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IN THE SUPREME COURT OF THE UNITED STATES

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NICHOLAS BRADY HEIEN, :

Petitioner : No. 13-604

v. :

NORTH CAROLINA. :

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Washington, D.C.

Monday, October 6, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: Our first case this  
4 morning is Heien v. North Carolina.

5 Mr. Fisher.

6 ORAL ARGUMENT OF JEFFREY L. FISHER

7 ON BEHALF OF THE PETITIONER

8 MR. FISHER: Mr. Chief Justice, and may it  
9 please the Court.

10 In a country dedicated to the rule of law,  
11 governmental officers should be presumed to know the law  
12 at least as well as the citizens are. That being so,  
13 when questions about individualized suspicion arise  
14 under the Fourth Amendment, they should be addressed  
15 against the backdrop of the correct interpretation of  
16 the law, not simply any plausible reading an officer  
17 might have.

18 JUSTICE KENNEDY: So suppose that this  
19 State, North Carolina, did have a good-faith exception  
20 to the exclusionary rule. What would you be arguing  
21 today?

22 MR. FISHER: We would be -- still be  
23 arguing, if that were the case, that not only the Fourth  
24 Amendment was violated, but that the good-faith  
25 exception didn't apply. But you wouldn't have to reach

1 that question in this case, and I -- and I would concede  
2 to you, Justice Kennedy, that would be a debatable  
3 argument under this particular --

4 JUSTICE KENNEDY: Well, why would it be any  
5 more debatable than the argument you're making here?  
6 I -- I -- I've more or less anticipated your -- your --  
7 your answer. I think that has to be -- I -- I think you  
8 have to tell us even if the good-faith exclusionary rule  
9 applies, a mistake of law just doesn't count.

10 MR. FISHER: Well, that's not exactly what  
11 this Court's jurisprudence holds, of course. In *Krull*  
12 and *Davis*, the Court has held that reasonableness of  
13 mistakes of law can be taken into account at the remedy  
14 stage, and I think that would be --

15 JUSTICE KENNEDY: Then -- and then -- but  
16 then that question is why isn't that a problem for you  
17 when you say there cannot be a reasonable mistake of  
18 law? We know there can be.

19 MR. FISHER: Well, there's a difference,  
20 Justice Kennedy, between rights and remedies in the  
21 Court's jurisprudence. When you ask the question about  
22 what is reasonable as to whether or not the Fourth  
23 Amendment was violated, both in its Fourth Amendment  
24 jurisprudence in criminal cases and in qualified  
25 immunity cases, you would do that assessment against the

1 correct interpretation of the law.

2 Now, in Leon --

3 JUSTICE KENNEDY: Well, in connection --  
4 we're talking about whether as a -- as a categorical  
5 matter, as a jurisprudential matter, we can have this  
6 dichotomy known as a reasonable mistake of law, a  
7 difficult and interesting question. But it seems to me  
8 that you have to make the same argument here or in --  
9 in -- in the case where they have a good-faith  
10 exception, as you're making here, and that you have a  
11 problem with Davis and Krull. And if you don't have  
12 a -- if you have a problem with Davis and Krull, then  
13 that undermines your categorical argument.

14 MR. FISHER: No, I really don't think so,  
15 Justice Kennedy. If -- I think the best exposition of  
16 this problem in the course of jurisprudence is actually  
17 in the Anderson against Creighton case, the qualified  
18 immunity case, where the Court wrestled with this notion  
19 that how can something be reasonable in one sense and  
20 unreasonable in another.

21 And the answer the Court gave is that when  
22 we ask whether the Fourth Amendment was violated, we do  
23 not take mistakes of law into account, but the  
24 reasonableness of a mistake of law can go to the remedy  
25 question. This is the premise from which Leon, Krull,

1 and Davis all derive, which is that there was a Fourth  
2 Amendment --

3 JUSTICE ALITO: Would you just submit that  
4 the --

5 JUSTICE GINSBURG: Mr. Fisher, I have a  
6 preliminary question.

7 Even if you -- you're right about mistake of  
8 law, isn't it a moot question in this case because, as I  
9 understand it, the traffic stop ended with a warning  
10 citation. So the traffic stop was over. And at that  
11 point, the police officer asked if he can inspect the  
12 car, and the answer is yes. Why isn't the consent to  
13 the search the end of this case?

14 MR. FISHER: Because it would be the fruit  
15 of the poisonous tree, Justice Ginsburg, if the stop was  
16 illegal. There would have never been an opportunity to  
17 ask for consent. And I think that's why the State and  
18 assistant attorney general haven't made any argument  
19 that the consent wipes away the Fourth Amendment  
20 question here.

21 JUSTICE ALITO: Well, suppose the officer  
22 had said, all right, I'm giving you a warning. You're  
23 free to leave now. But by the way, may we -- may I  
24 search your car?

25 MR. FISHER: I -- I think that's more or

1 less what the officer did say here, Justice Alito.

2 JUSTICE ALITO: And you would say then, even  
3 in that situation, that that would be the fruit of the  
4 poisonous tree?

5 MR. FISHER: Yes. Because the stop wouldn't  
6 have taken place. The -- the Court's cases, Prouse and  
7 all the rest, say that a traffic stop is a seizure. And  
8 so upon pulling Mr. Heien over, the officer needed to  
9 have reasonable suspicion to do so. And the only  
10 argument for reasonable suspicion is the mistake of  
11 North Carolina law as to the brake light in this case.

12 CHIEF JUSTICE ROBERTS: I understood you to  
13 say earlier that you don't take -- distinguishing the  
14 exclusionary rule in qualified immunity, you don't take  
15 reasonableness into account when it comes to a mistake  
16 of law?

17 MR. FISHER: What -- what I -- I'm sorry,  
18 Mr. Chief Justice. What I -- I think I said is that  
19 you -- you don't take the reasonableness of mistake of  
20 law into account when you ask whether the Fourth  
21 Amendment was violated.

22 CHIEF JUSTICE ROBERTS: Well, but the Fourth  
23 Amendment --

24 MR. FISHER: You do sometimes --

25 CHIEF JUSTICE ROBERTS: I'm sorry, go ahead.

1 MR. FISHER: Forgive me.

2 You do sometimes when you ask about the  
3 remedy, and that's what he did.

4 CHIEF JUSTICE ROBERTS: But the -- but the  
5 Fourth Amendment itself protects only against  
6 unreasonable searches and seizures by its term. I don't  
7 understand. It would seem to me that there's a stronger  
8 argument for taking the reasonableness of the officer's  
9 actions into account when you're talking about a mistake  
10 of law, because that's what the Fourth Amendment says,  
11 as opposed to remedies and qualified immunity.

12 MR. FISHER: Mr. Chief Justice, the Court  
13 rejected that precise argument in Anderson, that textual  
14 argument that the word "reasonableness" means that the  
15 Fourth Amendment incorporates mistakes of law, and  
16 because of a deep common law rule, which is that when we  
17 ask --

18 CHIEF JUSTICE ROBERTS: If I could just  
19 pause.

20 MR. FISHER: Yeah.

21 CHIEF JUSTICE ROBERTS: I thought we said  
22 exactly that in Herring, though, where we said that even  
23 though we're going to look at it in terms of remedy,  
24 that was not to say that the reasonableness didn't go to  
25 whether there was a substantive violation of the Fourth



1 Amendment.

2 MR. FISHER: My understanding of Herring  
3 would be that would be a mistake of fact case, whether  
4 or not there was a warrant outstanding for  
5 Mr. Herant's -- Mr. Herring's arrest would have been a  
6 factual question, not necessarily a legal question.

7 In Anderson and Krull and Leon -- in Leon,  
8 Mr. Chief Justice, the Court said the officer in that  
9 case acted exactly as a reasonable officer could and  
10 should have acted. And time and again in the Court's  
11 exclusionary rule cases, they've said the officer acted  
12 reasonably because at the reasonableness stage, you can  
13 take into account whether the officer reasonably  
14 misunderstood the law.

