

THE SUPREME COURT'S MISTAKE ON LAW ENFORCEMENT MISTAKE OF LAW: WHY STATES SHOULD NOT ADOPT *HEIEN V. NORTH CAROLINA*

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ABSTRACT

Should a law enforcement officer's mistake of law constitute reasonable suspicion? According to the Supreme Court, the answer is yes. In *Heien v. North Carolina*, the Supreme Court took the minority approach and held that a law enforcement officer's mistake of law could equate to reasonable suspicion—provided that the mistake was objectively “reasonable.” In doing so, the Court reached the wrong conclusion.

This Article is the first to urge state courts to provide greater Fourth Amendment protections rather than the low standard set forth in *Heien*. States should not adopt *Heien* and instead should extend greater individual privacy protections under state constitutions for four reasons.

First, because *Heien* left many unanswered questions, if states adopt the standard *Heien* set forth, it is unclear exactly what the state is adopting. These unanswered questions include: What is a “reasonable” law enforcement officer's mistake of law? What types of mistakes can even be considered in a reasonableness analysis?

Second, states should extend greater privacy protections than *Heien* because of well-established common law principles. Ignorance of the law is no excuse for citizens, so it should not be an excuse for law enforcement officers. Additionally, ambiguity in statutes should not be held against criminal defendants.

Third, law enforcement mistake of law violates governmental separation of powers. Law enforcement officers

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should not exercise the judicial function of interpreting laws or legislative function of creating laws one might reasonably believe exist, but in actuality do not.

Fourth, *Heien* is inconsistent with Fourth Amendment jurisprudence. Case law relating to the good faith exception to the exclusionary rule presumes that a mistake of law equates to a constitutional violation, yet *Heien* says just the opposite—that a mistake of law does not necessarily equal a constitutional violation. Therefore, states should not adopt *Heien v. North Carolina*.

Further, because states should extend greater privacy protections and not allow a law enforcement officer's mistake of law to rise to the level of reasonable suspicion, states should apply the exclusionary rule to evidence obtained during a stop premised on a law enforcement officer's mistake of law.

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I. INTRODUCTION

In *Heien v. North Carolina*, the Supreme Court surprisingly adopted a low baseline standard for Fourth Amendment protections, holding that a law enforcement officer's mistake of law, if statutorily "reasonable," does not constitute a Fourth Amendment violation.¹ This approach was in the extreme minority of federal circuits. In fact, prior to *Heien*, the Eighth Circuit was the only circuit to adopt this approach.² Before *Heien*, the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits squarely held that a law enforcement officer's mistake of law was a constitutional violation and applied the exclusionary rule when evidence was found following a traffic stop premised on such a mistake of law.³

This Article is the first to urge states to provide greater constitutional protections for citizens under state constitutions following a law enforcement officer's mistake of law. Law enforcement mistake of law should never equate to reasonable suspicion, even if the mistake itself is statutorily "reasonable," and state courts should hold accordingly. "It is the duty of [state] courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."⁴ Therefore, states should extend greater Fourth Amendment protections for four fundamental reasons.

First, *Heien* leaves many unanswered questions. Therefore, states should not blindly follow its result because the actual result is unclear. *Heien's* unanswered questions include: What is a "reasonable" law enforcement officer's mistake of law? What kind of mistakes of law can be considered under *Heien*? Ambiguous statutes? Sunset statutes? Belief that a statute exists when in fact it does not? Such questions are left unanswered by the *Heien*

1. *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

2. *United States v. Smart*, 393 F.3d 767, 770–71 (8th Cir. 2005).

3. *See* *United States v. Nicholson*, 721 F.3d 1236, 1244 (10th Cir. 2013); *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006); *United States v. Chanthasouvat*, 342 F.3d 1271, 1278–79 (11th Cir. 2003); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999); *United States v. Miller*, 146 F.3d 274, 280 (5th Cir. 1998).

4. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 494 (1977) (citing *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

majority and comprise just one of many reasons why states should not adopt *Heien*.

Second, *Heien* violates important common law principles. These principles include the maxim that ignorance of the law is no excuse.⁵ It does not make sense that a law enforcement officer is held to a higher standard when he is not wearing his badge than when he is. If an ordinary citizen cannot use ignorance of the law as a defense, then a law enforcement officer's mistake of law should not equate to reasonable suspicion. Also, *Heien* potentially holds ambiguity in statutes against criminal defendants.

Third, the allowance of law enforcement mistake of law violates governmental separation of powers. Giving officers the authority to interpret the meaning of laws undercuts the separation of powers between the executive, judicial, and possibly legislative branches of government, depending on how far the *Heien* decision extends.⁶

Fourth, states should provide greater protections of Fourth Amendment rights because doing so is consistent with Fourth Amendment jurisprudence. For example, *Heien* is inconsistent with *Davis v. United States* and other remedial law cases that assume a mistake of law is a Fourth Amendment violation in making a remedial determination.⁷

These problems should be remedied at the state level by state courts of last resort declining to follow the *Heien* approach and extending greater individual privacy protections under state constitutions. Upon finding that law enforcement mistake of law violates constitutional rights, states should apply the exclusionary rule to any evidence found during the course of a stop premised on a mistake of law. The good faith exception should not apply when an officer's reliance is on himself rather than on the good faith belief of a judge or warrant.

5. *United States v. Baker*, 197 F.3d 211, 218 (6th Cir. 1999) (“[I]gnorance of the law is no excuse.” This maxim, deeply embedded in our American legal tradition, reflects a presumption that citizens know the requirements of the law.”).

6. In *Heien*, the Court allows an officer's interpretation of a statute to equate to reasonable suspicion. *See generally* *Heien v. North Carolina*, 135 S. Ct. 530 (2014). Typically, statutory interpretation is a job for the judicial branch. Though uncertain, if *Heien* allowed law enforcement officers' reasonable belief that a statute exists, when it actually does not, to qualify as reasonable suspicion, then law enforcement mistake of law also violates the role of the legislature. *See generally id.*

7. *Davis v. United States*, 564 U.S. 229, 237–41 (2011).

In Section II, this Article will address the *Heien* decision and other relevant case law, including key exclusionary rule and good faith exception precedent. Section III will argue that states should not adopt *Heien* by discussing traditional counterarguments to the *Heien* decision. Section III will also address the unanswered questions that exist as a result of *Heien*, as well as the inconsistencies between *Heien* and established Fourth Amendment jurisprudence. Lastly, Section IV will explain why states should apply the exclusionary rule when a stop is premised on a law enforcement officer's mistake of law—even if that mistake was in good faith.

II. BACKGROUND

This Section discusses relevant background information of *Heien v. North Carolina* and its relationship to states, as well as the pre-*Heien* circuit split in favor of the anti-*Heien* standard. This section also discusses *Heien* itself and germane Fourth Amendment jurisprudence.

A. *Fourth Amendment Reasonableness and Law Enforcement Mistake of Law*

i. Pre-*Heien*: States and Law Enforcement Mistake of Law

Even before *Heien*, states were split on the issue of whether law enforcement mistake of law could constitute reasonable suspicion for a traffic stop.⁸ Prior to the *Heien* decision, some state courts of last resort held that law enforcement mistake of law cannot equate to reasonable suspicion, even if the mistake was seemingly “reasonable.” These courts include: Delaware, Florida, Iowa, Kansas, Minnesota, and Montana.⁹ For example, the Iowa

8. Compare cases cited *infra* note 9, with cases cited *infra* note 11.

9. McDonald v. State, 947 A.2d 1073, 1079 (Del. 2008) (holding that because there was not a traffic violation, “the stop was unreasonable and in violation of [defendant’s] Fourth Amendment rights”); Hilton v. State, 961 So. 2d 284, 297 (Fla. 2007) (asserting that reasonable misinterpretations of the law still should not justify a traffic stop); State v. Louwrens, 792 N.W.2d 649, 654 (Iowa 2010) (following the pre-*Heien* federal majority that mistake of law does not equate to reasonable suspicion); Martin v. Kansas Dep’t of Revenue, 176 P.3d 938, 948 (Kan. 2008) (“We . . . hold that an officer’s mistake of law alone can render a traffic stop violative of the Fourth Amendment and § 15 of the Bill of Rights.”); State v. Anderson, 683 N.W.2d 818, 824 (Minn. 2004) (en banc)

Supreme Court in *State v. Louwrens* agreed with the majority of federal circuit courts, concluding that allowing law enforcement mistake of law would foster police ignorance of the law and would be fundamentally unfair to criminal defendants.¹⁰ However, there were a few state courts of last resort that followed the minority approach, including North Carolina, and allowed law enforcement mistake of law to equate to reasonable suspicion.¹¹

ii. Pre-*Heien*: Federal Circuit Split and Law Enforcement Mistake of Law

a. Overwhelming Majority of Circuits Held Law Enforcement Mistake of Law Cannot Equate to Reasonable Suspicion

Before *Heien*, a majority of federal circuit courts held that law enforcement mistake of law could never equate to the reasonable suspicion necessary to justify a traffic stop.¹² The Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits directly adopted what would be the Anti-*Heien* rule.¹³

In *United States v. Miller*, the Fifth Circuit held that stopping a vehicle under the assumption that the law prohibited the use of a turn signal without actually turning—when such a law did not exist—was a constitutional violation.¹⁴ Likewise, the Seventh Circuit held in *United States v. McDonald* that a “stop based on subjective belief that a law has been broken, when no violation actually occurred, [was] not objectively reasonable.”¹⁵ The Ninth Circuit also held that law enforcement mistake of law cannot establish reasonable suspicion, even if the mistake itself was

(“[E]mphasiz[ing] that whether made in good faith or not, the officer was mistaken in his interpretation of [the statute], and therefore he lacked a particularized and objective basis for stopping Anderson.”); *State v. Lacasella*, 60 P.3d 975, 982 (Mont. 2002) (concluding that a mistake of law cannot justify an investigatory stop). These states have not overruled these holdings since *Heien*.

10. *Louwrens*, 792 N.W.2d at 653.

11. *See* *Travis v. State*, 959 S.W.2d 32, 34 (Ark. 1998); *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008); *State v. Heien*, 737 S.E.2d 351, 357 (N.C. 2012); *State v. Wright*, 791 N.W.2d 791, 799 (S.D. 2010).

12. This Article refers to this holding as the Anti-*Heien* holding.

13. *See* cases cited *infra* notes 14–15, 18–19.

14. *United States v. Miller*, 146 F.3d 274, 279–80 (5th Cir. 1998).

