered the issue are split.” *Id.*

On one side of the split, the court recognized, are the U.S. Court of Appeals for the Seventh Circuit

and the Arkansas and Florida Supreme Courts. *Id.* These courts have “all determined that a discrepancy in an automobile’s paint color found via a database check does not amount to reasonable suspicion of criminal activity sufficient to justify a warrantless investigatory stop.” *Id.* “In many of these cases,” the court continued, “the courts considering the issue have noted that there was no requirement under state law to update a vehicle registration when an owner changes the color of his or her car.” *Id.* at 26a. These courts have “concluded that the lawful color discrepancy alone was not probative of wrongdoing and therefore did not authorize a traffic stop.” *Id.*

On the other side of the split, the Court of Appeals observed, are intermediate appellate courts in Georgia, Indiana, and Idaho. *Id.* These courts have “determined that the discrepancy between an automobile’s paint color and the color reported on a vehicle’s registration amounts to reasonable suspicion of criminal activity to authorize an investigatory stop when the officer believes the vehicle was stolen or has a fictitious plate.” *Id.*

The Court of Appeals was “persuaded by the approach taken in” the latter group of cases. *Id.* at 27a. The court determined that “the color discrepancy between the vehicle’s actual paint color (black) and the BMV’s registration (white) gave Heinz reason to believe that the vehicle may have been stolen or the license plate switched from another vehicle.” *Id.* The Court of Appeals accordingly held that “[t]he discrepancy in the vehicle’s color coupled with Heinz’s experience and belief that the vehicle or its plates might have been stolen provided reasonable and ar-

ticulable suspicion to authorize the investigatory stop of appellant's vehicle." *Id.* at 28a.

4. A divided Ohio Supreme Court affirmed. *Id.* at 1a-16a.

The court's majority concluded that the color discrepancy between Hawkins' car and the car's registration was sufficient to provide Heinz with reasonable suspicion of criminal activity. *Id.* at 8a-9a. "Heinz testified that in his experience, the color discrepancy could signify that the vehicle either was stolen or had an illegal license plate," the court reasoned. *Id.* "Based on his professional experience, Heinz suspected that Hawkins was engaged in criminal activity." *Id.* at 9a. The court accordingly held that "Heinz met the reasonable-and-articulable-suspicion standard necessary to perform a lawful investigative traffic stop." *Id.*

Justice Stewart concurred in the judgment only. *Id.*

Justice Donnelly dissented. *Id.* at 9a-16a. "It is not reasonable," he explained, "for a police officer to infer that a vehicle's driver has stolen the vehicle, stolen license plates from a second vehicle, and switched the license plates whenever the officer notices a discrepancy between the color of a vehicle and the color listed in its registration records." *Id.* at 10a.

Justice Donnelly criticized the majority for allowing "a wealth of inferences based upon a single fact that a 15-year-old black GMC SUV was registered as a 15-year-old white GMC SUV." *Id.* at 10a-11a. He noted that the majority erroneously counted Officer Heinz's experience as a second fact justifying a conclusion that he had reasonable suspicion of car

theft. *Id.* at 11a. “An officer’s experience and background are certainly important considerations when determining whether the inferences he drew from the facts were reasonable,” Justice Donnelly observed. *Id.* “But an officer’s inferences drawn from the facts, as well as the background and experience informing those inferences, are not part of the facts themselves.” *Id.*

Justice Donnelly determined that Heinz’s inference of car theft, based solely on the color discrepancy, was not reasonable. Justice Donnelly observed that “[t]here is nothing unlawful in Ohio about driving a vehicle whose color does not match the color listed on the vehicle’s registration.” *Id.* at 13a. “The baseline here,” he continued, “is that driving such a vehicle is consistent with innocent conduct.” *Id.* For this reason, he agreed with the decisions of the Seventh Circuit and the Arkansas and Florida Supreme Courts that “the discrepancy, standing alone, does not adequately support reasonable suspicion absent some other indicia of criminal activity.” *Id.* at 14a-15a.