15 CHIEF JUSTICE ROBERTS: Well, if you put  
16 aside --

17 MR. FISHER: But at the right stage --  
18 forgive me.

19 CHIEF JUSTICE ROBERTS: I was just saying,  
20 putting aside our discussion of Prouse and -- and  
21 Herring, why does it make sense to say that you don't  
22 take reasonableness into account when the Fourth  
23 Amendment only protects against unreasonable searches  
24 and seizures?

25 MR. FISHER: I think for three reasons,

1 Mr. Chief Justice. There's a practical reason, a  
2 theoretical reason, and a jurisprudential reason.

3 Now, I'll start with the theory because  
4 that's where I was just describing. The deep common law  
5 heritage in this country that we have always followed,  
6 and the best exposition of that is in the Court's Cheek  
7 case, is that the criminal law is presumed to be  
8 definite and knowable.

9 So in all kinds of settings, whether it be  
10 punishing somebody for violating the law or any other  
11 actions citizens or the government engages in, we always  
12 assume a correct understanding of the law, even if it's  
13 later construed by a court in a way that wasn't exactly  
14 predictable or foreseeable.

15 JUSTICE ALITO: Isn't it strange that you're  
16 citing Cheek for that proposition? Didn't the Court  
17 hold in Cheek that under the -- in that -- in the  
18 circumstances there, ignorance of the law would be a  
19 defense?

20 MR. FISHER: Because of a special statutory  
21 exception that Congress had written. The beginning of  
22 part two of Cheek is what I'm relying on, Justice Alito,  
23 where there is a paragraph or two that sets out with  
24 numerous citations this principle Justice Holmes  
25 described, and many others, that the criminal law is

1 presumed to be definite and knowable.

2 And once you take that presumption and put  
3 it into the police officer's mind, in this case or any  
4 other governmental actor who acts on a mistake of law,  
5 then there is no reasonable suspicion because we  
6 presumed them to have known the law when they acted.

7 JUSTICE KENNEDY: Suppose the officer  
8 stopped the driver here and said, you know, I've been  
9 going to night law school and we don't know about this  
10 one light/two light thing. There's an intermediate  
11 court of appeals that's hearing a case, it sounds like  
12 they're going so say only one light is necessary, but I  
13 don't know what the law is. You better get this fixed.

14 MR. FISHER: Well, I think there's two  
15 questions in there.

16 JUSTICE KENNEDY: And then -- and then he  
17 sees the contraband.

18 MR. FISHER: Pardon me?

19 JUSTICE ALITO: And -- and then he sees  
20 the -- in the course of this conversation, he sees the  
21 contraband.

22 MR. FISHER: Well, I think there's two  
23 questions embedded in there. One is whether the officer  
24 can look to court decisions or other third party sources  
25 to help him do his job. Now, again, that is what the

1 Court has said in the Krull and Davis cases, that you  
2 take into account things like police manuals, court  
3 decisions, and the rest. The Court has embraced that in  
4 its remedy jurisprudence, but in Whren has said that is  
5 off limits as to the Fourth Amendment.

6 Now, I think there's also an element of your  
7 question asking about what if -- all that the officer  
8 was worried about was the safety on the roadway. That  
9 would be a very different case. Again, I'm going to  
10 turn the Court to Whren, where the Court said that if  
11 there's a stop done for reasons aside from probable  
12 cause, then the purpose of that stop, such as the  
13 community caretaking function, might kick in. But of  
14 course the State hasn't made any argument in that  
15 respect in this case because the record is quite clear  
16 the officer was performing a criminal investigation.

17 JUSTICE SCALIA: But Mr. Fisher, we -- we  
18 don't review opinions. We review judgments, we review  
19 results. What you're complaining about here is the  
20 admission of what was discovered in the search of the  
21 car, right?

22 Now, what difference does it make whether  
23 that was lawfully admitted because it was a  
24 constitutional search or it was lawfully admitted  
25 because the remedy of excluding it would not be applied

1 if there was a mistake of law, a reasonable mistake of  
2 law?

3 I mean, the constitutional problem is the  
4 admission of this evidence. And it seems to me whether  
5 it's properly admitted because the Fourth Amendment  
6 wasn't violated or whether it's properly admitted  
7 because the remedy for that violation is not -- is not  
8 exclusion of the evidence, you lose either way, don't  
9 you?

10 MR. FISHER: Well, Justice Scalia, nobody  
11 has addressed the question of remedy in this case  
12 because nobody needs to address the good-faith --

13 JUSTICE SCALIA: Well, we need to if we  
14 find, as you urge us to find, that it violates the  
15 Fourth Amendment to make the search. We would then have  
16 to -- in order to decide whether this judgment is  
17 lawful, we would have to decide whether the remedy of  
18 excluding that evidence has to be applied. And you know  
19 the answer to that --

20 MR. FISHER: Well, with -- forgive me. With  
21 respect, Justice Scalia, I'm not sure the Court needs to  
22 do that. Of course, I think the Court can vacate and  
23 remand the judgment just as it does innumerable other  
24 times where it finds a problem with the lower court  
25 decision and therefore sends it back. Even if this were

1 purely a Federal case, Justice Scalia, I think I'd be  
2 saying the same thing, which is nobody has briefed or  
3 argued the good-faith exception in this case. So you  
4 would need --

5 JUSTICE SCALIA: Well, you have. I mean,  
6 you have and you acknowledge that it applies to  
7 remedies.

8 MR. FISHER: No. No. No. Here's what I've  
9 acknowledged, Justice Scalia. And I guess this is  
10 important. We've acknowledged that the question of  
11 whether the mistake was reasonable would be relevant, if  
12 at all, at the remedy stage.

13 So what you would do is you'd ask the  
14 question, if this were a Federal case where you had to  
15 reach the question, you'd ask whether the officer's  
16 mistake of law in this case renders suppression  
17 inappropriate.

18 Now, I would -- I would add that holding  
19 that it did render suppression inappropriate would be an  
20 extension of the Court's current good-faith  
21 jurisprudence, which thus far has held that good-faith  
22 doctrine applies only when an officer relies on binding  
23 law from a third -- from a legislature or a court.

24 JUSTICE SCALIA: So the most you can get  
25 from us is a remand?

1 MR. FISHER: That's right. But I do think  
2 it's just like any other --

3 JUSTICE SCALIA: Just let the North Carolina  
4 law -- court decide whether -- whether the remedy of  
5 exclusion should have been --

6 MR. FISHER: That's right. For example,  
7 Justice Scalia, I'm not sure it's any different if I  
8 said it was a constitutional violation that I may or may  
9 not be entitled to a remedy for under Chapman because  
10 the error was harmless or not. Those are the kinds of  
11 situations where the Court would always resolve the  
12 constitutional question that the lower court addressed  
13 and then send it back down for the question of remedy.  
14 And that's all I --

15 JUSTICE SOTOMAYOR: I don't know why,  
16 following up on what Justice Scalia is saying, he's  
17 saying we don't give you a remedy unless we believe that  
18 one is warranted under the Fourth Amendment. And since  
19 we apply -- it doesn't matter what North Carolina  
20 applies, good faith or not -- what we apply in terms of  
21 determining whether a Federal violation or a  
22 constitutional violation is subject to any type of  
23 remedy for you is the good-faith exception. So why do  
24 we have to remand? I think that's just Justice Scalia's  
25 question and I'm not quite sure you've answered it.

1           MR. FISHER:           The reason to remand is because  
2     the lower court hasn't addressed any question of remedy.  
3     And so in the first instance, you should send it back to  
4     the lower court for a full adversarial briefing subject  
5     to waiver and --

6           JUSTICE GINSBURG:           But North Carolina has a  
7     rule, I thought, that if you violate the Fourth  
8     Amendment, that's it. We don't -- we don't have a  
9     good-faith exception.

10          MR. FISHER:           That will be our position on  
11     remand, Justice Ginsburg. But The State may try to  
12     persuade the Court of something else.