15. *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006).

statutorily “reasonable.”¹⁶ In *United States v. Lopez-Soto*, for example, the Ninth Circuit found that law enforcement mistake of law “cannot justify the stop under the Fourth Amendment.”¹⁷ The court reached a similar conclusion in the Tenth Circuit in *United States v. Nicholson*, which held “[l]ike most of our sister circuits, we judge the facts against the correct interpretation of the law, as opposed to any other interpretation, even if arguably a reasonable one.”¹⁸ The Eleventh Circuit also held that law enforcement mistake of law, even if ostensibly reasonable, could not create enough reasonable suspicion to justify a traffic stop, and refused to hold an ambiguous statute against a defendant.¹⁹

Additionally, three other circuits recognized the Anti-*Heien* rule, leaving the Eighth Circuit the only one to follow the approach taken in *Heien*.²⁰ In *United States v. Coplin*, the First Circuit upheld a traffic stop based on a mistake of fact, but still stated that “[s]tops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional.”²¹ Similarly, the Third Circuit in *United States v. Harrison* upheld a search premised on a mistake of fact but noted that “a search conducted pursuant to a police officer’s mistake about the governing law, even if reasonable, is not permitted under the Fourth Amendment.”²² The D.C. Circuit also reached a similar conclusion in *United States v. Booker*.²³

16. *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (“[T]he traffic stop in the case before us was not objectively grounded in the governing law. . . . This cannot justify the stop under the Fourth Amendment. Nor is it possible to justify the stop objectively.”).

17. *Id.*; see also *United States v. King*, 244 F.3d 736, 741 (9th Cir. 2001) (finding that an officer’s mistake of law cannot form the basis for a reasonable suspicion); *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000) (holding that a belief based on a misunderstanding of the law cannot constitute reasonable suspicion).

18. *United States v. Nicholson*, 721 F.3d 1236, 1244 (10th Cir. 2013).

19. *United States v. Chanthasouvat*, 342 F.3d 1271, 1278–79 (11th Cir. 2003).

20. *Petition for Writ of Certiorari at 8–9, Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604).

21. *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006).

22. *United States v. Harrison*, 689 F.3d 301, 309 (3d Cir. 2012).

23. *United States v. Booker*, 496 F.3d 717, 722 (D.C. Cir. 2007).

*b. Minority of Circuits Held Law
Enforcement Mistake of Law Can
Equate to Reasonable Suspicion*

Pre-*Heien*, the Eighth Circuit was the only circuit to hold that a law enforcement officer's mistaken understanding of the law could equate to reasonable suspicion.²⁴ According to *United States v. Martin*, “[t]he determinative question is not whether Martin actually violated the Motor Vehicle Code by operating a vehicle with one defective brake light, but whether an objectively *reasonable* police officer could have formed a reasonable suspicion that Martin was committing a code violation.”²⁵ Though the court in *Martin* held that the officer's misunderstanding was not reasonable, the Eighth Circuit determined that a “distinction between a mistake of law and a mistake of fact is irrelevant to the [F]ourth [A]mendment inquiry.”²⁶

iii. *Heien v. North Carolina*: The Decision

a. Facts and Procedural History

In April 2009, Sergeant Matt Darisse of the Surry County Sheriff's Department saw a Ford Escort pass by while observing traffic on Interstate 77.²⁷ Darisse thought the driver appeared nervous, so he decided to follow the vehicle.²⁸ After following the vehicle for a few miles, the Escort applied its brakes but only one brake light illuminated.²⁹ Darisse then pulled the Escort over.³⁰ There were two men inside the vehicle, Maynor Javier Vasquez, who was driving the vehicle, and Nicholas Brady Heien, who was in the rear seat.³¹ Darisse told Vasquez that he would only issue a warning ticket for the brake light if his license and registration checked out.³² After completing a records check, Darisse issued a warning ticket, but during the course of the stop, Darisse became

24. Petition for Writ of Certiorari, *supra* note 20, at 10–11.

25. *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) (emphasis added).

26. *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005).

27. *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

suspicious.³³ Darisse asked to search the Escort.³⁴ Heien, the owner of the vehicle, consented.³⁵ With the aid of a second officer, Darisse searched the vehicle and discovered a sandwich bag of cocaine.³⁶ Vasquez and Heien were arrested, and Heien was charged with attempted trafficking of cocaine.³⁷

Heien moved to suppress the evidence found during the course of the search and argued that the initial stop violated his Fourth Amendment rights.³⁸ The trial court denied Heien's motion to suppress, so he pled guilty, but preserved the right to appeal the suppression decision.³⁹

On appeal, the North Carolina Court of Appeals reversed, concluding that the initial stop was invalid because North Carolina law requires only one working brake light.⁴⁰ The State appealed, and the North Carolina Supreme Court reversed, concluding that Darisse could have reasonably believed the traffic code required two working brake lights, even if this belief was erroneous.⁴¹ The case was then remanded to the North Carolina Court of Appeals, which affirmed the trial court's decision on the motion to suppress.⁴² In turn, the North Carolina Supreme Court affirmed.⁴³ The United States Supreme Court then granted certiorari and affirmed the North Carolina Supreme Court.⁴⁴

b. Majority Opinion

According to the majority, the question in *Heien* was “whether reasonable suspicion can rest on a mistaken

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 534–35.

38. *Id.* at 535.

39. *Id.* (internal citations omitted).

40. *Id.*

41. *Id.* (“An officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances. . . . [W]hen an officer acts reasonably under the circumstances, he is not violating the *Fourth Amendment*.” (emphasis added) (citing *State v. Heien*, 737 S.E.2d 351, 356 (N.C. 2012))).

42. *State v. Heien*, 741 S.E.2d 1, 7 (N.C. App. 2013), *aff'd*, 749 S.E.2d 278 (N.C. 2013), *aff'd sub nom.* *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

43. *State v. Heien*, 749 S.E.2d 278, 279 (N.C. 2013), *aff'd sub nom.* *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

44. *Heien v. North Carolina*, 135 S. Ct. 530, 531 (2014).

understanding of the scope of a legal prohibition.”⁴⁵ The Court held that it could.⁴⁶ The majority began its discussion by considering the meaning of “reasonableness” within the context of the Fourth Amendment, noting that “reasonable men make mistakes of law . . . and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer’s understanding of the facts and his understanding of the relevant law.”⁴⁷

The majority justified its position with nineteenth century case law that the Court itself noted was “not directly on point.”⁴⁸ The majority also relied on *Michigan v. DeFillippo* to justify its holding that mistakes of law can equate to reasonable suspicion.⁴⁹

The majority then focused its analysis on combatting counterarguments to its position.⁵⁰ The majority also noted that its holding would not discourage law enforcement officers from learning the law since the “Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. . . . Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce.”⁵¹

The majority also addressed concerns of the inherent unfairness of allowing law enforcement mistake of law, but not citizen mistake of law.⁵² The majority attempted to justify this unfairness: “But just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop.”⁵³

Through its understanding of the relevant circumstances, the majority had “little difficulty concluding that the officer’s error of law was reasonable” and thus concluded that Heien’s Fourth Amendment rights were not violated.⁵⁴

45. *Id.* at 536.

46. *Id.*

47. *Id.*

48. *Id.* at 537.

49. *Id.* at 538.

50. *Id.* at 539–40.

51. *Id.*

52. *Id.* at 540.

53. *Id.*

54. *Id.*

c. Concurrence

Justice Kagan, with whom Justice Ginsburg joined, concurred in the opinion.⁵⁵ Justice Kagan wrote “separately to elaborate briefly on [the] important limitations” of the majority’s holding, as the majority left many unanswered questions, which will be discussed in Section III of this Article.⁵⁶

First, Justice Kagan noted that “an officer’s subjective understanding is irrelevant.”⁵⁷ Second, she explained the important differences in considering claims which address whether reasonable suspicion exists to determine if a Fourth Amendment violation has occurred and claims of qualified immunity—concluding that the majority’s holding is “more demanding” than a qualified immunity analysis.⁵⁸

Justice Kagan then explained this “demanding” inquiry as limiting a court’s ability to determine if a law enforcement officer’s mistake of law was seemingly reasonable to situations where an ambiguous statute exists and an officer reasonably interprets the meaning within the ambiguity.⁵⁹

d. Dissent

Justice Sotomayor was the only dissenter in *Heien*, despite the overwhelming majority of federal circuits that also reached the opposite conclusion.⁶⁰ In her dissent, Justice Sotomayor reframed the question presented in *Heien* as “whether a police officer’s understanding of the law is an input into the reasonableness inquiry, or whether this inquiry instead takes the law as a given and assesses an officer’s understanding of the facts against a fixed legal yardstick.”⁶¹

The dissent noted that the majority was incorrect because “[w]hat matters . . . are the facts as viewed by an objectively reasonable officer, and the rule of law—not an officer’s conception of the rule of law, and not even an officer’s reasonable

55. *Id.* (Kagan, J., concurring).

56. *Id.* at 541.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 542 (Sotomayor, J., dissenting).

61. *Id.*

misunderstanding about the law, but the law.”⁶² Justice Sotomayor justified this position with the notion that officers are best able to evaluate the factual circumstances that give rise to reasonable suspicion.⁶³ However, “[t]he same cannot be said about legal exegesis . . . [because] the notion that the law is ‘definite and knowable’ sits at the foundation of our legal system.”⁶⁴ Justice Sotomayor then went on to explain why allowing law enforcement mistake of law erodes the “Fourth Amendment’s protection of civil liberties in a context where that protection has already been worn down.”⁶⁵

Justice Sotomayor also addressed the human consequences of the majority’s holding:

One wonders how a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so. In addition to these human consequences—including those for communities and for their relationships with the police—permitting mistakes of law to justify seizures has the perverse effect of preventing or delaying the clarification of the law.⁶⁶

This result is bad for ordinary citizens and law enforcement officers alike.⁶⁷

Further, Justice Sotomayor claimed that a downside does not exist for denying law enforcement mistake of law because the good faith exception will not require suppression of evidence, even if a reasonable mistake of law is a Fourth Amendment violation.⁶⁸

The dissent also asserted that the majority’s holding was incorrect because the Court’s “jurisprudence draws a sharp ‘analytica[l] distinct[ion]’ between the existence of a Fourth

62. *Id.* at 542–43 (contending that the Court has always interpreted the rule of law without considering a law enforcement officer’s interpretation).

63. *Id.*

64. *Id.* at 543 (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991)).

65. *Id.*

66. *Id.* at 544.

67. *Id.*

68. *Id.* at 544–45.

Amendment violation and the remedy for that violation.”⁶⁹ Justice Sotomayor further attacked the Majority’s conclusion, as it was based on “both serious legal and practical errors” that leave open many unanswered questions, which create a “murky” standard to determine whether a law enforcement officer’s mistake of law was reasonable.⁷⁰

iv. Post-*Heien* States and Law Enforcement Mistake of Law

Since *Heien*, three state courts of last resort have adopted its holding.⁷¹ Arizona, California, Indiana, and New York also had lower court opinions apply the *Heien* holding in favor of law enforcement mistake of law.⁷² Additionally, some state lower courts did not apply *Heien*, not necessarily because the courts disagreed with its result, but because the courts held that *Heien* did not apply under the given circumstances.⁷³ No state courts have

69. *Id.* at 545 (internal citations omitted) (quoting *Davis v. United States*, 564 U.S. 229, 243 (2011)).

70. *Id.* at 545–47.

71. *People v. Gaytan*, 32 N.E.3d 641, 654 (Ill. 2015) (holding “that an objectively reasonable, though mistaken, belief about the meaning of the law may form the basis for the constitutionally valid vehicle stop”); *State v. Hurley*, 117 A.3d 433, 441 (Vt. 2015) (holding that “the officer’s misapprehension of the law was an objectively reasonable one,” and thus, the Fourth Amendment did not require the exclusion of evidence gathered from the traffic stop); *State v. Houghton*, 868 N.W.2d 143, 147 (Wis. 2015) (holding an officer’s objectively reasonable mistake of law could form the basis of reasonable suspicion to support the traffic stop).