“In this case,” Justice Donnelly continued, “it was within the realm of possibility that Hawkins stole a black 2001 GMC SUV, drove around until he found another 2001 GMC SUV (which happened to be white), stole the license plates from the white 2001 GMC SUV, and put those plates on the black 2001 GMC SUV.” *Id.* at 15a. But he pointed out that “[i]t was also quite possible that the vehicle was originally white but was painted black at some point in the previous 15 years.” *Id.* “And it was also quite possible that the vehicle had always been black and a mistake was made at some point in the Bureau of

Motor Vehicles’ ... record keeping or in the transfer of the vehicle-registration information to the police.” *Id.*

Justice Donnelly concluded that “nothing in Hawkins’s suppression hearing establish[ed] that the drivers of such vehicles are not, by and large, innocent travelers.” *Id.* at 15a-16a. In his view, therefore, “subjecting all such drivers to random investigatory seizures offends the Fourth Amendment’s basic protections.” *Id.* at 16a.

The Ohio Supreme Court denied reconsideration. *Id.* at 29a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari. The decision below is contrary to decisions in other lower courts and to decisions of this Court. This is an issue that arises frequently and is likely to arise even more frequently in the future. And this is an ideal case for resolving the conflict.

I. The decision below creates a conflict with the Seventh Circuit and the Arkansas, Florida, and Montana Supreme Courts.

Until this case, the federal courts of appeals and state supreme courts had unanimously held that a discrepancy in color between the car and the registration, without additional facts suggestive of car theft, does not constitute reasonable suspicion that the car is stolen.

In *United States v. Uribe*, 709 F.3d 646, 648 (7th Cir. 2013), a police officer stopped the defendant’s car solely because “the blue Nissan he was driving had a registration number that traced back to a

white Nissan.” The traffic stop led to the discovery of nearly a pound of heroin in the car. *Id.* The Seventh Circuit held that the heroin should have been suppressed, because “investigatory stops based on color discrepancies alone are insufficient to give rise to reasonable suspicion.” *Id.* The court pointed out that “the color discrepancy itself was lawful, because neither Indiana [where the defendant was stopped] nor Utah [where the car was registered] requires a driver to update his vehicle registration when he changes the color of his car.” *Id.* at 650. The court noted that “the government provided no information on the correlation between stolen vehicles and repainted ones. We do not know whether ninety-nine percent of repainted cars are stolen, which would suggest a color discrepancy is highly probative of criminal activity, or whether less than one percent are, which would suggest a color discrepancy is completely innocuous.” *Id.* at 652. As a result, the Seventh Circuit held, “we cannot conclude that a color discrepancy alone is probative of wrongdoing without the risk of subjecting a substantial number of innocent drivers and passengers to detention.” *Id.*

The Arkansas Supreme Court reached the same holding in *Schneider v. State*, 459 S.W.3d 296 (Ark. 2015). In *Schneider*, the defendant was stopped “[b]ased solely on the color discrepancy” between the car and the registration. *Id.* at 297. The court noted that Arkansas “has no requirement that the owner of a vehicle change the registration to reflect the color of a vehicle in the event it is painted or the color otherwise altered.” *Id.* at 299. There “was, therefore, no evidence before the circuit court that a color discrepancy was indicative of any criminal activity that

would possibly allow otherwise innocent behavior to give rise to a reasonable suspicion of criminal activity.” *Id.*

The Florida Supreme Court also reached the same holding in *State v. Teamer*, 151 So. 3d 421 (Fla. 2014). Again, the defendant was stopped “[b]ased only on the color inconsistency” between his car and the registration. *Id.* at 424. The court held that the discrepancy did not constitute “reasonable suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying” the state’s department of motor vehicles. *Id.* at 427-28. The court noted that under the state’s theory, “anyone who chooses to paint his or her vehicle a different color could be pulled over by law enforcement every time he or she drives it.” *Id.* at 429. As the court explained, “[c]onducting an investigatory stop based on a color discrepancy only when that discrepancy exists *in conjunction with* additional factors indicating potential criminal activity still protects the government’s interests, while also preserving a motorist’s right of freedom from arbitrary interference by law enforcement.” *Id.* at 430.