13          JUSTICE GINSBURG:           But isn't that -- isn't  
14     that -- isn't that what the North Carolina law is now?  
15     So it would be futile to send it back for them to answer  
16     the good-faith exception since they have none.

17          MR. FISHER:           It wouldn't be futile, Justice  
18     Ginsburg. I think -- I think the analogy that I gave  
19     earlier about Chapman is more or less on point. The  
20     Court has held that if the Constitution is violated,  
21     that the defendant in a criminal case doesn't get a  
22     remedy unless he satisfies that test.

23          Now, all of the time in criminal cases you  
24     would just decide the constitutional issue and then send  
25     it back for remedy analysis if the lower court hadn't



1 addressed it.

2 JUSTICE SCALIA: That's because -- that's  
3 because they would be applying Federal law. They would  
4 be answering the question that you want us to leave  
5 unanswered; namely, whether the Constitution requires  
6 that this evidence be -- be stricken from the case.

7 MR. FISHER: Well, let me say --

8 JUSTICE SCALIA: But if indeed they're not  
9 going to ask that question when we send it back, it  
10 seems to me we have to answer that question here before  
11 we are able to reverse or affirm the North Carolina  
12 court. It's a Federal question.

13 They are not going to -- they are not going  
14 to get to that, but you're asking us to invalidate this  
15 conviction on the basis of Federal law. And it seems to  
16 me we cannot do that unless there has -- even if there  
17 has been a violation of the Fourth Amendment, the remedy  
18 must be exclusion of -- of the evidence. That's a  
19 Federal question. I think we're going to have to decide  
20 it. If we send it back to North Carolina, they're not  
21 going to decide it. Are they?

22 MR. FISHER: No, I don't believe they would  
23 or should. But I -- but just if a State had adopted a  
24 rule saying we're going to have a more favorable  
25 jurisprudence of constitutional error and give automatic

1 new trials, the Court wouldn't be prohibited from  
2 deciding a constitutional issue and sending it back down  
3 to the State.

4 In the retroactivity sphere, *Danforth v.*  
5 *Minnesota* is another case where the Court has said that  
6 States can choose for themselves to have more favorable  
7 remedies and the Court simply deals with the Federal  
8 question.

9 JUSTICE ALITO: Well, there's no question  
10 that if -- if North Carolina applied a State  
11 constitutional analog to the Fourth Amendment, they  
12 could have a more extensive remedy than is recognized  
13 under our Fourth Amendment cases. But your argument is  
14 they can adopt a State law rule for Fourth Amendment  
15 violations that is more protective of defendants than --  
16 than Federal case law provides. That would be your  
17 argument, right?

18 MR. FISHER: I don't need to make that  
19 argument. I think that would be an interesting question  
20 and I think the State may be able to do that. But what  
21 the Carter decision in North Carolina says is that  
22 violations of the State Constitution cannot be  
23 overlooked on good-faith doctrine.

24 JUSTICE ALITO: Well, was this decision  
25 based on the State constitution?

1           MR. FISHER:           No. It was based on the  
2 Federal Constitution, so we would send it back down.  
3 And we have preserved an argument that under State law,  
4 the violation of the Fourth Amendment also violates the  
5 North Carolina Constitution.

6           JUSTICE SCALIA:           But you're asking us to  
7 reverse it on the basis of Federal law and you're asking  
8 us to send it back to a State court which is not going  
9 to -- to inquire any further into Federal law, even  
10 though Federal law, arguably, you will concede says that  
11 even if there is a Fourth Amendment violation, if  
12 there's a good-faith reasonable belief that the law was  
13 violated, the remedy of exclusion will not be imposed.

14           That's what the Constitution requires.           And  
15 you're asking us to say, oh, no, there's -- there's been  
16 a violation of the Constitution and we're going to  
17 reverse this judgment, even though we haven't inquired  
18 into whether the remedy that -- that you want is  
19 required. And it seems to me -- I don't see how we can  
20 do that.

21           MR. FISHER:           Well, I don't want to keep  
22 saying the same thing. I'll try and say it one more  
23 time. I think it's fully customary for this Court to  
24 have a case from State courts where a State court issues  
25 a ruling on Federal law. There may be many other issues

1 in the case, Federal, State, whatever, but if the  
2 question of Federal law the State court decided is  
3 incorrect, this Court can reverse that judgment, say you  
4 got Federal law wrong, we're going to send it back down.

5 JUSTICE KENNEDY: But it -- but it chooses  
6 to decide based on only half of the Federal law or  
7 three-quarters of the Federal law. Can North Carolina  
8 more or less set us up this way?

9 MR. FISHER: There is -- there is Federal --

10 JUSTICE KENNEDY: This is consistent with  
11 Justice Scalia's concern --

12 MR. FISHER: Forgive me.

13 JUSTICE KENNEDY: -- which is a follow-on to  
14 Justice Scalia's question.

15 JUSTICE SCALIA: They didn't get Federal law  
16 wrong. Their opinion got Federal law wrong, but their  
17 judgment did not get Federal law wrong if indeed a good  
18 faith mistake of law does not require the exclusion of  
19 the evidence from the trial. The judgment did not get  
20 Federal law wrong if that's the case.

21 MR. FISHER: Well, I think that their  
22 analysis got Federal law wrong for the reasons we've  
23 described.

24 JUSTICE SCALIA: We don't review analyses.  
25 We review judgments. You're -- you're urging that this

1 conviction has to be set aside. That's what we're  
2 reviewing, the conviction, not the opinion.

3 MR. FISHER: Well, Justice Scalia, if you  
4 want to decide the good-faith question that has not been  
5 briefed by any party, I -- I suggest you might want to  
6 tread carefully.

7 Now, we've given you -- maybe what I need to  
8 do at this point before I sit down and reserve my time  
9 for rebuttal, is explain to you why, even if you did  
10 feel like you needed to get to that question, which I  
11 don't think you need to, but if you did need to get to  
12 that question, why you should say that the good-faith  
13 doctrine doesn't apply.

14 JUSTICE ALITO: Well, I don't want to take  
15 up your rebuttal time, but your argument this morning  
16 has confused me on something I thought I understood. I  
17 thought that your -- I thought the reason why you've  
18 argued this case the way you have, trying to convince us  
19 to draw a very sharp distinction between right and  
20 remedy is because you believe that North Carolina has  
21 the right under State law to devise its own version of  
22 the exclusionary rule. If you're not -- if that's not  
23 your argument, then I'm really puzzled by what you're  
24 doing.

25 MR. FISHER: Functionally, that's the way

1 things work in North Carolina, Justice Alito. I think  
2 the only thing that -- that maybe I need to make more  
3 clear is that the reason why it works that way in North  
4 Carolina is because the State has held that violations  
5 of our State constitution cannot be subject to a good  
6 faith exception. The States have also held --

7 JUSTICE ALITO: The State constitution is  
8 irrelevant because you're arguing about whether there is  
9 -- whether there can be mistake of law in determining  
10 whether a search is reasonable under the Fourth  
11 Amendment to the Constitution of the United States.  
12 Whatever we hold on that, North Carolina can do whatever  
13 it wants on the same question with respect to the State  
14 constitution.

15 MR. FISHER: That's the next thing I was  
16 going to say, is in theory you're right, Justice Alito,  
17 but what North Carolina has said is that we construe  
18 article 1, section 20, which is the State counterpart,  
19 to be coterminous with the Fourth Amendment. So that's  
20 not the way the Court goes about its business. So  
21 functionally in the State of North Carolina where you  
22 are is that Fourth Amendment questions run exactly  
23 parallel to State substantive constitutional law  
24 questions, and if there's a violation, you -- you  
25 suppress.

1 JUSTICE KAGAN: Mr. -- Mr. Fisher, suppose  
2 this were a Federal case and we had available to us, it  
3 had all been briefed, two alternative holdings in order  
4 to support the conviction. And one holding was this is  
5 not a violation of Fourth Amendment law in the first  
6 instance, and the other holding was this is a violation  
7 of Fourth Amendment law, but the exclusionary rule  
8 operates and so the -- the good-faith exception to the  
9 exclusionary rule operates and so the evidence comes in.  
10 Is there any difference between those two holdings?