72. *State v. Moreno*, 340 P.3d 426, 430–31 (Ariz. Ct. App. 2014) (recognizing that the distinction between mistake of fact and mistake of law is irrelevant in light of *Heien*, despite that this case is a mistake of fact case); *People v. Campuzano*, No. CA256406, slip op. at *6 (Cal. App. Dep’t Super. Ct. June 5, 2015) (evaluating the officer’s conduct based on whether the officer’s mistake of law was objectively reasonable under the facts); *Williams v. State*, 28 N.E.3d 293, 295 (Ind. Ct. App. 2015) (stating that after *Heien*, the only question is whether the officer’s belief that an infraction was committed was objectively reasonable); *State v. Stadler*, No. 112, 173, 2015 WL 4487059, at *5 (Kan. Ct. App. July 17, 2015) (holding the only question is whether it was objectively reasonable for a law enforcement officer to believe he had the authority to initiate the stop and inform defendant he was not authorized to be in the park after hours); *People v. Guthrie*, 30 N.E.3d 880, 885 (N.Y. 2015) (stating that where law enforcement’s mistake of law is reasonable, a traffic stop is constitutional).

73. *See, e.g., State v. Brown*, No. 13–2054, 2015 WL 4468841, at *3 (Iowa Ct. App. July 22, 2015) (declining to follow *Heien* because the statute was clear and had previously been interpreted by the courts); *State v. Scriven*, No. A-5680-13T3, 2015 WL 773824 (N.J. Super. Ct. App. Div. Feb. 25, 2015) (declining to apply *Heien* because the statute was unambiguous); *State v. Tercero*, 467 S.W.3d 1, 10 (Tex. Ct. App. 2015) (declining to apply *Heien* because case involved a warrantless search, not a traffic stop).

yet explicitly rejected *Heien* on the merits in favor of a broader reading of their state constitutional provisions.

B. Fourth Amendment and the Exclusionary Rule

i. Excluding Illegally Obtained Evidence

The exclusionary rule enforces “constitutional restraints on law enforcement.”⁷⁴ It is a suppression remedy that bans the admission of evidence that was illegally obtained by the government through a violation of individual constitutional rights in a criminal trial. The primary “purpose of the suppression remedy is to deter police and other law enforcement agents from committing the same kinds of violations in the future.”⁷⁵ The Supreme Court first ordered the exclusion of illegally obtained evidence in federal courts in *Weeks v. United States*.⁷⁶ The Court initially declined to enforce the exclusionary rule on states,⁷⁷ but the rule was eventually imposed on the states in *Mapp v. Ohio*.⁷⁸

ii. Good Faith Exception—Reasonable Reliance on a Third Party

United States v. Leon launched a line of cases that created an exception to the exclusionary rule known as the good faith exception.⁷⁹ This exception presumes a constitutional violation following a mistake of law.⁸⁰ For example, the Court held in *Leon*

74. WALTER P. SIGNORELLI, *THE CONSTABLE HAS BLUNDERED: THE EXCLUSIONARY RULE, CRIME, AND CORRUPTION* 3 (Carolina Acad. Press ed., 2d ed. 2012). These violations typically include violating the Bill of Rights, specifically the Fourth, Fifth, and Sixth Amendments. *Id.*

75. *Id.*

76. *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that evidence obtained in violation of the Fourth Amendment was inadmissible in federal courts).

77. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (holding that states need not apply the exclusionary rule for state court cases).

78. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the federal exclusionary rule would apply to state courts).

79. *United States v. Leon*, 468 U.S. 897, 920–21 (1984) (creating a good faith exception to the exclusionary rule where an officer reasonably relied on a search warrant issued by a neutral magistrate).

80. *See id.*; *see also* *Davis v. United States*, 564 U.S. 229, 232 (2011) (holding that the exclusionary rule does not apply when police conduct a search in objectively reasonable reliance on binding appellate precedent); *Illinois v. Krull*, 480 U.S. 340, 349–50 (1987) (holding that the exclusionary rule does not apply to evidence obtained by officers in objectively reasonable reliance on a statute later declared unconstitutional).

that the exclusionary rule would not be applied following law enforcement officers' reasonable reliance on a subsequently invalidated search warrant.⁸¹ The Court based its analysis on the assumption that a law enforcement officer's mistake of law established a constitutional violation.⁸² Likewise, the Court in *Illinois v. Krull* held that an officer's reasonable reliance on a statute that was later found unconstitutional was acceptable to trigger the good faith exception.⁸³ In *Davis v. United States*, the Court also applied the good faith exception to the exclusionary rule after holding "that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."⁸⁴ Here again, the Court premised its good faith analysis on the assumption that law enforcement mistake of law was a constitutional violation.⁸⁵

C. State Provisions of Greater Protections of Fourth Amendment Rights Under State Constitutions

As Justice Brennan famously observed, "[e]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court."⁸⁶ For instance, following *United States v. Leon* and other good faith exception cases, fourteen states declined to adopt an exclusionary rule exception.⁸⁷ Similarly, unlike the Supreme Court's decision in

81. *Leon*, 468 U.S. at 922.

82. *Id.* at 906. In *Leon*, the Court "concluded that in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions." *Id.* at 905. The intended function of the exclusionary rule is to deter law enforcement misconduct and protect the individual constitutional right to be free from unreasonable invasions of privacy. *Id.* at 900.

83. *Krull*, 480 U.S. at 355.

84. *Davis*, 564 U.S. at 232.

85. See cases cited *supra* note 72.

86. Brennan, *supra* note 4, at 500.

87. See *State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990) (finding that no good faith exception to the exclusionary rule exists under Connecticut state law); *Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000) (declining to recognize a good faith exception to the exclusionary rule under Delaware state law); *Gary v. State*, 422 S.E.2d 426, 428 (Ga. 1992) (holding that Georgia state law does not allow an exception for good faith execution of a warrant by police); *State v. Guzman*, 842 P.2d 660, 677 (Idaho 1992) (holding that the good faith exception does not apply under the Idaho state constitution); *State v. Cline*, 617 N.W.2d 277, 283 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001); *Commonwealth v. Upton*, 476 N.E.2d 548, 554 n.5 (Mass. 1985)

Michigan Department of State Police v. Sitz, which upheld the constitutionality of sobriety checkpoints,⁸⁸ several states have held that such stops are unconstitutional on state constitutionality grounds.⁸⁹ Likewise, several states have declined to follow *Illinois v. Gates*,⁹⁰ in which the Supreme Court held that a totality of the circumstances test is sufficient to establish whether probable cause exists following an informant's tip.⁹¹

(holding that Massachusetts state statutes do not recognize a good faith exception to the exclusionary rule); *State v. Canelo*, 653 A.2d 1097, 1102 (N.H. 1995) (holding that New Hampshire state law does not recognize a good faith exception to the exclusionary rule); *State v. Johnson*, 775 A.2d 1273, 1282 (N.J. 2001) (holding that good faith exceptions to warrants do not apply under New Jersey law); *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993) (holding that the New Mexico state constitution does not allow a good faith exception to the exclusionary rule); *People v. Bigelow*, 488 N.E.2d 451, 457–58 (N.Y. 1985) (holding that the New York state constitution does not allow for a good faith exception to the exclusionary rule); *Commonwealth v. Edmunds*, 586 A.2d 887, 888 (Pa. 1991) (holding that a good faith exception to the exclusionary rule was contrary to the provisions of the Pennsylvania state constitution); *State v. Oakes*, 598 A.2d 119, 121 (Vt. 1991) (holding that Vermont's state constitution does not recognize a good faith exception); *State v. Afana*, 233 P.3d 879, 886 (Wash. 2010) (finding no good faith exception in Washington's state constitution); *see also* *People v. Krueger*, 675 N.E.2d 604, 606, 612 (Ill. 1996) (citing *Heien v. North Carolina*, 135 S. Ct. 530, 545–46 (2014) (Sotomayor, J., dissenting)) (limiting the exception to situations where police have a warrant). North Carolina also does not apply a good faith exception. *State v. Carter*, 370 S.E.2d 553 (N.C. 1988).

88. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 444 (1990) (holding that highway sobriety checkpoints did not violate the Fourth Amendment).

89. *See* *State v. Henderson*, 756 P.2d 1057, 1063 (Idaho 1988) (holding that sobriety roadblocks are unconstitutional under the Idaho state constitution); *State v. Church*, 538 So. 2d 993, 997–98 (La. 1989) (finding that sobriety checkpoints are unreasonable searches and seizures under the Louisiana constitution); *Sitz v. Dep't of State Police*, 506 N.W.2d 209, 210 (Mich. 1993) (holding that sobriety checkpoints violate the Michigan constitution); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 186–87 (Minn. 1994) (holding that sobriety roadblocks are a violation of the provisions of the Minnesota state constitution); *State v. Boyanovsky*, 743 P.2d 711, 712 (Or. 1987) (holding that sobriety roadblocks are unconstitutional under the Oregon state constitution); *Pimental v. Dep't of Transp.*, 561 A.2d 1348, 1351–52 (R.I. 1989) (holding that sobriety checkpoints are a violation of the Rhode Island constitution); *Seattle v. Mesiani*, 755 P.2d 775, 777–78 (Wash. 1988) (holding that sobriety checkpoints are unconstitutional as an invasion of privacy and violation of the Fourth Amendment under the Washington state constitution); *see also* R. Marc Kantrowitz et al., Annotation, *Validity of Police Roadblocks or Checkpoints for Purpose of Discovery of Alcoholic Intoxication—Post-Sitz Cases*, 74 A.L.R. 5th 319 (1999).

90. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983) (adopting a totality of the circumstances test for assessing probable cause based on an informant's tip).

91. *See* *State v. Jones*, 706 P.2d 317, 324 (Alaska 1985) (rejecting the *Gates* totality of the circumstances test in Alaska); *People v. Campa*, 686 P.2d 634, 638–39 (Cal. 1984) (holding that California state law requires the application of the *Aguilar-Spinelli* test for informants); *State v. Kimbro*, 496 A.2d 498, 500 (Conn. 1985) (holding that the magistrate's determination of probable cause can be based on either the totality of the

Because of his article, *State Constitutions and the Protection of Individual Rights*, Justice Brennan is “regularly credit[ed]” for “launching the renewal of state constitutional law.”⁹² According to Justice Brennan, the “Supreme Court decisions under the [F]ourteenth [A]mendment have significantly affected virtually every other area, civil and criminal, of state action.”⁹³ Within these changes, however, Justice Brennan urged state courts to remember their independent function.⁹⁴ “[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution.”⁹⁵ Rather, states must “be the guardians of our liberties.”⁹⁶ Further, according to Justice Brennan,

[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.⁹⁷

Thus, it is the duty of state courts to protect the state constitutional rights of citizens and provide greater protections than the United States Constitution when necessary. Accordingly, Justice Brennan noted that even though “the United States Supreme Court is [not] necessarily wrong in its interpretation of

circumstances analysis of *Gates* or the *Aguilar-Spinelli* test); *Commonwealth v. Upton*, 476 N.E.2d 548, 556 (Mass. 1985) (rejecting the *Gates* test and adopting the *Aguilar-Spinelli* test under Massachusetts state law); *State v. Jackson*, 688 P.2d 136, 137–38 (Wash. 1984) (holding that Washington will apply the *Aguilar-Spinelli* test for determining probable cause based on an informant tip); see also WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 160 (5th ed. 2012); Jodi Levine Avergun, *The Impact of Illinois v. Gates: The States Consider the Totality of the Circumstances Test*, 52 BROOK. L. REV. 1127, 1130 (1987).

92. Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421 (1996). “Brennan’s 1977 article in the *Harvard Law Review* has been called ‘the starting point of the modern re-emphasis on state constitutions.’” *Id.* at 421–22 (citing David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1197 n.1 (1992)).

93. Brennan, *supra* note 4, at 491.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

the federal Constitution . . . the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”⁹⁸ Justice Brennan urges states to provide greater constitutional protections than those afforded by federal courts when states find it necessary to do so.⁹⁹

III. STATES SHOULD NOT FOLLOW *HEIEN V. NORTH CAROLINA*

States should not follow *Heien v. North Carolina* and instead should offer greater protections for their citizens. Not only did the Court leave open important questions regarding how and when to apply law enforcement mistake of law, but *Heien* also violates important common law principles. Additionally, *Heien* violates governmental separation of powers and is inconsistent with corresponding Fourth Amendment jurisprudence. Therefore, states should afford citizens greater privacy protections than the Supreme Court did in *Heien*.

A. *Heien Leaves Unanswered Questions*

i. What is a “Reasonable” Law Enforcement Mistake of Law?

The overlapping powers that result from *Heien* leave open the question of what constitutes reasonableness. The standard is “undefined” and “murky”¹⁰⁰ because the *Heien* majority did not explain the confines of the prescribed reasonableness requirement.¹⁰¹

Before *Heien*, the objective nature of the reasonable suspicion standard was clear, especially in the context of a traffic stop. This two-part analysis began with “a determination of historical facts.”¹⁰² In the second prong of this analysis, the Court considered “whether the rule of law as applied to the established facts is or is not violated.”¹⁰³ The question was “whether the facts

98. *Id.* at 502.

99. *See generally id.*

100. *Heien v. North Carolina*, 135 S. Ct. 530, 547 (2014) (Sotomayor, J., dissenting).

101. *See id.*

102. *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *see also* Brief for the Petitioner at 13, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604).

103. *Ornelas*, 517 U.S. at 697.

[gave] rise to sufficient reason to believe that a driver [was] violating an applicable traffic regulation.”¹⁰⁴ The clarity this reasonable suspicion test provided, however, is diminished in light of *Heien*. Now courts must look to whether the officer’s application *and* opinion of the law were reasonable.¹⁰⁵

In her concurrence, Justice Kagan recognized that the majority did not clearly establish how lower courts were to make reasonableness determinations.¹⁰⁶ To reconcile the majority’s lack of direction on how to determine whether a mistake of law was reasonable, Justice Kagan explained the limits of the reasonableness standard:

A court tasked with deciding whether an officer’s mistake of law can support a seizure . . . faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer’s judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not.¹⁰⁷

ii. What Kind of Mistakes of Law Can Be Considered in the Reasonableness Analysis?

Not only was the majority unclear about the “reasonableness” standard, but also the majority was unclear regarding when a court should even apply such a reasonable analysis. Does *Heien* only apply to traffic stops? Does *Heien* apply only when a statute is ambiguous? Can an officer be “reasonably” mistaken about the very existence of law? If a law was recently overturned, can the court consider whether it was reasonable for the officer not to know? One thing from *Heien* is certain—the uncertainty of *Heien*’s future application.¹⁰⁸ Justice Kagan also addressed this uncertainty in her concurrence.¹⁰⁹

104. Brief for the Petitioner, *supra* note 102, at 13 (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)).

105. *Heien*, 135 S. Ct. 530.

106. *Id.* at 541 (Kagan, J., concurring).

107. *Id.*

108. *See State v. Millerton*, 26 N.E.3d 317, 323 (Ohio Ct. App. 2015) (noting that the possible applicability of *Heien* in the context of a *Terry* stop for jaywalking); *Evans v. State*, No. 14-13-00642-CR, 2015 WL 545702, at *n. 5 (Tex. App. Feb. 10, 2015) (declining to

To explain away the uncertainty, Justice Kagan noted that the mistake of law must result from a “really difficult or [a] very hard question of statutory interpretation.”¹¹⁰ *Smith v. United States*, however, sheds light on the difficulty courts will have proscribing to the standard set out in the concurrence.¹¹¹ *Smith* illustrates the difficulty courts have in determining if a statute is even ambiguous and how that ambiguity should be construed.¹¹² Such a standard for law enforcement mistake of law will lead to inconsistent results that defy the well-pronounced rule that “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.”¹¹³

B. Heien Violates Important Common Law Principles

In reaching the conclusion that law enforcement mistake of law can justify a traffic stop, the Court ignored important common law principles, including the maxims that ignorance of the law is no excuse and that ambiguity in statutes should not be used against criminal defendants. These principles will each be discussed below.

apply *Heien* in the case of a clear statute); *State v. Lerdahl*, No. 2014AP2119-CR, 2015 WL 4619946, at *3–4 (Wis. Ct. App. 2015) (finding that the law enforcement officer’s mistake of law was not reasonable based on *Heien* concurrence stating that reasonable police mistakes of law are very rare). Each of these cases show the inconsistent results *Heien* produces through its unanswered questions.

109. *Heien*, 135 S. Ct. at 540–42 (Kagan, J., concurring) (emphasizing that the majority opinion did not define what constitutes “reasonableness” in the standard it proscribed to questions of law enforcement mistake of law).

110. *Id.* at 541.

111. *See Smith v. United States*, 508 U.S. 223 (1993) (exhibiting the difficulty courts have in determining if a statute is ambiguous, and, if so, how that ambiguity should be construed). Because the majority in *Heien* does not even prescribe a standard, federal courts are not bound by Justice Kagan’s explanation of how a court should review law enforcement mistakes of law. *Heien*, 135 S. Ct. at 540–41.

112. *Smith*, 508 U.S. at 223 (illustrating the difficulty the court had in interpreting whether the term “use” should be construed broadly or narrowly in the context of the statute in question). The dissent notes that “[a]t the very least, it may be said that the issue is subject to some doubt.” *Id.* at 246–47 (Scalia, J., dissenting).

113. *Id.* at 246–47 (Scalia, J., dissenting) (internal citation omitted); *see also United States v. Chanthasouvat*, 342 F.3d 1271, 1278–79 (11th Cir. 2003) (noting that statutory ambiguity should not be used against a defendant).

i. Ignorance of the Law is No Excuse

Ignorance of fact may produce a different outcome for citizens than ignorance of the law, as ignorance of fact serves as a defense and ignorance of the law does not for ordinary citizens.¹¹⁴ The distinction between mistake of fact and mistake of law is crucial.

a. Mistake of Fact and Law

The distinction between mistake of law and mistake of fact is simple.¹¹⁵ “Mistake and ignorance of *fact* involve perceptions of the world and empirical judgments derived from those perceptions. Mistake and ignorance of *law* involve assessment of whether, given a certain set of facts, the actor would or would not be violating the law.”¹¹⁶ In fact, there are two relatively simple tests to determine whether an offense is a factual and legal mistake.¹¹⁷

First, assume that the actor knows of all of the facts; if she is nevertheless mistaken about whether her conduct violates the law, then she has made a

114. Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 448–49 (1990) (stating that an “unreasonable factual mistake” can be used as an excuse, but that “only a reasonable legal mistake concerning an offense element” should excuse).

115. *Id.* at 469 (asserting that mistake of fact and mistake of law are distinguishable because each analyze separate issues); see also Brief for the Petitioner, *supra* note 102, at 9 (stating that courts have shown that they “can easily distinguish mistakes of law from those of fact”). *But see* State v. Heien, 737 S.E.2d 351, 358 (N.C. 2012) (citing United States v. Miguel, 368 F.3d 1150, 1153–54 (9th Cir. 2004)) (finding that it is “not always clear whether a mistake is one of fact or of law”). However, in actuality, the *Miguel* court did not have trouble distinguishing mistake of law and mistake of fact. See Brief for the Petitioner, *supra* note 102, at 22 (asserting that the *Miguel* court easily separated and considered the issues of mistake of fact and of law).

116. Simons, *supra* note 114, at 469. “The law recognizes three types of mistakes: (1) pure mistakes of law; (2) mistaken interpretations of law; and (3) mistakes of fact. Of those three, a defendant may only invoke mistake of fact as a defense to a criminal charge.” Brief of Professors Charles E. MacLean & Adam Lamparello as Amici Curiae Supporting Petitioner at 7, Heien v. North Carolina, 135 S. Ct. 530 (2014) (No. 13-604). There are two situations where a man acts under mistake of law. The first occurs “when a man does an act without giving any attention to the law,” and the second occurs when a man “considers the law but believes that it does not govern the particular case. In each instances he does an act in ignorance that the law has made the act criminal.” Edwin R. Keedy, *Ignorance and Mistake in Criminal Law*, 22 HARV. L. REV. 75, 90 (1908).

117. Simons, *supra* note 114, at 469 (stating that the differences between mistake of law and mistake of fact can be tested easily).

mistake of law. Second, assume that the actor has . . . a perfect understanding of the law. That is, she understands the legal consequences of any conceivable set of facts. If on a specific occasion she is nevertheless mistaken about whether her conduct violates the law, then she has made a mistake of fact.¹¹⁸

This test can also apply to law enforcement mistakes of fact and law. If an officer knows all of the facts exactly as they are but acts on an incorrect assumption that the facts violate a law, then that officer has made a mistake of law. If, however, the officer understands the legal landscape but was mistaken regarding the factual circumstances applied to her understanding of the legal landscape, then that officer has made a mistake of fact.¹¹⁹

b. Law Enforcement Should Be Held to At Least the Same Standard as Citizens

The distinction between mistake of fact and mistake of law is relevant to many criminal defendants. A mistake of fact can serve as a defense for a citizen.¹²⁰ Mistake of law, however, cannot serve that function for a citizen.¹²¹ This makes sense in light of the

118. *Id.* at 469–70.

119. *See id.* at 469–71 (illustrating the different outcomes in questions of mistake of law and mistake of fact).

120. *See* Keedy, *supra* note 116, at 81. “It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind.” *Id.* “Ignorance and mistake of fact, therefore, are important in so far as they negative the criminal mind.” *Id.* at 82.