The Montana Supreme Court recently reached the same holding in *City of Billings v. Rodriguez*, 456 P.3d 570 (Mont. 2020). In *Rodriguez*, the defendant was stopped because he was driving a white 2016 Chevrolet Cruze, the registration of which said it was red. *Id.* at 571. The Montana Supreme Court held that the officer “did not possess objective data and articulable facts from which he could infer Rodriguez was engaged in criminal behavior.” *Id.* at 573. The officer “was not specifically aware of any

stolen 2016 Chevrolet Cruzes in the area.” *Id.* Moreover, the court noted, “[i]t is not against Montana law to repaint a vehicle, nor does Montana law require a vehicle owner to inform the MVD upon changing the color of a vehicle.” *Id.* The court thus concluded: “Standing alone, the color discrepancy between Rodriguez’s vehicle and that listed on the vehicle’s registration is simply too thin to constitute particularized suspicion.” *Id.*

The Ninth Circuit has said much the same in dicta. In *United States v. Rodgers*, 656 F.3d 1023, 1025 (9th Cir. 2011), the defendant was stopped because his car was black but the registration said it was gold. The court held that evidence should have been suppressed on another ground, so it did not reach the question whether the stop was supported by reasonable suspicion. *Id.* at 1027. But the court cautioned that “[t]he failure to update a vehicle registration to reflect that a car has been painted is not a citable offense under state or local law,” so a color discrepancy, even when the car is found in a high-crime area, can “at best provide a thin basis for reasonable suspicion that the car was stolen.” *Id.*

Other lower courts have reached the same conclusion. See *United States v. Campa*, 2014 WL 4655436, *3 (D. Ariz. 2014) (“color discrepancy alone would unlikely be enough to support a stop”); *Commonwealth v. Mason*, 2010 WL 768721, *3 (Va. Ct. App. 2010) (“Simply having a different color on a vehicle than the color listed on a DMV registration—without more indication of how a crime may have been committed or how criminal activity may be afoot—is not enough information to give a law enforcement officer reasonable suspicion to stop that vehicle.”); *State v.*

O'Neill, 2007 WL 2227131, text at n.4 (N.H. Super. Ct. 2007) (applying the reasonable suspicion standard under the state constitution) (officer “lacked a reasonable, articulable suspicion that the defendant was involved in any sort of criminal activity” because no law “requir[ed] a vehicle owner to notify the DMV of a change in vehicle color”).

In the decision below, the Ohio Supreme Court joined the intermediate appellate courts of Georgia, Idaho, and Indiana, which have found that a color discrepancy, without any additional facts, constitutes reasonable suspicion. *Andrews v. State*, 658 S.E.2d 126, 128 (Ga. Ct. App. 2008) (concluding that the police officer “had a basis for believing the car to be a different color than that listed on the registration, and it was reasonable for him to infer that the license plate may have been switched from another car”); *Thammasack v. State*, 747 S.E.2d 877, 880 (Ga. Ct. App. 2013) (same); *State v. Creel*, 2012 WL 9494147, *2 (Idaho Ct. App. 2012) (color discrepancy meant “the vehicle could have been stolen” and thus gave the officer “reasonable and articulable suspicion to initiate the stop”); *Smith v. State*, 713 N.E.2d 338, 342 (Ind. Ct. App. 1999) (officer “had reasonable suspicion to believe that Smith’s vehicle had a mismatched plate, and as such, could be stolen or re-tagged”); *Rush v. State*, 2019 WL 6709462, *3 (Ind. Ct. App. 2019) (same).

Many other courts have concluded that a color discrepancy may give rise to reasonable suspicion in combination with other evidence that the car was stolen. *United States v. Cooper*, 431 F. App’x 399, 402 (6th Cir. 2011) (color discrepancy plus presence in “a high-crime area”); *United States v. Caro*, 248

F.3d 1240, 1246 (10th Cir. 2001) (color discrepancy plus driver's inability to recall the name of the car's owner); *United States v. Kitowski*, 729 F.2d 1418, 1421-22 (11th Cir. 1984) (color discrepancy plus damage to the car, obvious misalignment of the license plate, and discrepancies in engine size and name of registered owner); *United States v. Clarke*, 881 F. Supp. 115, 117 (D. Del. 1995) (color discrepancy plus presence in "a high crime area"); *United States v. Harvey*, 2015 WL 1197918, *4 (W.D. Mo. 2015) (color discrepancy plus officer's knowledge that a stolen car had recently been at that address); *Commonwealth v. Starr*, 773 N.E. 2d 981, 983, 985 (Mass. App. Ct. 2002) (color discrepancy plus model discrepancy—car was a Thunderbird but registration was for a Taurus).

Until this case, the conflict could have been reconciled without this Court's intervention. Not any longer. Now that the Ohio Supreme Court has joined the wrong side of the split, only this Court can provide uniformity.

II. The decision below is wrong.

Review is also warranted because the Ohio Supreme Court's decision is wrong. A color discrepancy between a car and its registration—by itself—does not create reasonable suspicion that the car is stolen.