11 MR. FISHER: I think the difference between  
12 those two holdings, if the Court remanded, may well play  
13 out differently in North Carolina.

14 JUSTICE KAGAN: No, no, no. But I mean, if  
15 it were a Federal case --

16 MR. FISHER: Oh, if it were. I'm sorry, I  
17 missed that.

18 JUSTICE KAGAN: Is there any difference?

19 MR. FISHER: If it were a Federal case, it  
20 would be functionally the same holding as to the outcome  
21 of that case. But I think -- if I could.

22 JUSTICE KAGAN: Yes, please.

23 MR. FISHER: But there would be important  
24 reasons nonetheless, even though that would be a  
25 functionally identical holding for the parties in the

1 case, there'd be very important reasons nonetheless to  
2 make sure that you render that holding as to remedy  
3 jurisprudence, not as to the Fourth Amendment itself.

4 And one reason is what I opened with and  
5 I've tried to say a couple times, that the government  
6 should be presumed to know the laws. It would undercut  
7 public confidence in law enforcement and the common law  
8 rule upon which the criminal law is built to say the  
9 government doesn't have to be presumed to know the law  
10 when it acted.

11 JUSTICE KAGAN: Well, you say that, but some  
12 people say that the existence of a rule-remedy gap  
13 undermines public confidence in the law. So why should  
14 we take that argument any more seriously than the --  
15 than the rule-remedy gap problem in law?

16 MR. FISHER: Because that argument comes  
17 from academic literature and my argument comes from the  
18 Court's jurisprudence, where people have argued that you  
19 shouldn't suspend remedy and the Court has rejected and  
20 said, no, as Judge Wilkinson wrote in the law review  
21 piece that I cited in the brief, there's an important  
22 reason to announce the right even if you're not going to  
23 give a remedy.

24 Now, there are practical reasons for this as  
25 well. Even in the Court's good-faith jurisprudence, the



1 Court has given leeway to officers only to the extent  
2 the officers are relying on a clear directive from a  
3 third party, like a legislature or a court. This is  
4 very different. This is like the Johnson case from  
5 1982, where the Court held that if the officer acts on  
6 his own view of a, quote, "unsettled" rule of law, that  
7 we not only find a Fourth Amendment violation, we  
8 suppress. Even if I have to argue this case --

9 JUSTICE ALITO: Do you dispute that this was  
10 a reasonable interpretation of State law?

11 MR. FISHER: I -- I would dispute if you  
12 were asking in sort of a Chevron sense, that -- that the  
13 statute was sufficiently ambiguous that it could have  
14 been read this way. But I don't think it should be  
15 viewed as a reasonable mistake under the good-faith  
16 doctrine, because the good-faith doctrine deals with  
17 directives from third parties and officers relying on  
18 third parties. Johnson that I was just citing to you  
19 says that unsettled questions of law --

20 JUSTICE ALITO: Well, I don't mean to -- I  
21 don't mean to ask this in the context of any other body  
22 of the Court's case law, just in the common sense  
23 understanding of the term. Was it reasonable if a --  
24 even an attorney sat down and read the -- the relevant  
25 North Carolina statutes, do you think it would be

1 reasonable for that attorney to conclude that you have  
2 to have two functioning brake lights and not just one?

3 MR. FISHER: I think in the common sense  
4 way, I could concede that that would be reasonable. But  
5 there's a legal way of asking what is reasonable and  
6 what is not, Justice Alito. Let me say two things about  
7 that. One is to just remind you that the Court has  
8 never taken into account ambiguity or -- or the  
9 possibility for error in asking whether a governmental  
10 officer gets the law right.

11 And secondly, you have to define the concept  
12 of reasonable. So even if you look at the facts of this  
13 case and you think, well, this mistake was reasonable,  
14 the other side hasn't given a definition of what it  
15 would say would be a reasonable mistake of law. There's  
16 a reference to qualified immunity jurisprudence in the  
17 State's brief, and the Solicitor General describes --  
18 uses language to say a foothold in the statutory text.

19 I'm not sure what definition actually would  
20 apply here, but one thing I do know from the Court's  
21 good -- qualified immunity and EDPA jurisprudence, you'd  
22 have to define that concept, and the definitions that  
23 exist in the law right now are very, very broad. And I  
24 think that goes to the practical reason that I was going  
25 to describe to the Court why you shouldn't hold that the

1 Fourth Amendment was satisfied here. Because if you say  
2 that anything that's reasonable, as the Court has  
3 defined it in other cases, susceptible to debate, you  
4 vastly expand police officer discretion to conduct  
5 traffic stops.

6 As the Court has noted already, officers  
7 have enormous discretion both by the nature of the  
8 traffic laws and under the Whren decision. If --

9 JUSTICE SCALIA: Mr. Fisher, let me -- let  
10 me try my problem just one last time before your time.  
11 You -- you assert that -- that we -- we should not  
12 decide the remedy question because it hasn't been  
13 argued. But wasn't it your responsibility to argue it?  
14 You're asking us to set aside a judgment of the North --  
15 North Carolina court. That judgment can be set aside  
16 only if, number one, the Fourth Amendment was not  
17 violated or, number two, it was violated, but the remedy  
18 does not have to be exclusion of the evidence.

19 It's -- it seems to me it's your burden to  
20 establish not just that the Fourth Amendment was  
21 violated, but also that -- that exclusion was necessary  
22 under the Constitution. And it is no answer to say,  
23 well, that hasn't been argued. You haven't argued it.  
24 That's the problem.

25 MR. FISHER: Well, if I need to argue it, I

1 would refer you to the part three arguments in our  
2 opening brief, which explain why even if you move good  
3 faith into the right -- those -- those would be my  
4 arguments, Justice Scalia.

5 The only other case that comes to mind is  
6 the Court's Ayolta case several years ago, where there  
7 was a takings question brought to the Court, and the  
8 Court divided that Federal law question into two pieces.  
9 And when the lower court had only addressed the first  
10 piece of the case, the Court reversed on that first  
11 piece of the case and sent it back down. So I think  
12 what I'm asking for isn't terribly different.

13 JUSTICE SCALIA: Sent it back down for that  
14 court to decide the other piece. But this Court will  
15 not decide the other piece, as you acknowledge.

16 MR. FISHER: If a State makes that choice  
17 that it's going to give a more favorable remedy, then  
18 federalism should respect that choice, Justice Scalia.

19 And so I'd like to reserve the rest of my  
20 time.

21 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
22 Fisher.

23 Mr. Montgomery.

24 ORAL ARGUMENT OF ROBERT C. MONTGOMERY.

25 ON BEHALF OF THE RESPONDENT

1 MR. MONTGOMERY: Mr. Chief Justice, and may it please  
2 the Court:

3 The Fourth Amendment prohibits unreasonable searches and  
4 seizures, but it does not require that police officers  
5 be perfect. Because the touchstone of the Fourth  
6 Amendment is reasonableness, all that is required is  
7 that a police officer have a reasonable view of the  
8 facts and apply those facts to a reasonable  
9 understanding of the law.

10 JUSTICE SOTOMAYOR: When will we ever get an  
11 understanding, the right understanding of the law?  
12 Meaning as I read the North Carolina Supreme Court  
13 decision, it still hasn't told me whether it's one or  
14 two brake lights, and the next police officer who wants  
15 to stop someone won't know that either.

16 MR. MONTGOMERY: In North Carolina -- excuse  
17 me.

18 JUSTICE SOTOMAYOR: Now, he may be bound by  
19 the appellate court decision, but that won't help  
20 clarify the state of the law.

21 Isn't what you're doing going to leave the  
22 criminal law unclear? It's one thing to say that you  
23 want to not subject officers to civil liability. It's  
24 another to say you want to leave the law unclear in a  
25 criminal prosecution.