121. *See* *People v. Marrero*, 507 N.E.2d 1068, 1068 (N.Y. 1987). In *Marrero*, the New York Court of Appeals held that “the defense of mistake of law is not available to a Federal corrections officer arrested in a Manhattan social club for possession of a . . . pistol.” *Id.* In this case, the appellate court “rejected the defendant’s argument that his personal misunderstanding of the statutory definition of a peace officer is enough to excuse him from criminal liability.” *Id.* Though the defendant’s mistaken belief was seemingly reasonable, the court held that overriding public policy interests upheld criminal liability for the defendant, thus staying in line with the common law maxim that ignorance of the law is no excuse. *Id.* at 1073. To allow citizen excuse of mistake of law “would be to encourage ignorance where the law-maker has determine to make men know and obey.” Brief for the Petitioner, *supra* note 102, at 17 (citing OLIVER W. HOLMES, JR., *THE COMMON LAW* 48 (1881)).

common law principle that ignorance of the law is never an excuse.¹²²

Like a citizen, a law enforcement officer's action can be reasonable and not violate the Fourth Amendment, even if there is a reasonable mistake of fact.¹²³ Unlike citizens, however, as a result of *Heien*, law enforcement officers can also make "reasonable" mistakes of law that counter any Fourth Amendment violation.¹²⁴ Put simply, mistake of law is not an excuse for citizens facing criminal liability, but mistake of law is an excuse for law enforcement in making reasonable suspicion determinations.¹²⁵

Under *Heien*, the well-established common law maxim that "everyone is presumed to know the law" no longer holds water.¹²⁶ As a result of *Heien*, law enforcement is no longer part of the "everyone standard."¹²⁷ "Law enforcement officers should not be

122. Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 517 (1986). "Few principles in the criminal law are more firmly and consistently espoused than *ignorantia juris, quod quisque tenetur scire, neminem excusat*." *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *27); see also *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation."); *Lambert v. California*, 355 U.S. 225, 228 (1957) (noting that it is a longstanding rule of law that mistake of law cannot be an excuse).

123. *United States v. Cortez*, 449 U.S. 411 (1981) (finding that the officer's mistake of fact was reasonable under the circumstances and did not constitute an unlawful seizure under the Fourth Amendment); see also *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990) (stating the test for "reasonableness" for officer mistake of fact in search and seizure cases).

124. *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014) (stating that "a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake"). Courts allow law enforcement to infer facts from circumstances because they are well trained to do so. *Cortez*, 449 U.S. at 417–18; see Brief for the Petitioner, *supra* note 102, at 20 (stating that the Fourth Amendment provides officers with "flexibility when it comes to facts because they need to make quick, ad hoc assessments and are better positioned than courts to make those judgments"). However, law enforcement is not trained to interpret laws or create laws in the legislature's absence, so they should not be given this authority. *Id.* at 21.

125. See *Heien*, 135 S. Ct. at 546–47 (Sotomayor, J., dissenting) (questioning why an officer's "mistaken understanding" of laws should be treated differently as compared to an ordinary citizen). "One is left to wonder . . . why an innocent citizen should be made to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question." *Id.* at 546.

126. Keedy, *supra* note 116, at 91 (internal citations omitted); see also Misner, *supra* note 122, at 508 (noting that there is a "common law view that a mistake of law by a police officer or anyone else does not excuse the conduct").

127. See *Heien*, 135 S. Ct. at 537 (holding an officer's reasonable mistakes of law can justify probable cause).

afforded this luxury.”¹²⁸ It is inherently unfair to require less of law enforcement officers and more of ordinary citizens in their knowledge and understanding of the criminal code. State courts should refuse to allow law enforcement mistake of law to protect “the parameters of rights [that must] be learned and respected.”¹²⁹

If the average citizen has the duty to know and understand substantive criminal law, it is irreconcilable that law enforcement is not held to this same standard.¹³⁰ “Reciprocal expectations of law-abidingness between government and citizens can scarcely be expected to endure if one party—the government—need not uphold its end of the bargain.”¹³¹ Police should be held to at least the same, if not greater, standard than ordinary people.¹³² Otherwise, the scales are “tip[ped] too far in law enforcement’s favor,” disregarding an “individual’s Fourth Amendment rights” in the process.¹³³

Indeed, it is reasonable to presume law enforcement officers know or should know the law better than ordinary citizens since they are charged with its enforcement.¹³⁴ A teacher would not expect her students to understand the subject better than she

128. Brief for the Petitioner, *supra* note 102, at 7 (“[T]he fundamental unfairness of holding citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it.” (quoting *United States v. Chanthasouvat*, 342 F.3d 1271, 1280 (11th Cir. 2003))).

129. Misner, *supra* note 122, at 509.

130. Petition for Writ of Certiorari, *supra* note 20, at 18–19.

131. *Id.* at 19 (quoting Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 91 (2011)); *see also* Brief for the Petitioner, *supra* note 102, at 34 (“Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for the law.” (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928))).

132. *State v. Wright*, 791 N.W.2d 791, 799 (S.D. 2010) (“[O]fficers have an obligation to understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable.”); *see also State v. Greer*, 683 N.E.2d 82, 85 (Ohio Ct. App. 1996) (allowing mistake of law “would provide a strong incentive to police officers to remain ignorant of the language of the laws that they enforce and of the teachings of judicial decisions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct”).

133. Brief of Professors Charles E. MacLean & Adam Lamparello as Amici Curiae Supporting Petitioner, *supra* note 116, at 4; *see also Greer*, 683 N.E.2d at 86 (“The police officer must be held to a higher standard of knowledge of the law than would be appropriate for an ordinary citizen, since it is the police officer’s special function to apply and to enforce the laws.”).

134. Brief for the Petitioner, *supra* note 102, at 17–18.

does, just as law enforcement should not expect more from citizens than it does from itself.

ii. Ambiguity in Statutes Should Not Be Used Against a Defendant

Allowing law enforcement mistake of law creates a tension between the well-established common law principle that ambiguity in a criminal statute should not be used against a defendant.¹³⁵ It is unclear whether *Heien* applies only to ambiguous statutes with “reasonable” interpretations or all reasonable law enforcement mistakes of law.¹³⁶ Even so, in a factual situation like *Heien*, common law principles of statutory construction prohibit *Heien*’s result. “Under the ‘venerable rule’ of lenity,¹³⁷ ‘penal laws are to be construed strictly’ in order to prevent the government from restraining individual liberty absent clear authority to do so.”¹³⁸ Accordingly, if a criminal law is so uncertain that “men of common intelligence must necessarily guess at its meaning,” then the law is invalid because of its ambiguity.¹³⁹ To allow law enforcement to use the ambiguity of a statute in its favor against a defendant deprives a person of fair warning, which is why this common law principle exists.¹⁴⁰

C. Law Enforcement Mistake of Law Violates Governmental Separation of Powers

i. Law Enforcement Officers Should Not Exercise the Judicial Function of the Interpretation of Law

Allowing a law enforcement officer to make a reasonable mistake of law “does more than augment executive power and undercut legislative primacy; it functions as an abdication of

135. *Id.* at 8.

136. *See supra* notes 83–94 and accompanying text (discussing the power of state constitutions when interpreting Fourth Amendment freedoms and Supreme Court precedent).

137. Brief for the Petitioner, *supra* note 102, at 18 (citing *United States v. R.L.C.*, 503 U.S. 291, 305 (1992)).

138. *Id.* (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)).

139. *Id.* at 18–19 (internal citation omitted) (quoting *United States v. Lanier*, 50 U.S. 259, 266 (1997)).

140. *United States v. Chanthasouvat*, 342 F.3d 1271, 1279 (11th Cir. 2003).

judicial authority.”¹⁴¹ “[P]ermitting mistakes of law to justify seizures [also] has the perverse effect of preventing or delaying the clarification of the law.”¹⁴² If law enforcement mistake of law is enough to equate to reasonable suspicion, then courts would be less likely to interpret statutes if all that was required was a review of the officer’s reasonableness.¹⁴³ This is bad for citizens and police alike, who benefit from legislative interpretation.¹⁴⁴

There is no room in our legal system to allow law enforcement to take on the responsibility of the courts or the legislature.¹⁴⁵ The separation of powers is a basic principle of democracy and “is deemed essential to avoid usurpation and tyranny by the holder of these powers.”¹⁴⁶ In fact, the founding fathers believed that the separation of powers was a necessary safeguard to protect democracy, even in a state that regularly elects its leaders.¹⁴⁷ Some might say that “[t]his principle is so much a part of our political culture that we no longer question it.”¹⁴⁸ The Court in *Heien*, however, seemed to ignore this basic and fundamental principle by allowing the executive branch to

141. Logan, *supra* note 131, at 96.

142. *Heien v. North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting); see also Logan, *supra* note 131, at 96 (“Courts find it ‘unnecessary’ to interpret statutory language or content themselves with generalized assessments of whether an officer’s interpretation was reasonable.”).

143. *Heien*, 135 S. Ct. at 544 (citing *United States v. Rodriguez-Lopez*, 444 F.3d 1020, 1022–23 (8th Cir. 2006); see also *United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999) (finding that it was “unnecessary to parse the words of the South Dakota statute” in order to determine whether the mistake of law was reasonable).

144. *Heien*, 135 S. Ct. at 544.

145. *State v. Heien*, 737 S.E.2d 351, 362 (2012) (Hudson, J., dissenting) (“The job of the police is to *enforce* the law as it has been written by the legislature and interpreted by the courts.”).

146. Torsten Persson et al., *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163, 1164 (1997).

147. *Id.*

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Id. at 1163 (quoting THE FEDERALIST NO. 49 (James Madison)).

148. *Id.* at 1164. “For example, some of the Supreme Court’s most prominent separation-of-powers decisions have invalidated attempts by each branch of the federal government to circumvent constitutionally prescribed lawmaking procedures.” Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001).

assume the function of the judicial branch—statutory interpretation—while simultaneously enforcing the law.¹⁴⁹ Therefore, states should not follow *Heien* in order to preserve the separation of powers.

“[E]xcept perhaps when acting pursuant to some ‘specific’ constitutional power, the [executive branch] has no inherent power to invade private rights. To the contrary, ‘executive officials ordinarily must point to the presence of legislative authority, not to its absence, to justify conduct that burdens private rights.’”¹⁵⁰ In fact, the Supreme Court has even concluded that “police officers cannot be expected to question” judicial or legislative determinations.¹⁵¹ Thus, it is fundamental to our justice system that police, the executors of our laws, not violate private Fourth Amendment rights.

Law enforcement is required to be reasonable in evaluating the facts.¹⁵² The reasonable application of these facts must then be applied to consistent laws.¹⁵³ Police should be left to evaluate “conclusions about human behavior,” not conclusions about the law.¹⁵⁴ “Allowing police, executive branch actors, to not only enforce but also interpret and expand upon such laws, based on use of an amorphous standard-like rule that is difficult for courts themselves to apply, represents a significant departure from this institutional arrangement.”¹⁵⁵

149. See generally *Heien*, 135 S. Ct. at 530 (holding officer’s reasonable suspicion can rest on a mistake of law, which expands the role of the executive from enforcing the law to interpreting the law).

150. Clark, *supra* note 148, at 1393 (quoting Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 39 (1993)).

151. *Illinois v. Krull*, 480 U.S. 340, 350 (1987) (holding that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute created by the legislators).

152. See *Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990) (“[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they be reasonable.”); see also *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting).