The Fourth Amendment permits investigative traffic stops like the one in this case "when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Navarette v. California*, 572 U.S. 393, 396 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). The officer must have "rea-

sonable suspicion to believe that criminal activity may be afoot.” *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citation and internal quotation marks omitted). While reasonable suspicion “is a less demanding standard than probable cause,” the “officer must be able to articulate more than an ‘inchoate and unparticularized suspicion or ‘hunch’ of criminal activity.” *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

A color discrepancy between a car and its registration, without more facts suggesting that the car has been stolen, comes nowhere close to satisfying this standard. Common sense suggests that in the vast majority of cases, there is a lawful explanation for such a color discrepancy.

A. Many cars on the road are a different color from the color listed on their registrations, for reasons that are entirely innocuous.

There are several innocuous reasons a car’s registration may inaccurately state the car’s current color.

To begin with, it is common knowledge that cars are often repainted. There is an entire industry devoted to repainting cars. As *Car and Driver* magazine recently advised,

It can pay—literally and figuratively—to make your old car look almost new with a fresh paint job. First, there’s the psychic pay you get in return for having a good-looking car once again. And then there’s the potential financial payoff

when you sell your ride; it should be more valuable.

Nick Kurczewski, *How Much Does it Cost to Paint a Car?*, Car and Driver (May 14, 2019).¹ There is no way to know precisely how often cars are repainted a different color from their original color, because state motor vehicle departments do not generally keep track of such information. But it appears to be quite common.

Some drivers just want a change. “If you want to create a new look for your vehicle,” the CarsDirect website suggests, “then changing the car paint color can help you do just that.” CarsDirect, *4 Facts to Consider When Changing Car Paint* (Jan. 30, 2019).² Other drivers are required to change the color of their cars for work. *See, e.g.*, 2007 WL 2227131, text at n.1. Cars sometimes have to be repainted after accidents. Whatever the reason, many people would like a car of a different color. Indeed, one of the “Frequently Asked Questions” on the website of the largest company in the automobile repainting industry is “How much does it cost to change the color of my car?” Maaco, *Maaco’s Frequently Asked Questions*.³ Needless to say, it is far less expensive to repaint a car than to buy a new one.

In recent years it has also become possible to change a car’s color by affixing inexpensive vinyl decals to the body panels. The Edmunds automotive

¹ <https://www.caranddriver.com/features/a27438340/cost-to-paint-car>.

² <https://www.carsdirect.com/car-maintenance/4-facts-to-consider-when-changing-car-paint>.

³ <https://www.maaco.com/about/faq>.

website reports that this technique, called *wrapping*, is “a fast-growing trend in vehicle customization, with a North American market that is expected to reach \$10.8 billion by 2025, up from \$1.62 billion in 2015.” Ronald Montoya, *Should I Wrap My Car?*, Edmunds (Nov. 1, 2018).⁴

Few states, if any, require a car’s owner to update the car’s registration when the color is changed. Ohio does not. App. 13a (“Ohio’s laws and regulations governing vehicle registration … do not address vehicle color at all, let alone require a driver to immediately file a new registration application to update or correct a vehicle’s registered color.”). Nor do any of the other states in which this issue has arisen. Car owners need not notify the motor vehicle bureau of a color change in Indiana, *Uribe*, 709 F.3d at 650; Utah, *id.*; Arkansas, *Schneider*, 459 S.W.3d at 299; Florida, *Teamer*, 151 So.3d at 428; Montana, *Rodriguez*, 456 P.3d at 573; California, *Rodgers*, 656 F.3d at 1027; Arizona, *Campa*, 2014 WL 4655436 at *3; Virginia, *Mason*, 2010 WL 768721 at *3; or New Hampshire, *O’Neill*, 2007 WL 2227131 at text at n.4.

For this reason, there are many people driving cars that have been repainted or wrapped a different color than the color listed on the car’s registration. These people have done nothing wrong.

Clerical errors made by car owners or by employees of the state motor vehicle bureau can also lead to inaccurate color listings on car registrations. As Ohio helpfully explained in its briefing below, the state Bureau of Motor Vehicles assigns a number to each

⁴ <https://www.edmunds.com/car-maintenance/should-i-wrap-my-car.html>.

color. The car's owner, when registering a car for the first time, reads a posted sign to learn the correct number and orally reports the number to a clerk, who then enters that number into a computer. State's Ohio Sup. Ct. Br. at 7 & App. A-2. Human fallibility alone no doubt produces errors. And people are often rushed or impatient when visiting the BMV, which can make them even more error-prone than usual. If a driver misreads the posted sign, or tells the wrong number to the clerk, or if the clerk commits a keystroke error when inputting the number, a registration will include the wrong color.