1           MR. MONTGOMERY:           Well, Your Honor in North  
2 Carolina, controlling precedent does come from the  
3 intermediate court of appeals. That's not to say that  
4 our supreme court might not reach a different decision  
5 some day. But for now, police officers would be bound  
6 by what the North Carolina court of appeals decided.

7           So the law has been decided.           An officer who  
8 goes out and makes a stop tomorrow because one brake  
9 light is out would be acting unreasonably under that  
10 decision, so it doesn't leave criminal law uncertain.  
11 It --

12           JUSTICE SOTOMAYOR:           Well, it will for the  
13 appellate decision if it's now taking your view that it  
14 can just find out whether the reading, the officer's  
15 reading of the law is reasonable. It basically means  
16 that any open question, police officers will rule in  
17 favor of their right to search.

18           MR. MONTGOMERY:           It depends on whether the  
19 question is an open question and whether that  
20 interpretation by the officer is reasonable. It  
21 certainly may be an unreasonable interpretation. It  
22 would have --

23           JUSTICE SOTOMAYOR:           Define what would make  
24 it unreasonable?

25           MR. MONTGOMERY:           Well, it would be

1 unreasonable if there was plain language of the statute  
2 that no one could reach a different interpretation about  
3 at all if it was plain, or if there was a definite  
4 decision by an appellate court it would be unreasonable  
5 for officer to interpret it in his own way.

6 And the whole standard would be a reasonable  
7 person standard. Would a reasonable person be able to  
8 take this view of the statute?

9 CHIEF JUSTICE ROBERTS: That's a very broad  
10 definition of reasonable. I understand the idea that  
11 when, you know, 99 people out of a hundred think you  
12 have to have two brake lights, like you do everywhere  
13 else in the country, that it's reasonable for the police  
14 officer to think that.

15 But it sounds to me like you're adopting the  
16 same standard that we apply in qualified immunity, which  
17 gives the officers quite -- quite broad scope, and  
18 that -- that's troubling.

19 MR. MONTGOMERY: It's not -- it's not the  
20 same as qualified immunity in that qualified immunity  
21 looks also -- it looks -- it protects the plainly  
22 incompetent. We're not saying that is the standard  
23 here, that --

24 JUSTICE KAGAN: No, I think it doesn't  
25 protect the --

1           MR. MONTGOMERY:           I'm sorry. It doesn't  
2 protect the plainly incompetent.

3           JUSTICE KAGAN:           Yes. So I think what the  
4 Chief Justice is asking you is to describe a case for us  
5 where the officer would receive qualified immunity but  
6 it would not count as reasonable for these purposes.

7           MR. MONTGOMERY:           One of the things that this  
8 Court has said in *Wilson v. Layne* is that this Court and  
9 courts can look beyond just the officer's interpretation  
10 like this. It can look to other matters. There could  
11 be an officer who -- who had an unreasonable  
12 interpretation of the statute, and yet he may still have  
13 qualified immunity, for instance, because he was told by  
14 a judge or by the attorney general or by someone that  
15 this was correct, and that was a complete  
16 misunderstanding of the statute.

17           It may be that that officer would still be  
18 protected by qualified immunity, but for the -- for  
19 Fourth Amendment purposes, that would not be a  
20 reasonable interpretation of the statute.

21           CHIEF JUSTICE ROBERTS:           You would not give a  
22 pass -- I mean, let's say the case is flipped here and  
23 the most reasonable reading of the statute is that you  
24 only need one brake light.

25           And so someone's driving around with one



1 brake light. You pull him over. He's going to say: I  
2 reasonably thought that, you know, I -- I only -- I only  
3 needed one. And the Court comes out and says, I needed  
4 two.

5 In that case, ignorance of the law would not  
6 save him, would it?

7 MR. MONTGOMERY: No, it would not. But the  
8 flip side of that is that an officer's belief that you  
9 needed all of your brake lights, and that is not  
10 actually the law, does not mean that that person is  
11 guilty.

12 In other words, in this instance, this --  
13 this driver -- excuse me, the defendant here or driver,  
14 actually, could not be held liable for the brake light  
15 violation. So it's not that the fact that an officer  
16 thinks reasonably that the law is something. That  
17 doesn't make it the law, just like if a citizen does not  
18 think that's the law, that does not mean that he can  
19 escape liability.

20 JUSTICE SOTOMAYOR: There is a problem,  
21 however -- I'm sorry. The police officer wasn't  
22 stopping him because of the brake light. The police  
23 officer was involved in criminal interdictions and  
24 admitted that this was a pretext, a lawful pretext, he  
25 thought.

1           So he wasn't there just to tell him -- if he  
2 had just stopped him and said, you know, fix your brake  
3 light, and drove away, there would never be a lawsuit,  
4 correct?

5           MR. MONTGOMERY:           That's correct.

6           JUSTICE SOTOMAYOR:        So how many citizens  
7 have been stopped for one brake light who are asked to  
8 have their car searched? And is that something that we  
9 as a society should be encouraging?

10          MR. MONTGOMERY:           Well, there -- wholly  
11 innocent people are stopped quite often because of  
12 mistakes of fact, for instance. That's part of the  
13 whole Terry -- how Terry works and those types of brief  
14 stops. There turns out times that citizens have not  
15 committed any kind of offense, and yet they are stopped.

16          This is just another example of that, in  
17 which an officer acted reasonably, just as with a  
18 reasonable mistake of fact, and it turned out that this  
19 was not actually a violation.

20          CHIEF JUSTICE ROBERTS:        I'd like to focus  
21 again on your definition of reasonableness. Let's say  
22 you have two court of appeals decisions. One says you  
23 need two brake lights; the other says you need one.

24          Is it reasonable for the officer to pull  
25 somebody over when one of their two brake lights is

1 burned out?

2 MR. MONTGOMERY: If you have conflicting  
3 rulings from the court of appeals, it would be  
4 reasonable then for the officer to decide which he  
5 thought was the better rule, if there were two different  
6 decisions from the court of appeals, which is not  
7 supposed to happen in our system.

8 But if that happen, then it would be  
9 reasonable for the officer to rely on either one of  
10 those.

11 JUSTICE KAGAN: Mr. Montgomery, I take it  
12 that one of Mr. Fisher's arguments, maybe his primary  
13 argument, is that this just looks like a remedies  
14 question, it does not look like a rights question, it  
15 focuses on the culpability of the officer in the way we  
16 do when we think about immunity or when we think about  
17 the exclusionary rule.

18 So why isn't that exactly right, that to the  
19 extent that this conviction ought to be upheld, it ought  
20 to be upheld on remedies reasons rather than rights  
21 reasons to fit in with our basic understanding of what  
22 remedies and rights do and do differently in our law?

23 MR. MONTGOMERY: Well, certainly this court  
24 looks at different things when it looks at the right  
25 versus the remedy. Reasonableness is important in the

1 rights stage. In the remedies stage, that may be  
2 considered, but also the culpability of -- of the  
3 officer, whether he was deliberately disregarding the  
4 law, those types of things.

5 This Court has addressed mistakes of law  
6 both in the rights and the remedy stage. And so it  
7 would be important to address it in the rights stage  
8 here in this particular case because then we don't get  
9 into the sorts of things that wouldn't be necessary in  
10 the remedy stage, if that answers your question.

11 JUSTICE GINSBURG: What about -- what about  
12 the dissenter in the North Carolina court of appeals who  
13 said North Carolina has no good-faith exception, and so  
14 all that this decision does is it allows the police to  
15 get around the absence of a good-faith exception?

16 Wasn't that the position of the dissenter,  
17 that allowing for a reasonable mistake of law to support  
18 a warrantless stop is the functional equivalent of a  
19 good-faith exception?

20 MR. MONTGOMERY: That was the position of  
21 the dissenting justices at the North Carolina Supreme  
22 Court, one of the things that they said.

23 But again, this again gets back to  
24 reasonableness as the standard for the Fourth Amendment.  
25 And that is what this Court has said is important at

1 that stage, is whether an officer is acting reasonably.