153. “[T]he notion that the law is definite and knowable’ sits at the foundation of our legal system.” *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991)).

154. *Id.* at 543.

155. Logan, *supra* note 131, at 95. “Allowing police to make reasonable mistakes of law, as the Eleventh Circuit has observed, serves to ‘sweep behavior into [a] statute which the authors of the statute may have had in mind but failed to put into the plain language of the statute.’” *Id.* The plain language of the law, however, is what is binding—not what the police interpret as necessary.

“At its core, the Fourth Amendment regulates police officers’ primary behavior.”¹⁵⁶ According to the United States Department of Justice, “at least 45 percent of the approximately 40 million Americans (18.8 million people) who have face-to-face contact with a police officer in a given year do so in the context of a traffic stop.”¹⁵⁷ Because traffic stops are the most common point of contact between law enforcement and citizens, police behavior must be regulated within the confines of a strict legal standard.¹⁵⁸ Otherwise, subjectivity will creep into what is supposed to be an objective determination.¹⁵⁹

According to Justice Scalia,

[i]t is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law. Indeed, on its face the suggestion seems quite incompatible with Marshall’s aphorism that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹⁶⁰

Though Justice Scalia was referring to executive and administrative agencies in the context of this quotation, law enforcement agencies perform the same function. Surely an executive officer cannot alter a law—a product of the legislature—by what the officer thinks.¹⁶¹ Even if a police officer has “expertise” on the question of law, it has always been “the constitutional duty of the *courts* to say what the law is.”¹⁶²

156. Reply Brief for the Petitioner at 6, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604).

157. Petition for Writ of Certiorari, *supra* note 20, at 12, (citing CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC 2–3 (Bureau of Justice Statistics ed. 2011)).

158. See *Heien*, 135 S. Ct. at 542 (Sotomayor, J., dissenting).

159. See *State v. Heien*, 737 S.E.2d 351, 360 (N.C. 2012) (Hudson, J., dissenting) (“This Court has repeatedly and recently stated that what an officer believes is irrelevant to Fourth Amendment analysis.”); see also *Heien*, 135 S. Ct. at 543 (“We have conceded that an arresting officer’s state of mind does not factor into probable-cause inquiry, ‘except for the facts that he knows.’” (emphasis added) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004))).

160. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513 (1989). “Police evaluation is . . . part of the traditional judicial toolkit.” *Id.* at 515.

161. *Id.* at 513.

162. *Id.* at 514.

ii. Even Officers in the Field Must Respect
the Separation of Powers

In the context of a traffic stop, the Supreme Court looks to the events leading up to the stop to determine whether probable cause or reasonable suspicion exists.¹⁶³ In determining whether the events leading to the stop were objectively reasonable, the Court then considers “a mixed question of law and fact”¹⁶⁴ and addresses whether the facts satisfy applicable statutory law or constitutional standards.¹⁶⁵

Law enforcement officers are given leeway in their appraisal of the factual circumstances.¹⁶⁶ “The leeway [courts] afford officers’ factual assessments is rooted . . . in [courts’] recognition that police officers operating in the field have to make quick decisions.”¹⁶⁷ This recognition is consistent with the understanding that an officer cannot know the ins and outs of every factual situation encountered. Indeed, even citizens can make reasonable mistakes of fact and utilize this mistake as a defense.¹⁶⁸ Law inherently differs from facts, however.¹⁶⁹

In *Heien*, “the statute . . . either requires one working brake light or two, and the answer does not turn on anything ‘an officer might suddenly confront in the field.’”¹⁷⁰ Law is fixed; facts are fluid.¹⁷¹ Even in an emergency, “the Constitution ‘recognizes no [executive] license to disregard otherwise concededly applicable legislation’ . . . because permitting the [executive branch] to ignore applicable statutes would transform the power to *execute* the

163. *Heien*, 135 S. Ct. at 542 (Sotomayor, J., dissenting).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 543. “Officers in the field must make factual assessments on the fly.” *Id.*; see also Brief for the Petitioner, *supra* note 102, at 8–9 (“The Fourth Amendment affords officers leeway to make good-faith mistakes of fact because officers need flexibility to make quick, ad hoc factual assessments in the field—and they are expert in doing so. The law, by contrast, lends itself to careful, ex ante analysis.”).

168. See *supra* notes 99–113 and accompanying text.

169. See *id.*

170. *Heien*, 135 S. Ct. at 539 (quoting Brief for the Petitioner, *supra* note 102, at 21).

171. See generally *id.* at 542–43 (Sotomayor, J., dissenting) (discussing the inferences and deductions that must be determined by police when establishing facts compared to “definite and knowable” law).

law into a power to *make* the law.”¹⁷² Nonetheless, *Heien* permits shifting this function of the executive branch. States should not fall weary to the suggestion that officers need to interpret laws on the fly and therefore should be able to exceed their executive function.

iii. Law Enforcement Mistake of Law Leads to Biased Interpretations of the Law

Because “a police officer views the facts through a lens of his police experience and expertise,” it follows that a police officer would view the law in its broadest form if allowed to make objectively reasonable determinations of the scope or meaning of a law.¹⁷³ Therefore, a law enforcement officer is more likely to expand his authority if he cannot only make factual determinations, but also legal determinations.¹⁷⁴ Since police are subject to bias through their understanding and interpretations of circumstances, the Court in *Ornelas v. United States* held that warrantless “determinations of reasonable suspicion and probable

172. Clark, *supra* note 148, at 1400 (quoting Monaghan, *supra* note 150, at 31). *Youngstown Sheet & Tube Co. v. Sawyer* best illustrates the proposition that the executive branch cannot defy legislative or judicial powers, even in an emergency. In this case, the Court rejected President Truman’s attempt to executiveally seize the steel mills, absent statutory authority. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). The Court reasoned that the Constitution purposely excludes this degree of executive power. *Id.* “A contrary conclusion would effectively permit the President to amend or revise statutes, a lawmaking function governed exclusively by constitutionally prescribed procedures.” Clark, *supra* note 148, at 1393. This logic holds true for any member of the executive branch. *See id.* (applying to all *executive officers*, not only to the President).

173. *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding that a reviewing court should give due weight to inferences drawn from historical facts by residing judges and local law enforcement officers). “[O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists.” *Id.* at 700.

174. “[T]he meaning of the law is not probabilistic in the same way that factual determinations are.” *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting). A law enforcement officer also loses the incentive to know and understand the law, if all that is required of him is that his actions and understanding of the law is reasonable. *See United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (holding that there is no good-faith exception to the exclusionary rule for an officer’s mistake of law when that officer did not comply with governing law). “Indeed, in a world in which police officers would be allowed to conduct traffic stops anytime state law could reasonably be interpreted to prohibit the conduct the officer observed, officers would be all but invited to read traffic statutes aggressively.” *See* Brief for the Petitioner, *supra* note 102, at 37.

cause should be reviewed *de novo*.”¹⁷⁵ In other words, courts do not grant deference to law enforcement officers for reasonable suspicion determinations.¹⁷⁶ Again, “it is courts, not officers, that are in the best position to interpret the laws.”¹⁷⁷

The Fourth Amendment requires reasonableness “upon the exercise of [the] discretion by government officials, including law enforcement agents, in order to ‘safeguard the privacy and security of individuals against arbitrary invasions.’”¹⁷⁸ Because governmental interest in stopping a vehicle must be measured against an individual’s Fourth Amendment right to privacy,¹⁷⁹ law enforcement should not have the authority to expand the intended meaning of a statute.

When officers confront ambiguous statutes on which they lack outside guidance, they should be encouraged to do exactly what other branches of the government must: construe ambiguous statutes narrowly, in favor of individual liberty. Only by measuring reasonable suspicion against the correct interpretation of the law can the Fourth Amendment ensure these incentives are aligned.¹⁸⁰

It is natural that an officer would slant any uncertainty in favor of the prosecution through an “aggressive interpretation.”¹⁸¹ This does not mean that only “bad” officers would abuse their discretion, rather it means that even officers with the best intentions will not interpret laws with the same level of neutrality as a detached magistrate.¹⁸²

175. *Ornelas*, 517 U.S. at 699. The Court does not give deference to police determinations of probable cause or reasonable suspicion. *Id.* (refusing to give more deference to police officers conducting warrantless searches). However, a magistrate judge is given deference, as she is a detached, neutral third-party. *See id.*

176. *Id.* at 699–700 (instructing the appeals court to give due weight to a credible and reasonable inferences by an officer, but also giving the appeals court *de novo* review).

177. *Heien*, 135 S. Ct. at 543.

178. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978)).

179. *Id.*

180. Brief for the Petitioner, *supra* note 102, at 38.

181. *See id.* at 10.

182. *See supra* notes 52–54 and accompanying text. A traffic stop may lead to a “possibly unsettling show of authority.” Brief for the Petitioner, *supra* note 102, at 39

In *Whren v. United States*, the Court held that “[s]ubjective intentions play no role in ordinary probable-cause Fourth Amendment analysis.”¹⁸³ However, the logic of *Whren* has two components.¹⁸⁴ First, “as long as the circumstances, viewed objectively justify [law enforcement action],” the officer’s actual thinking is irrelevant.¹⁸⁵ Second, according to *United States v. Miller*, “the flip side of that leeway [which provides for the irrelevancy of that subjectivity] is that the legal justification must be objectively grounded.”¹⁸⁶ A law enforcement mistake of law is not objectively grounded, and states should not allow for such mistakes.

D. Heien is Inconsistent with Fourth Amendment Jurisprudence

i. Good Faith Exception Cases Make No Sense After *Heien*

Because a mistake of law should not give rise to reasonable suspicion, states should not follow *Heien*. A stop based on a misinterpretation of the law, no matter how reasonable, should be a Fourth Amendment violation. “[A]s *Heien* points out, under the Fourth Amendment, an investigatory stop is permissible only if supported by reasonable suspicion of *criminal activity*.”¹⁸⁷ If there is in fact no possible criminal activity afloat because of a misunderstanding of law, then reasonable suspicion cannot exist under even the most “reasonable” misunderstanding of the legal landscape to which the facts apply.¹⁸⁸

(quoting *Prouse*, 440 U.S. at 657). “[A] simple mistaken traffic stop can escalate into a series of increasingly invasive acts.” *Id.* at 40.

183. *Whren v. United States*, 517 U.S. 806, 813 (1996).

184. Petition for Writ of Certiorari, *supra* note 20, at 17.

185. *Whren*, 517 U.S. at 813 (citing *Scott v. United States*, 436 U.S. 128, 138 (1978)); Petition for Writ of Certiorari, *supra* note 20, at 17.

186. *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998) (finding that flashing a turn signal under these circumstances is not a violation of Texas law and therefore did not create an objective basis for probable cause for the stop).

187. Sarah Ricciardi, *Do You Know Why I Stopped You?: The Future of Traffic Stops in a Post-Heien World*, 47 CONN. L. REV. 1075, 1090 (2015).

188. See *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006) (“[A] police officer’s mistake of law cannot support probable cause to conduct a stop. Probable cause only exists when an officer has a ‘reasonable’ belief that a law has been broken.”); see also Brief of Professors Charles E. MacLean & Adam Lamparello as Amici Curiae Supporting Petitioner, *supra* note 116, at 6.