Error can also creep in, as it did in this case, via an erroneous report from a police dispatcher to an officer in the field. Dispatchers must work extremely quickly. Here, for example, the dispatcher provided Officer Heinz with the information he requested within a matter of seconds. Under such intense time pressure, a dispatcher can easily make a mistake.

In sum, there are several reasons there might be a color discrepancy between a car and a dispatcher's report of the car's registration, in circumstances where the car was not stolen.

B. By contrast, there are likely very few cars on the road that have been stolen and that bear license plates swapped from other cars of the same make and model but a different color.

There is, to be sure, one more possibility. It is conceivable that a car thief stole the car, drove it around until he found another car of the same make and model but a different color, stole the license plates from the other car, and placed them on the car that

he stole. But there are several reasons to think that this technique of car theft is quite rare.

To begin with, car thieves normally do not steal cars in order to use them as transportation for long periods of time. Many cars are stolen to be disassembled, for the purpose of selling the parts. National Insurance Crime Bureau, *Rising Cost of Parts Fuels Interest of Car Thieves* (Feb. 15, 2018).⁵ This demand for replacement parts is one reason that older models are stolen much more often than newer ones. In 2017, for example, the most stolen vehicles in the country were the 1998 Honda Civic and the 1997 Honda Accord. National Insurance Crime Bureau, *NICB's Hot Wheels: America's 10 Most Stolen Vehicles* (Sept. 18, 2018).⁶ A thief who steals a car for this purpose has a strong incentive to take it to a “chop shop” as quickly as possible, so the car is safely off the road before the police begin looking for it. This kind of thief has no reason to take the time to search for another car of the same make and model in order to steal its license plate.

Another common motivation for car theft is joyriding, where the thief drives the car for a very short time and then abandons it. Jeff Anderson & Rick Linden, *Why Steal Cars? A Study of Young Offenders Involved in Car Theft*, 56 Can. J. Criminology & Crim. Just. 241 (2014). This kind of thief also has no reason to take the time to search for another car of

⁵ <https://www.nicb.org/news/news-releases/rising-cost-parts-fuels-interest-car-thieves>. The National Insurance Crime Bureau is a trade association of insurance companies.

⁶ <https://www.nicb.org/sites/files/2019-06/HotWheelsReleaseFINAL18WEB.pdf>.

the same make and model in order to steal its license plate.

Even a thief who plans to keep the stolen car for a long period of time has little to gain by stealing the license plate of another car and placing it on the stolen car. This strategy could work, at best, for only so long as the owner of the *other* car fails to notice that his or her license plate is missing. At that point, the police would be searching for cars bearing *both* license plates. Indeed, the strategy is unlikely to work at all, because it requires the thief, after stealing the car, to spend valuable time driving around in public, searching for another car of the same make and model, rather than concealing or modifying the car to avoid detection. Moreover, some models will be very hard to find, which casts further doubt on the efficacy of this strategy. Here, for instance, the car was a 15-year-old model that was not among the sales leaders. Finding a match would have required considerable luck.

C. Where a set of facts is much more likely to have an innocent than a criminal explanation, it does not give rise to reasonable suspicion.

As the Seventh Circuit correctly noted in *Uribe*, 709 F.3d at 652, the question for Fourth Amendment purposes is the relative frequency of culpable and innocent explanations for the color mismatch. What percentage of color mismatches is attributable to car thieves using this plate-switching technique, and what percentage is attributable to something else—repainting, wrapping, clerical errors at the motor

vehicles bureau, or mistaken reports by police dispatchers?

In finding reasonable suspicion, the Ohio Supreme Court asked the wrong question. The court placed dispositive weight on Heinz's assertion that he had heard of instances in which car thieves had used this technique. App. 9a. But the relevant question is not whether this method of car theft *ever* happens. The relevant question is whether it happens *often enough*, compared with the innocent reasons for a color discrepancy, to constitute reasonable suspicion that a car has been stolen. Some people wear coats to conceal items they have stolen. But an officer who sees a person wearing a coat—without more facts—does not have reasonable suspicion that a theft has been committed, because many more people wear coats to stay warm.