2 There are other considerations that take  
3 place at the remedy stage. So the State was asking for  
4 nothing more than simply whether this violated the  
5 Fourth Amendment, and not about remedy. And --

6 JUSTICE SCALIA: Counsel, maybe you have the  
7 answer to all the questions I was asking of -- of  
8 Mr. Fisher. And -- and I guess the answer is you  
9 haven't argued that point, right?

10 MR. MONTGOMERY: The remedy?

11 JUSTICE SCALIA: You did not -- you did not  
12 assert in your -- in your brief or you haven't asserted  
13 it in oral argument, thus far, anyway, that even if it  
14 did constitute a violation of the Fourth Amendment, the  
15 remedy did not have to be exclusion of the evidence, and  
16 that remedy is indeed subject to reasonable mistake of  
17 law, and therefore, the decision has to be affirmed.

18 But you didn't make that argument. You want  
19 to put all your eggs in the basket of whether it's a  
20 violation of Fourth Amendment. Am I right about this?

21 MR. MONTGOMERY: That's correct, Your Honor.

22 JUSTICE SCALIA: Okay. I'm sorry to waste  
23 so much of our time.

24 MR. MONTGOMERY: Well, we did not make that  
25 argument below in the North Carolina Supreme Court. And

1 Mr. Fisher is correct in that it is our State  
2 constitution that says that there's no good-faith  
3 exception.

4 If a defendant had only raised a Fourth  
5 Amendment question in our courts, the good-faith  
6 exception would still be available if that defendant did  
7 not make a claim under the State constitution.

8 JUSTICE KENNEDY: Well, I'm not so sure it  
9 makes good prudential sense to allow the North Carolina  
10 Supreme Court to put to us what is basically an abstract  
11 question.

12 MR. MONTGOMERY: The question of --

13 JUSTICE KENNEDY: To -- to give an answer  
14 without reference to the fact that, as Justice Scalia  
15 indicates, part of the Fourth Amendment is the  
16 good-faith exception. It bears on reasonableness.

17 MR. MONTGOMERY: That's correct. And -- and  
18 this -- this Court has, in cases like Rodriguez dealt  
19 with mistake of law just in the rights stage rather than  
20 the remedies stage, and that's all that it -- has been  
21 briefed in this instance. That's correct.

22 And one of the things that is different  
23 about this from Krull and Davis is that we're not  
24 talking about --

25 JUSTICE SCALIA: Excuse me. I mean, that

1 just doesn't wash. Yes, in other cases we just decide  
2 the -- the right and -- and don't have to decide the  
3 remedy, but this is a case in which, unless -- unless  
4 the remedy is exclusion, there's no basis for us to set  
5 aside the judgment of the North Carolina Supreme Court.  
6 Unless -- unless the remedy is exclusion. It seems to  
7 me that's part of the case to reverse. If -- if we  
8 can't say that, we have no business reversing. But if  
9 it hasn't been argued, I guess we can do that. I guess.

10 MR. MONTGOMERY: That -- that has not been  
11 argued here or below, that's correct. A difference  
12 between this case and Krull and Davis is that this case  
13 has not -- this involves a mistake of law as to a  
14 substantive statute rather than a mistake of law as to  
15 the Fourth Amendment itself. And the difference in that  
16 is that a reasonable violation of the Fourth Amendment  
17 is still a violation of the Fourth Amendment.

18 There -- if there's a statute that gives an  
19 officer the opportunity to make a seizure on less than  
20 what is required by the Constitution, less than probable  
21 cause or less than reasonable suspicion, even if the  
22 officer is reasonable, that is still a Fourth Amendment  
23 violation, which is why this Court would have to go to  
24 the remedy portion to decide whether the exclusionary  
25 rule applied.

1           In this instance, this case, it was a  
2 mistake as to a substantive statute that was used by the  
3 officer to -- as part of the facts and circumstances of  
4 this case. As part of the totality of the circumstances  
5 of this case, the officer considered what he thought was  
6 the correct law.

7           JUSTICE GINSBURG:           Why does it -- why should  
8 you draw the line between if he gets the Fourth  
9 Amendment wrong, the Fourth Amendment is violated, but  
10 if he gets the statute wrong, then the Fourth Amendment  
11 is not violated?

12          MR. MONTGOMERY:           Because the officer only  
13 needs to act reasonably and the fact that he gets the  
14 statute wrong does not mean that he acted necessarily  
15 unreasonably.

16          JUSTICE GINSBURG:           Well, the fact that he  
17 made a mistake about what the Fourth Amendment requires  
18 could also be reasonable.

19          MR. MONTGOMERY:           It could be, and that would  
20 be proper to consider, as this Court has, in the  
21 remedies stage rather than in the rights stage. In the  
22 DeFillippo case which this Court decided, there was a  
23 situation in which a statute, a substantive statute was  
24 found unconstitutional and void for vagueness, and yet  
25 this Court found that there was probable cause in that



1 case for the officer to make an arrest based upon that  
2 statute.

3 So that was one case in which this Court  
4 looked at it at the rights stage as a mistake of law  
5 rather than at the remedy stage.

6 JUSTICE KAGAN: Well, do you think if  
7 DeFillippo came up again today, with all the cases that  
8 have been decided since then, that we would decide it  
9 the same way or do you think we would conceptualize it  
10 now as a remedies question?

11 MR. MONTGOMERY: I think the Court would  
12 decide it the same way. And this Court in Arizona v.  
13 Evans said that if the case is even decided before the  
14 good-faith exception are still viable in terms of the  
15 Fourth Amendment analysis.

16 JUSTICE SOTOMAYOR: What kind of mistake of  
17 law did the police officer make in DeFillippo? The law  
18 said exactly what he thought it said.

19 MR. MONTGOMERY: That's correct, Your Honor.

20 JUSTICE SOTOMAYOR: Why do you classify this  
21 as a mistake of law question?

22 MR. MONTGOMERY: I believe the --

23 JUSTICE SOTOMAYOR: We said it was  
24 presumptively valid and he acted according to a statute.

25 MR. MONTGOMERY: That's correct.

1 JUSTICE SOTOMAYOR: You don't ask police  
2 officers to ignore the law.

3 MR. MONTGOMERY: That is correct that it's  
4 different from this case, but there was still --

5 JUSTICE SOTOMAYOR: No, no, no. This is a  
6 mistake of law; he wasn't following the law, presumably,  
7 according to the appellate decision.

8 MR. MONTGOMERY: That's right. The  
9 DeFillippo case is important because you had someone who  
10 was acting wholly innocently; he was not committing an  
11 offense at all, as -- as in this case you had someone  
12 who was acting wholly innocently and was not committing  
13 a violation of the law. So in DeFillippo, this Court  
14 said that even though the conduct was wholly innocent,  
15 there still was probable cause despite the mistake of  
16 law, and that's all that we're saying in this case.

17 JUSTICE KAGAN: Isn't there another  
18 difference between DeFillippo and this case? The court  
19 in DeFillippo talks a lot about how there's a  
20 presumption of constitutionality for any statute and we  
21 don't want officers to go around questioning the  
22 constitutionality of statutes. But here, that's not the  
23 case. Here, there's a statute and an officer is not  
24 supposed to read it as broadly as possible. An officer  
25 is supposed to read it fairly.

1           So there's no presumption that goes into  
2 effect and there's no -- there's no way in which we  
3 could say the same thing about DeFillippo, is that we  
4 don't want officers to question -- to inquire into this  
5 area.

6           MR. MONTGOMERY:           It is different, but we do  
7 want officers to enforce the law. We don't want them to  
8 just sit back and not enforce --

9           JUSTICE KAGAN:           We want them to enforce the  
10 law fairly and as written and -- and not to push every  
11 statute to its -- you know, to the furthest, furthest,  
12 furthest it could go without being found, you know,  
13 utterly unreasonable.