The Court's decision is likely wrong if preexisting case law cannot be reconciled with the outcome of the new case. The principle that reasonable mistake of law is not a constitutional violation does not fit within exclusionary rule jurisprudence.¹⁸⁹

United States v. Leon commenced a line of cases that presumed a constitutional violation followed a mistake of law before addressing whether the exclusionary rule should apply.¹⁹⁰ Again, in each of these cases, a mistake of law—whether by the fault of the police officer or another—presumably equated to a constitutional violation and required a discussion of whether or not the exclusionary rule should apply. The Court did not reconcile the meaning of these cases, which ultimately renders them moot and undercuts such a decisive, critical line of Fourth Amendment jurisprudence.

In *Leon*, the Court held “that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion,” and therefore applied a good faith exception.¹⁹¹ Before reaching this conclusion, the Court premised its analysis on the existence of a Fourth Amendment violation.¹⁹²

Similarly, the Court in *Illinois v. Krull* held that an officer's reasonable reliance on “a statute that appeared legitimately to allow a warrantless administrative search of respondents' business” allowed for a good faith exception to the exclusionary rule.¹⁹³ Also in *Krull*, the Court analyzed whether the good faith exception

189. See *supra* notes 173–82.

190. See *United States v. Leon*, 468 U.S. 897 (1984); see also *Davis v. United States*, 564 U.S. 229 (2011) (holding that when police conduct a search in objectively reasonable reliance on binding appellate precedent the exclusionary rule is inapplicable); *Illinois v. Krull*, 480 U.S. 340 (1987) (holding that the Fourth Amendment exclusionary rule is not applicable to evidence obtained by police acting in objectively reasonable reliance upon a statute authorizing warrantless administrative searches but subsequently violates the Fourth Amendment).

191. *Leon*, 468 U.S. at 922.

192. *Id.* at 905. In *Leon*, the Court concluded that “in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions.” *Id.* The Court further explained that the intended function of the exclusionary rule is to deter law enforcement misconduct and protect the individual constitutional right to be free from unreasonable invasions of privacy. *Id.* at 900.

193. *Krull*, 480 U.S. at 360.

should apply based on the assumption that a mistake of law was a Fourth Amendment violation.¹⁹⁴

In *Davis v. United States*, the Court also applied the good faith exception to the exclusionary rule and held that searches conducted “in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”¹⁹⁵

These three cases have something in common—reasonable reliance, mistake of law, and a Fourth Amendment violation. If reliance, even if reasonable, on an invalid warrant, statute, or precedent equates to a Fourth Amendment violation, then reliance on one’s own mistaken interpretation of the law should also be a violation. The Court in *Leon*, *Krull*, and *Davis* would not have even addressed whether the exclusionary rule applied without the understanding that the law enforcement officer’s mistake, even if reasonable, violated a constitutional right.

These good faith exception cases also highlight the important, long-held distinction the Supreme Court has given to rights and remedies analyses.¹⁹⁶ “Even in instances where there may be no remedy for equitable reasons, legal clarity that the Fourth Amendment has nonetheless been violated is important in making a system of individual rights effective.”¹⁹⁷ Without this important distinction, there is no legal clarity and a murky reasonableness standard exists.¹⁹⁸

Additionally, the Supreme Court’s qualified immunity precedent bolsters the long-standing assumption that a police mistake of law is a Fourth Amendment violation. For example, this

194. *Id.* at 353. The Court would not have discussed the exclusionary rule in this case if a constitutional violation had not occurred. “When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure.” *Id.* at 347 (emphasis added).

195. *Davis*, 564 U.S. at 232.

196. *Leon*, 468 U.S. at 906.

197. Brief for the Petitioner, *supra* note 102, at 10.

198. It is crucial for this Court to continue a distinct analysis of rights and remedies: First, holding that such reasonableness is relevant to whether the Fourth Amendment is violated would require courts to embark on the difficult task of determining which types of mistakes of law affect rights and which affect only remedies. Second, importing inquiries about the reasonableness of mistakes of law into the rights stage would preclude courts from considering important evidence relevant to such determinations—such as police customs, training manuals, and court decisions.

Id. at 9–10.

Court has described how “the same standard of objective reasonableness that [was] applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer.”¹⁹⁹ Moreover, “this Court has held repeatedly that officers conducting searches or seizures that they ‘reasonably believe to be lawful’ are entitled to immunity from damages. Yet this Court has never held that such reasonableness means that the Fourth Amendment was not violated.”²⁰⁰

ii. The Majority in *Heien* Did Not Rely on Applicable Precedent

a. *Founding Era Case Law*

In *Heien*, the Court relies on Fourth Amendment precedent that predates modern Fourth Amendment jurisprudence to assert that reasonable mistake of law does not constitute a constitutional violation.²⁰¹ In fact, the majority itself notes that its reliance on nineteenth-century case law is “not directly on point.”²⁰² These founding-era cases are not related to modern day Fourth Amendment jurisprudence and instead address qualified immunity issues for damages in a civil suit.²⁰³

b. *Michigan v. DeFillippo*

The majority also relies on *Michigan v. DeFillippo*, which addresses whether an arrest was valid under a law that was later held unconstitutional.²⁰⁴ This case can easily be distinguished from the present issue.²⁰⁵ Indeed, *DeFillippo* is not even a mistake of law

199. *Id.* at 25 (citing *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004)).

200. *Id.* at 26 (internal citations omitted) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

201. See *United States v. Riddle*, 9 U.S. (5 Cranch) 311 (1809); *La Manche*, 14 F. Cas. 965 (C.C.D. Mass. 1863) (No. 8,004); *Friendship*, 9 F. Cas. 825 (C.C.D. Mass. 1812) (No. 5,125); *United States v. Recorder*, 27 F. Cas. 723 (C.C.S.D.N.Y. 1849) (No. 16,130); *United States v. Reindeer*, 27 F. Cas. 758 (C.C.D.R.I. 1848) (No. 16,145).

202. *Heien v. North Carolina*, 135 S. Ct. 530, 537 (2014) (“Chief Justice Marshall was not construing the Fourth Amendment, and a certificate of probable cause functioned much like a modern-day finding of qualified immunity, which depends on an inquiry distinct from whether an officer has committed a constitutional violation.”).

203. See *id.* at 545 (Sotomayor, J., dissenting).

204. *Id.* at 533 (majority opinion) (citing *Michigan v. DeFillippo*, 443 U.S. 31 (1979)).

205. *DeFillippo*, 443 U.S. at 31. *DeFillippo* is an ambiguous anticipation of the good faith precursor to *Krull*.

case.²⁰⁶ Instead, *DeFillippo* presents the question of whether an “officer lacked probable cause to believe that the conduct he observed and the words spoken constituted a violation of law simply because he should have known the ordinance was invalid and would be judicially declared unconstitutional.”²⁰⁷ A law cannot be mistaken if it is correctly understood at the time it is enforced; any notion to the contrary is simply a stretch.²⁰⁸

The *DeFillippo* Court held that because the officer relied on a valid statute that only later was found to be unconstitutional, the officer had probable cause.²⁰⁹ The Court reached this conclusion by deciding that “[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.”²¹⁰ The Court in *Heien* ignored this logic, however. It should follow that if police cannot make constitutionality determinations, then they should not be able to interpret laws, even if they are vague. Furthermore, the Court’s reliance on this case is misplaced because *DeFillippo* came from an earlier time when courts simultaneously analyzed Fourth Amendment rights and remedies.²¹¹

c. *Ornelas v. United States*

The majority was also incorrect in its application of *Ornelas v. United States*.²¹² In her dissent, Justice Sotomayor addresses the majority’s bare-boned analysis of *Ornelas*.²¹³ *Ornelas* is inconsistent with *Heien*, as the Court in *Ornelas* held that law enforcement action should be reviewed de novo since police are guided through their own personal knowledge and experience.²¹⁴ In other words, because law enforcement officers are not detached and neutral like a magistrate judge, their actions should not be given deference upon appellate review. *Heien* is inconsistent with

206. *Id.* at 40 (explaining arrest was proper under a presumptively valid ordinance despite the later determination that ordinance was unconstitutionally vague).

207. *Id.* at 37.

208. *Id.* The *Heien* majority was incorrect in the following analysis that “[t]he contrary conclusion would be hard to reconcile with . . . *DeFillippo*.” *Heien*, 135 S. Ct. at 538.

209. *See DeFillippo*, 443 U.S. at 37–38.

210. *Id.* at 38.

211. Petition for Writ of Certiorari, *supra* note 20, at 20 n.7.

212. *Heien*, 135 S. Ct. at 545 (Sotomayor, J., dissenting).

213. *Id.*

214. *Ornelas v. United States*, 517 U.S. 690, 691 (1996).

this principle. The majority in *Heien* grants great deference to law enforcements' power to understand, analyze, and apply the law to their reasonable interpretation of the facts.²¹⁵

d. *Brinegar v. United States*

In her dissent, Justice Sotomayor also addresses the majority's application and analysis of *Brinegar v. United States*,²¹⁶ which is a factual analysis of "the mistakes . . . of reasonable men, acting on *facts* leading sensibly to their conclusions of probability."²¹⁷ Again, this case simply "states the uncontroversial proposition that the probable-cause inquiry looks to the reasonableness of an officer's understanding of the facts."²¹⁸

E. *States Should Extend Greater Protections than the Court Did in Heien*

It is the duty of state courts to safeguard individual rights—even when the Supreme Court has not²¹⁹—and in *Heien*, the Supreme Court fails in this respect. Therefore, states must actively engage in upholding state constitutional rights though the broad interpretation of state constitutions. The Court in *Heien* merely set the floor for the protection of Fourth Amendment liberties. States should guard these liberties and provide greater protections when necessary—and the protection of citizens from privacy invasions based on law enforcement mistake of law is necessary.

According to Justice Brennan, in his well-known article calling for greater protection of individual rights from state courts:

[F]ederalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly

215. See generally *Heien*, 135 S. Ct. 530 (holding reasonable mistake of law may support reasonable suspicion).

216. *Brinegar v. United States*, 338 U.S. 160, 161 (1949) (holding probable causes exists "where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient . . . to warrant . . . a crime is being committed"); see also *Heien*, 135 S. Ct. at 545 (Sotomayor, J., dissenting).

217. *Brinegar*, 338 U.S. at 176 (emphasis added).

218. *Heien*, 135 S. Ct. at 545–46.

219. See generally Brennan, *supra* note 4 (arguing state courts must also protect individual liberties, at times beyond what is protected by the Constitution).

when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusion on their freedoms.²²⁰

In fact, the very existence of the federal system is based on the Founders' belief that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."²²¹

In order to guard these rights, states should not accept *Heien* at face value but instead should evaluate whether law enforcement mistake of law violates Fourth Amendment protections. "[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens."²²² This Article urges that states protect their citizens from the encroachment of *Heien*, which violates fundamental Fourth Amendment principles of privacy.