Instead of asking whether Heinz's experience encompassed instances of this technique of car theft, the court should have asked whether Heinz had any experience bearing on the relative frequency of culpable and innocent explanations for color mismatches. For example, if 10% (or 1%, or 0.1%) of the color mismatches he had experienced turned out to involve stolen cars, that would have been relevant to whether he had reasonable suspicion that this particular car was stolen. But Heinz had no such experience. His experience placed him in the same position as an officer who has heard that people sometimes wear coats to conceal items they have stolen, but who has no clue as to the percentage of coat-wearers who are thieves.

There is no database of color mismatches between a car and its registration, so there can be no precise

quantitative answer to the question of what percentage of color mismatches is attributable to car theft. We do know that of the fourteen cases we have identified in which a color mismatch was the sole reason for stopping a car (the thirteen cases cited above on both sides of the conflict, plus this one), there was not a single case in which the car was stolen. This sample suggests that the percentage of color mismatches attributable to car theft is minuscule. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 530 (2001) (using reported cases as a sample from which to infer the likelihood of a phenomenon).

In the absence of definitive data, we can use our common sense, as the Court has done in answering analogous questions that likewise depended on the relative frequency of innocent and culpable explanations for the same facts.

For example, in *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam), the defendant flew into Atlanta from Fort Lauderdale, in the early morning during a lull in law enforcement activity, with no luggage other than a shoulder bag. A DEA agent testified that these characteristics matched a “drug courier profile,” because Fort Lauderdale was the principal source of cocaine in the country and because drug couriers carry little luggage and try to avoid law enforcement officers. *Id.* at 440-41. The Court nevertheless held that “the agent could not as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances.” *Id.* at 441. The Court reasoned that many more people who are *not* drug couriers fly from Fort Lauderdale to Atlanta in the morning without much luggage. These “circumstances describe a very

large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.” *Id.* Where there are criminal and innocent explanations for the same facts, and where common sense suggests that the innocent people greatly outnumber the criminals, there is no reasonable suspicion that a crime has been committed.

Likewise, in *Brown v. Texas*, 443 U.S. 47, 48-49 (1979), the police stopped a man in an alley who was walking away from another man on a block known for frequent drug sales. The Court explained that these facts did not constitute reasonable suspicion that a crime had been committed. *Id.* at 52. “There is no indication in the record that it was unusual for people to be in the alley,” the Court observed. *Id.* “The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.” *Id.* The police lacked reasonable suspicion, because “the appellant’s activity was no different from the activity of other pedestrians in that neighborhood.” *Id.* Again, where a set of facts *might* indicate that a crime has been committed, but where common sense suggests that the facts are much more likely to have an innocent explanation, reasonable suspicion is lacking.

Likewise, in *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975), the Border Patrol stopped a vehicle near the Mexican border based on “the apparent Mexican ancestry of the occupants.” No doubt *some* people near the border who look Mexican are unlawfully present in the country. But the Court

nevertheless held that the Border Patrol lacked reasonable suspicion to stop the car, because many more people who look Mexican have committed no crime. “Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens,” the Court explained. *Id.* at 886. “The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.” *Id.* at 886-87.

The same analysis applies here. When cars are a color different from that on their registrations, *some* of the drivers may be car thieves. But common sense suggests that the car thieves are greatly outnumbered by drivers who have done nothing wrong. If the police can stop a car merely on the basis of a color mismatch, the police can stop everyone who has had their car repainted, everyone who has had their car wrapped, everyone who has given the wrong color-code to the clerk at the motor vehicles bureau, everyone who has been the victim of a keystroke error committed by a harried clerk, and everyone whose registration is misdescribed by a police dispatcher. A color mismatch, *along with other evidence of car theft*, can constitute reasonable suspicion that a car is stolen. Here, for example, if Officer Heinz had received a report that a GMC Yukon had been stolen, the color mismatch, combined with the report of the theft, would have given him reasonable suspicion to stop this particular GMC Yukon. But a color

mismatch by itself does not constitute reasonable suspicion.

The decision below authorizes Ohio's police officers to seize every driver in the state who has had his or her car repainted a different color. This is a serious intrusion in the lives of a great many people who have done nothing wrong. Vehicle stops "interfere with freedom of movement, are inconvenient, and consume time." *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). They "create substantial anxiety" for law-abiding motorists. *Id.* When a police car—with its lights flashing and its siren wailing—zooms up from behind, and you realize that they're coming for *you*, the experience can be extraordinarily unsettling.