14          MR. MONTGOMERY:           That's correct, Your Honor.  
15 But we do want them to act reasonably and still enforce  
16 the law, not to turn a blind eye to what may be a  
17 violation.

18          JUSTICE SCALIA:          How -- how does the statute  
19 read here? What are the exact words from the statute.

20          MR. MONTGOMERY:          The statute has two parts.  
21 It has a subsection (d).

22          JUSTICE KENNEDY:         Where -- where do we find  
23 it?

24          MR. MONTGOMERY:          This would be in the  
25 appendix to the Respondent's brief, appendix pages 1 --

1 appendix pages 1 through -- actually through 5, has all  
2 of the relevant portions of the statute.

3 Subsection (d) involves rear lamps and says  
4 that, "every motor vehicle shall have all originally  
5 equipped rear lamps or the equivalent in good working  
6 order." That's the relevant portion of subsection (d).  
7 Subsection (g), which is on page 3 of the appendix says,  
8 "No person shall sell or operate on the highways of the  
9 State any motor vehicle manufactured after December  
10 31st, 1955 unless it shall be equipped with a stop lamp  
11 on the rear of the vehicle." That is the language that  
12 the North Carolina Court of Appeals said when it said "a  
13 stop lamp," that meant that only one was required.

14 JUSTICE SCALIA: That -- that seems to be  
15 what it says.

16 MR. MONTGOMERY: The confusion comes in --  
17 the confusion comes in, Justice Scalia, in the last  
18 sentence of subsection (g) on appendix page 3, which  
19 says, "The stop lamp may be incorporated into a unit  
20 with one or more other rear lamps." Where the confusion  
21 comes in is that sentence would seem to imply that the  
22 stop lamp is a rear lamp, that it can be incorporated  
23 into a unit with one or more other rear lamps.

24 And if you go back to subsection (d), that's  
25 the section that says that "all originally equipped rear

1 lamps must be in good working order." So there --  
2 there's some conflicts in --

3 JUSTICE SCALIA: Well, I mean, that applies  
4 to all rear lamps, the stop lamp and all the other  
5 lamps.

6 MR. MONTGOMERY: That's correct. All the  
7 other lamps we know --

8 JUSTICE SCALIA: So -- so it has to be  
9 plural. If it's going to apply to the stop lamp and all  
10 the other lamps, of course, it would say lamps.

11 MR. MONTGOMERY: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Ms. Kovner.

14 ORAL ARGUMENT OF RACHEL P. KOVNER

15 ON BEHALF OF THE UNITED STATES

16 AS AMICUS CURIAE, SUPPORTING RESPONDENT

17 MS. KOVNER: Mr. Chief Justice, and may it  
18 please the Court:

19 Since the founding, the probable cause  
20 standard had allowed -- has allowed police officers to  
21 make stops when there are reasonable grounds to believe  
22 that a person committed a crime even if the officer  
23 later turns out to have been mistaken about either the  
24 facts or the law. And as Justice Kennedy observed at  
25 the start of this argument, given that this Court's

1 cases recognize that there can be a reasonable mistake  
2 of law, an officer who makes a reasonable mistake of law  
3 may have a reasonable grounds to believe that a person  
4 committed a crime.

5 If I can go to a question that Justice Kagan  
6 asked about why this question is more appropriately  
7 addressed at the rights stage than the remedies stage,  
8 we think there are three main reasons. The first has to  
9 do with history. Since the founding, this Court has  
10 treated the probable cause standard as allowing for  
11 reasonable mistakes of law.

12 JUSTICE SOTOMAYOR: Are all the cases that  
13 you cite, including Riddle, all in the context of a  
14 customs statute that didn't permit customs officers to  
15 suffer damages --

16 MS. KOVNER: Yes, Your Honor.

17 JUSTICE SOTOMAYOR: -- for purposes of an  
18 error of law, correct?

19 MS. KOVNER: That's correct. The reason --

20 JUSTICE SOTOMAYOR: None of those cases  
21 involved a violation of the Fourth Amendment.

22 MS. KOVNER: That's correct. The reason  
23 those cases are relevant here is because those cases are  
24 interpretations of the probable cause standard.

25 JUSTICE SOTOMAYOR: But how is that

1 different in terms of its analysis, those cases, from  
2 what we've ultimately applied as a qualified immunity  
3 standard with respect to civil damages today?

4 MS. KOVNER: So --

5 JUSTICE SOTOMAYOR: Doesn't it follow --  
6 don't they follow exactly the same reason?

7 MS. KOVNER: I don't think so, Your Honor.  
8 Those cases, the probable cause reasoning that the Court  
9 has followed in those cases is what the Court has done  
10 at the merits stage of the Fourth Amendment analysis.

11 So this Court has routinely cited cases under those  
12 customs statutes as illuminating the meaning of the  
13 probable cause standard, and therefore illuminating --

14 JUSTICE SOTOMAYOR: So you disagree with  
15 Justice Story when he looked at those cases and made the  
16 point I just made.

17 MS. KOVNER: No --

18 JUSTICE SOTOMAYOR: Do you think he was  
19 wrong?

20 MS. KOVNER: There's no doubt that in those  
21 cases the question, the question the court was  
22 ultimately answering is, are those customs officers  
23 liable. But the way that it was answering that question  
24 was by determining whether those officers had probable  
25 cause. And probable cause is the constitutional

1 standard. And that's why this Court has subsequently  
2 relied on those cases in illuminating the --

3 JUSTICE BREYER: Can I ask you a question?  
4 I'd just like you to address for a minute -- assume for  
5 the sake of argument that I agree with you that a  
6 reasonable mistake of law that I -- is an excuse. But  
7 what is a reasonable mistake?

8 Now, that's what I'd like you to address.  
9 And in particular, would you have objection to: It has  
10 to be, one, exceedingly rare; two, objective; three, it  
11 is -- has to be that a reasonable lawyer would think  
12 that the policeman was right on the law, and only if  
13 after, to quote you brief, a careful scrutiny and  
14 serious difficulty in construing the law, does it turn  
15 out that he is wrong.

16 Now, what do you think about that or some  
17 other standard?

18 MS. KOVNER: I think we agree with each of  
19 those descriptions of a reasonable --

20 JUSTICE BREYER: All right. If you agree  
21 with those then what about this case? Because after  
22 all, it does say a stamp light -- a stop light. What's  
23 the difficulty of construing that to mean a stop light?

24 MS. KOVNER: So we think that the North  
25 Carolina Supreme Court and the court of appeals were



1 right that an officer could reasonably interpret the  
2 statute to require --

3 JUSTICE BREYER: Only after a careful  
4 scrutiny and serious difficulty in construing the law  
5 does it turn out that the officer was wrong. What's the  
6 difficulty?

7 MS. KOVNER: Here --

8 JUSTICE BREYER: It stays a stamp -- a stop  
9 light.

10 MS. KOVNER: Here, the difficulty is in the  
11 other provision, which requires all originally equipped  
12 rear lamps to be working. And --

13 JUSTICE SCALIA: But that includes the stop  
14 light and any other lights. Okay. A stop light, the  
15 turn lights, the back-up lights.

16 So you had to use the plural for those other  
17 provisions.

18 MS. KOVNER: Agreed. It's not the plural.  
19 It's the fact that all originally equipped rear lamps  
20 need to be working, which means that if a car was  
21 originally equipped with multiple stop lamps, as cars  
22 now are, then when one of them is broken, one of the  
23 originally equipped rear lamps is not working.

24 So that's the difficulty. And that's why  
25 none of the courts that considered this question thought

1 this was anything other than a very hard question of  
2 statutory interpretation.

3 CHIEF JUSTICE ROBERTS: So where do you come  
4 out in my hypothetical of the two court of appeals  
5 decisions? Is that reasonable for the officer to say,  
6 "Well, I'm going to pick this one and follow that?"