IV. STATES SHOULD APPLY THE EXCLUSIONARY RULE IN LAW ENFORCEMENT MISTAKE OF LAW CASES

Both the *Heien* majority and dissent are incorrect about the result of allowing law enforcement mistake of law. The majority is wrong because it establishes a precedent that law enforcement mistake of law does not equate to a Fourth Amendment violation. Further, because the Supreme Court held that law enforcement mistake of law does not equate to a constitutional violation, the Court did not need to discuss whether the exclusionary rule should apply. This discussion is only necessary following a constitutional violation.

Conversely, in the dissent, Justice Sotomayor is correct in her assessment of law enforcement mistake of law and reasonable suspicion. However, Justice Sotomayor is wrong on one very important point—the application of the exclusionary rule to law enforcement mistake of law violations. Although Justice Sotomayor acknowledged that law enforcement mistake of law was a constitutional violation, she concluded that such a violation

220. *Id.* at 503.

221. *Id.* at 504.

222. *Id.* at 503.

would not trigger the exclusionary rule, and instead the good faith exception would apply.²²³

A mistake of law should not amount to reasonable suspicion, and a traffic stop that occurs as a result of a law enforcement mistake of law should be held unconstitutional. Because such a stop should be unconstitutional, state courts should decline to follow *Heien*. In doing so, state courts must address whether a remedy should apply. The expansion of *Heien* does not preclude any evidence, even if seized illegally. “Even when officers misinterpret the law entirely in good faith, a seizure on that basis is still indiscriminate insofar as it lacks any objective legal justification.”²²⁴ Therefore, state courts should find that law enforcement mistake of law when premised on an officer’s own interpretation of a statute or misguided belief that a statute exists triggers the application of the exclusionary rule.

A. Reasonable Reliance Standard of the Good Faith Exception

The good faith exception is synonymous with “reasonable reliance.” The question following a mistake of law case is whether law enforcement mistake of law qualifies as reasonable reliance to apply the good faith exception. “[S]urely it is *less* offensive to rely on affirmative (but wrong) authority from the legislative or judicial branches than it is for police officers to rely on their own misreading of local statutes.”²²⁵

The question of whether the exclusionary rule should apply in police-only mistake of law cases differs from cases where police rely on a third party. In *Davis*, the law enforcement officer relied on binding appellate precedent.²²⁶ In *Krull*, the officer relied on a statute.²²⁷ In *Leon*, the Court relied on a search

223. *Heien*, 135 S. Ct. at 546. Moreover, both the *Heien* majority and dissent also blur the lines of Fourth Amendment rights and Fourth Amendment remedies for the violation of those rights. The remedy of the exclusionary rule “is an issue separate from the question whether the Fourth Amendment rights of the party . . . were violated.” *United States v. Leon*, 468 U.S. 897, 906 (1984).

224. Brief for the Petitioner, *supra* note 102, at 14.

225. *Id.* at 31.

226. *Davis v. United States*, 564 U.S. 229, 235 (2011).

227. *Illinois v. Krull*, 480 U.S. 340, 358 (1987).

warrant.²²⁸ In a mistake of law case, however, an officer does not rely on third-party actors.²²⁹

In those cases, law enforcement officers are relying on the mistake of another. Therefore, the application of the exclusionary rule will not deter law enforcement from making similar mistakes in the future. Reasonable reliance on oneself, however, is different. One cannot reasonably rely on one's own interpretation or understanding. Self-reliance can be deterred through the application of the exclusionary rule—thus, the good faith exception should not apply.²³⁰

B. Goal of Deterrence

More specifically, the question of whether to apply the good faith exception to law enforcement mistake of law depends on whether making this excuse would “influence” law enforcement.²³¹ The goal of the exclusionary rule is to deter unlawful searches and seizures, but when officers rely on a third party, their personal behavior cannot be deterred. Justice Blackmun addressed the importance of considering the exclusionary rule's effect on law enforcement behaviors in his concurrence in *Leon*:

If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.²³²

228. *Leon*, 468 U.S. at 902.

229. *See* Heien v. North Carolina, 135 S. Ct. 530, 540 (2014) (stating a police officer's personal mistake of law, if reasonable, may justify an investigatory stop).

230. Police reliance on training or manuals is not enough to trigger the good faith exception—*Whren* expressly prohibits reliance on such materials in its analysis. *Whren v. United States*, 517 U.S. 806, 815 (1996) (noting police practices “vary from place to place and from time to time”).

231. Brief for the Petitioner, *supra* note 102, at 35 (citing *Krull*, 480 U.S. at 360 n.17).

232. *Leon*, 468 U.S. at 928 (Blackmon, J., concurring).

If the good faith exception should not change police conduct, then it cannot be applied in the case of law enforcement's self-reliance on the meaning or existence of a statute. The application of the good faith exception in these circumstances will change the way law enforcement view their responsibility to understand the law²³³—the standard would be lessened, as law enforcement would only be required to make reasonable guesses to what the law says or should say in the absence of a statute (if *Heien* extends that far).

Of course, there is a cost to the benefit of applying the exclusionary rule. However, deterring self-reliance and encouraging police to know the law in order to better protect individual constitutional rights far outweighs the exclusion of evidence obtained through an illegal seizure. After all, the exclusionary rule is not directly punishing an individual law enforcement officer but instead punishing the state as a whole, thereby encouraging the systematic understanding of the law that law enforcement agencies are charged with enforcing.²³⁴ “Even if the transgressor is unaware of the illegality or immorality of his act and consequently is incapable of being specifically deterred from his act by the threat of punishment, the person must be punished so that the proper standard of conduct will be learned and respected by others.”²³⁵

Applying the exclusionary rule in this way makes sense in the context of *Ornelas*.²³⁶ Because police tend to make determinations favorable to the needs of law enforcement, appellate courts do not give them deference in reviewing probable cause determinations.²³⁷ On the other hand, detached, neutral magistrates are given deference when they issue a warrant.²³⁸ Likewise, in cases where neutral, detached judges create the law

233. Police have a variety of means to clarify their understanding of a law or to determine whether a law exists. Brief for the Petitioner, *supra* note 102, at 38.

234. Misner, *supra* note 122, at 510.

235. *Id.* at 509. “The criminal law has generally refused to elevate specific deterrence of the individual above its goal of general deterrence and general education and therefore has, in the main, rejected the notion that mistake of law excuses conduct.” *Id.*

236. *Ornelas v. United States*, 517 U.S. 690, 691–93 (1996) (involving search after suspects’ names were found in a federal drug trafficker database).

237. *Id.* at 698–99.

238. *Id.* at 699.

enforcement mistake of law, the good faith exception to the exclusionary rule should apply.

Law enforcement will not be deterred from violating Fourth Amendment rights if they are relying on the interpretation of a third party. In contrast, however, the exclusionary rule should apply when law enforcement mistake of law results from individual misunderstanding of the law.²³⁹

Additionally, for states that have already rejected any application of the exclusionary rule, adopting *Heien* would be inconsistent. In context with law enforcement mistake of law, it would not make sense for a state to presume a constitutional violation while simultaneously holding that good faith reliance on even a valid statute is not enough to trigger the exclusionary rule.

V. CONCLUSION

States should extend greater Fourth Amendment protections than the Supreme Court extended in *Heien v. North Carolina*. In this case, the Supreme Court remarkably rejected the overwhelming majority of circuit courts and held that a law enforcement officer's mistake of law, if "reasonable," could still equate to reasonable suspicion.²⁴⁰ Because the Court held that a traffic stop was legal even if its inception was based on a mistake of law, the evidence found inside the vehicle was admissible evidence.²⁴¹ States should reject this limited Fourth Amendment protection and find that law enforcement mistake of law can never equate to reasonable suspicion, even if the mistake itself was reasonable.

States should provide greater individual constitutional protections under state constitutions for four reasons. First, states should not adopt *Heien* at face value, as the Court left many unanswered questions for *Heien's* application. One thing is

239. If the law enforcement officer shows that his mistake is not from his own interpretation or belief that a law exists, but rather is based on his reasonable reliance of police training manuals or judicial opinions, then the good faith exception might apply under *Davis* or *Krull*. See *Davis v. United States*, 564 U.S. 229, 238–39 (2011) (applying the rationale the deterrence benefits of the exclusionary rule are reduced when the officer's mistake is based upon reasonably relying on a third party); *Illinois v. Krull*, 480 U.S. 340, 360 (1987) (allowing an officer to rely, in good-faith, on a statute which is subsequently found to violate the Fourth Amendment).

240. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014).

241. *Id.* at 535, 540.

certain—*Heien*'s uncertain application by lower courts. What did the Court mean by “reasonable mistake”? When is a mistake “reasonable”? Does a reasonable mistake have to apply to an ambiguous statute? Even the concurring opinion took note of these unanswered questions and attempted to provide law enforcement mistake of law limitations.

Next, states should extend greater individual protections because common law doctrine requires so. Ignorance of the law is no excuse for ordinary citizens, and there is a strong policy reason against this defense.²⁴² If ignorance of the law is no excuse for citizens, then law enforcement ignorance of the law should not be a valid justification for undercutting Fourth Amendment rights. “If the Government becomes a lawbreaker, it breeds contempt for the law” and is inherently unfair to ordinary citizens.²⁴³ Also, *Heien* ignores the common law principle that ambiguity in statutes should not be held against criminal defendants.²⁴⁴ If a statute is ambiguous, and a law enforcement officer must interpret its meaning, the ambiguity in that statute should not be used against a criminal defendant who had no notice of that interpretation.

Third, states should extend greater constitutional protections than the Court did in *Heien* because law enforcement mistake of law violates governmental separation of powers. Not only does law enforcement mistake of law allow the executive branch to enforce, interpret, and possibly create laws, but also it will lead to decreased interpretations of ambiguous statutes. If all that courts must do is determine whether an officer's understanding of the law was reasonable, there is no need for the court to interpret the precise meaning of a statute. This is bad for law enforcement and ordinary citizens alike.

Also, allowing law enforcement mistake of law is inconsistent with Fourth Amendment jurisprudence. Good faith exception case law premises its analysis on the assumption that a mistake of law is a constitutional violation. Now, if a law enforcement officer reasonably mistakes the law, no constitutional violations occur and the basic assumption the courts relied upon in good faith exception jurisprudence is severely weakened.

242. *Id.* at 540.

243. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

244. *United States v. R.L.C.*, 503 U.S. 291, 307–08 (1992) (Scalia, J., concurring in part and concurring in judgment).

Because states should find that law enforcement mistake of law is a constitutional violation, states must then consider whether a good faith exception applies following the discovery of evidence after an illegal stop. Because a law enforcement officer's self-reliance cannot be objectively reasonable reliance, the good faith exception should not apply and the exclusionary rule should be triggered.

As the guardians of our liberties, states should be proactive in protection of citizens' constitutional rights. State courts cannot simply rely on the baseline standard set forward in *Heien*, but instead must consider individual rights under the meaning of the state constitution and find that a law enforcement mistake of law is a constitutional violation. The decisions of the Supreme Court are not dispositive, and state courts must carefully consider citizens' constitutional rights and, when necessary, raise the bar set by the Supreme Court. Law enforcement mistake of law should create a necessary undertaking by state courts, and state courts should extend greater protections for citizens under the Fourth Amendment.