And for what purpose? Scanning the traffic for color discrepancies is an absurdly inefficient method of detecting car theft, because the false positives will vastly outnumber the stolen cars. The victims of car theft have every incentive to make a prompt report to the police, so the police have no reason to search for stolen cars before the thefts have even been reported. Allowing the police to stop cars based solely on a color discrepancy imposes significant burdens on law-abiding people without serving any purpose of law enforcement.

III. The Question Presented arises frequently and will likely arise even more frequently in the future.

This issue is important because it affects so many people. It has already arisen in all the cases cited above in point I. It will almost certainly arise even more frequently in the future, due to the widespread

adoption by police departments of automated license plate readers.

Automated license plate readers are computer systems that read the license plates of passing cars and search computer databases for information about the cars and their registered owners. The information is transmitted to police officers nearly instantaneously. These systems are now used by police departments throughout the country. (For a detailed discussion, see Brief of Amici Curiae Electronic Privacy Information Center et al., *Kansas v. Glover*, No. 18-556.) As this case demonstrates, even tiny Washington Court House, Ohio, with a population of 14,000, equips its police officers with automated license plate readers.

Armed with this technology, a police officer can determine instantly whether a car's registration information is consistent with the visual appearance of the car. In this case, Officer Heinz used the old-fashioned method of contacting a police dispatcher to obtain the car's registration information, but there is no reason this information could not be provided to an officer automatically. The police will be able to stop many more drivers on this ground than ever before.

There have already been many color-mismatch cases even without automated license plate readers. We can expect the volume of this litigation to swell in the future, in proportion to the number of drivers who are stopped by the police solely because they are driving a car the police believe is the wrong color.

IV. This is the right case for resolving the conflict.

There is no reason to let this issue percolate any longer. It has been litigated in, and addressed at length by, many lower courts already. There is nothing new to say on either side.

This is the right case for resolving the issue. The facts are simple and crystal-clear. As Officer Heinz admitted, the color mismatch was the “sole reason” he stopped Hawkins’ car. App. 21a. The issue is presented as sharply as it could be: Does a color mismatch, with no other facts, constitute reasonable suspicion that a car is stolen?

The answer to this question will be outcome-determinative. The Ohio Supreme Court and the Ohio Court of Appeals both addressed the issue on the assumption that if the stop was unlawful, Hawkins’ conviction would have to be reversed. *Id.* at 28a (Court of Appeals holds that because the stop was lawful, the evidence was sufficient to sustain Hawkins’ conviction); *id.* at 9a (Supreme Court affirms Court of Appeals’ judgment); *id.* at 16a (Justice Donnelly, dissenting in the Ohio Supreme Court, finds that the unlawful stop requires reversal).

The Court is currently considering *Kansas v. Glover*, No. 18-556 (argued Nov. 4, 2019), another case that asks whether a single fact constitutes reasonable suspicion. If the Court does not grant plenary review in our case, it may be appropriate, if the Court affirms in *Glover*, to remand our case to the Ohio Supreme Court for reconsideration in light of *Glover*.

If the Court reverses in *Glover*, by contrast, our case will still warrant plenary review, because even if reasonable suspicion is present in *Glover*, it is absent in our case. In *Glover*, the single fact relied upon to support reasonable suspicion is that the car is registered to someone whose driver's license has been revoked. *Glover* is a hard case because it is difficult to estimate, from everyday experience, the frequency with which the driver of a car is the registered owner, where the owner's license has been revoked. As the briefing and argument in *Glover* indicate, different people, all consulting their common sense, come up with very different estimates.

Our case is much easier than *Glover*, because our everyday experience *does* allow us to estimate the frequency with which a color mismatch indicates that a car is stolen. Anyone familiar with cars knows that they are often repainted. Anyone familiar with state motor vehicle bureaus knows that clerks handle millions of data-entry tasks and that they sometimes make mistakes.⁷ Many cars on the road have a color different from the color listed on their registrations in circumstances where no crime has been committed. By contrast, there is no reason to think there are many car thieves who steal a car, drive around looking for another car of the same make and model, steal the other car's license plate, and place the plate on the car they stole. To put it bluntly, that would be an idiotic way to steal a car.

⁷ For example, undersigned counsel once had a driver's license on which his birthday was ten days later than his real birthday, because a clerk at the motor vehicle bureau erred in typing the first digit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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