7 MS. KOVNER: So if the officer is in a  
8 jurisdiction whose court of appeals has decided the  
9 question, we think the officer is bound by that  
10 interpretation, even if other courts of appeals come out  
11 differently. But if the officer is in a jurisdiction  
12 where the question is undecided and different courts  
13 have come out differently in other jurisdictions, then  
14 we don't think the fact that one court has decided it in  
15 one way is dispositive. We think then the court looks  
16 to this question of is it a really difficult --

17 JUSTICE BREYER: Well, now I forgot one  
18 thing, which may be obvious to me. We're not talking  
19 about a difficulty in construing the Fourth Amendment  
20 itself? We're talking only about a difficulty in  
21 construing a criminal statute, where, in fact, the  
22 reason for the stop or seizure is based on a violation  
23 of criminal law.

24 MS. KOVNER: That's right. I think the  
25 probable cause standard allows for an officer to act

1 when he has reasonable grounds to --

2 JUSTICE SOTOMAYOR: How is your standard  
3 differed from qualified immunity standard of  
4 reasonableness?

5 MS. KOVNER: Sure. We think that an  
6 officer, in order to have reasonable grounds for a stop,  
7 needs to be able to point to something in the statute  
8 that affirmatively supports his view, whereas the  
9 qualified immunity standard seems to require essentially  
10 the opposite. It seems to require that there's a  
11 precedent that forecloses what the officer does in order  
12 to protect only those who were acting -- to protect  
13 everybody except for those who are clearly incompetent.

14 JUSTICE GINSBURG: The one argument that is  
15 in your brief that I didn't follow is that the  
16 importance of holding the way you recommend is so that  
17 when you get this question solved, you tee up the  
18 question, what is the rule, one light or two lights.

19 But yet in this case, it was consent. The  
20 evidence that came in had nothing at all to do with the  
21 traffic violation, so we wouldn't need to -- the Court  
22 wouldn't need to decide the traffic violation, say -- it  
23 was consent. I think the North Carolina Immediate  
24 Appellate Court said it was a legitimate consent. It  
25 was consent, and this evidence comes in, and we never

1 had to deal with what the traffic regulation was.

2 MS. KOVNER: That's correct, Your Honor.

3 And this question comes up in two contexts. Sometimes  
4 it would be litigated in the suppression context, and  
5 sometimes it would be litigated because the officer  
6 actually issues a citation. And our concern expressed  
7 in that portion of the brief is that if the Court takes  
8 the position that whenever an officer is wrong about the  
9 law, he has violated the Fourth Amendment, it's going to  
10 deter officers from making stops where there are  
11 arguments on both sides.

12 JUSTICE KENNEDY: Do you -- do you agree  
13 that if there is an illegal stop, that this consent is  
14 the fruit of the poison tree?

15 MS. KOVNER: We think that would be a  
16 difficult question. We don't necessarily agree with  
17 that. This Court has said it's not simply a but-for  
18 test. So even if the stop was a but-for cause, that  
19 doesn't necessarily mean that the evidence was fruit of  
20 the poisonous tree. But the question wasn't argued  
21 below by the State and it hasn't been briefed here. So  
22 we've addressed simply the question of --

23 JUSTICE KAGAN: Ms. Kovner, you started your  
24 argument by saying you were going to give us three  
25 reasons why this should be a rights question rather than

1 a remedies question. You said history, which frankly,  
2 you know, I think your history probably doesn't say as  
3 much as you think it says. So I want to know what is  
4 number two and number three are.

5 MS. KOVNER: Sure. The second is an  
6 administrability reason. We think that this is the  
7 simplest standard. You simply ask officers to decide  
8 whether -- you simply ask courts to decide whether an  
9 officer could reasonably think that a person had  
10 committed a crime, and you don't separate was this a  
11 question of law or a question of fact and treat one in  
12 the rights section and one in the remedies section.

13 And the third is that we don't think there's  
14 a normative reason to treat mistakes of law and mistakes  
15 of fact differently. When an officer makes a stop in  
16 this situation, he can just as reasonably be confused as  
17 to what the -- the law is under these statutes, as  
18 confused as to what the facts are. And if we're going  
19 to treat mistakes of fact as part of the rights  
20 analysis, it makes sense to treat reasonable mistakes of  
21 law in the same way.

22 If the Court has no further questions, thank  
23 you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
25 Mr. Fisher, you have three minutes left.

1 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

2 ON BEHALF OF PETITIONER

3 MR. FISHER: Thank you. I'd like to make  
4 four points if I could. To start with the  
5 administrability question of what would reasonableness  
6 mean, Mr. Chief Justice, I think your hypothetical of  
7 two differing court of appeals opinions in a State,  
8 I think under the analysis that I just described, would  
9 mean that it would violate the Fourth Amendment and half  
10 the State to conduct the stop and not in the other half  
11 of the State, because each would be binding in its own  
12 component of the State.

13 And that shows why in Whren, and many other cases, this  
14 Court has rejected that kind of analysis at the rights  
15 stage and cabined it only to the remedies stage. If you  
16 want to ask --

17 JUSTICE ALITO: Well, in this -- in this  
18 case, didn't the dissenters in the North Carolina  
19 Supreme Court say that the interpretation adopted by the  
20 court of appeals was surprising? So all we would have  
21 to say on reasonableness is that if it's not -- if it's  
22 surprising, if the correct interpretation is surprising,  
23 then the contrary interpretation is reasonable. Would  
24 we have to go further than that?

25 MR. FISHER: I think you do because you have

1 to just give a little more teeth to it. What the  
2 Solicitor General said is that it would have to have  
3 foothold in the statute. And I think that's more or  
4 less what was recited today, was a recent D.C. Court of  
5 Appeals opinion that holds that a police officer  
6 could -- could argue from a foothold in the statute that  
7 all license plate frames are illegal.

8 Now, they rejected that under their code,  
9 but it's just one of innumerable arguments that a law  
10 enforcement officer might make and that this  
11 reasonableness test would give grave --

12 JUSTICE BREYER: No, no. I mean, it would  
13 be one way, one way. One court one way, one way the  
14 other way. The officer loses because, you know, it ties  
15 -- it has to be unusual. It has to be -- you heard  
16 what --

17 MR. FISHER: Well, I think, Justice Breyer,  
18 the problem with that is that it's the core presumption  
19 that the officer needs to understand the law as it  
20 existed, as it was later construed.

21 And Mr. Chief Justice, you asked, I think,  
22 about the ignorance canon. The State's response was,  
23 well, if somebody is reasonably mistaken about the law,  
24 we would convict him.

25 And the reason why is because we would

1     assume he knew the law. We would assume that somebody  
2     at the court of appeals split and this Court divided  
3     5-4, the person is still convicted because we assume  
4     they knew the law when they acted.

5             And all we are asking for today is for the  
6     exact same assumption to apply to police officers. And  
7     with due respect to the Solicitor General, the founding  
8     -- the cases they describe don't help them. They're  
9     only remedy cases, and they reinforce our point. And  
10    even when the Court has cited these cases, they're all  
11    in the pre-Leon context where this Court didn't  
12    distinguish rights from remedies.

13            If you want to look at the founding, the  
14    controlling rule would be the common law rule. And as  
15    we said in our brief, with no -- with no disagreement  
16    from the other side, the common law rule dating back  
17    centuries was that ignorance of the law on the police  
18    officer's part, even if it was perfectly reasonable,  
19    didn't justify the stop.

20            And if I could say one last thing to Justice  
21    Scalia about the colloquies we were having before, with  
22    all due respect, I really do think there is nothing  
23    unusual about a party litigating a case up through the  
24    courts. It may arise in Federal court or it may arise  
25    in State court, but they can choose the arguments they



1 choose to raise.

2 And when we got a judgment in our favor from  
3 the North Carolina court of appeals, it was up to the  
4 State at that point to choose what arguments it wanted  
5 to pursue further in this case. So just like a State  
6 may -- a party may ride the First Amendment instead of  
7 the Second or a rights question instead of remedy, we  
8 think that's all that's happened here.

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

10 The case is submitted.

11 Whereupon, at 11:02 a.m., the case in the  
12 above-entitled matter was submitted.)

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