FILED, Clerk of the Supreme Court, 09 Dec 2020, **083221**

SUPREME COURT OF NEW JERSEY
DOCKET NO. 083221

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Petition Granted for Certification to the New Jersey
v.	:	Supreme Court.
DARIUS J. CARTER,	:	Sat Below:
Defendant-Petitioner.	:	Hon. Robert J. Gilson, J.A.D. Hon. Arnold L. Natali, J.A.D.
	:	

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-PETITIONER

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DEFENDANT IS CONFINED

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[1] Originally appended to Defendant's January 27 letter to the Court, reproduced here for convenience.

[2] https://www.facebook.com/NutleyPD/photos/a.172024296318119/172039736316575/?type=1&theater (last visited October 23, 2020); https://www.nutleynj.org/police (last visited October 23, 2020).

[3] Michael Boren, Amid National Alarm on Police Tactics, Area Arsenals Also Growing, The Philadelphia Inquirer, August 26, 2014(https://www.inquirer.com/philly/news/new_jersey/20140827_Amid_national_alarm_over_police_tactics__area_departments__arsenals_also_growing.html) (last visited October 23, 2020)

[4]https://www.facebook.com/GloucesterTownshipPolice/photos/a.125584060787739/3477231635622948/?type=3&theater (last visited October 23, 2020).

[5]https://www.state.nj.us/mvc/vehicles/wildlife.htm (last visited October 23, 2020)

LIST OF TRANSCRIPTS AND RECORD CITES

Da - Appendix to defendant's Appellate Division brief

Pa - Appendix to defendant's petition for certification

DLa – Appendix to defendant's January 27, 2020 letter-brief

DSa - Appendix to defendant's supplemental brief

SSl – State's January 6, 2020 letter-brief

1T – May 18, 2016 Drug Court Application Transcript

2T – May 23, 2016 Conference Transcript

3T – May 24, 2016 Oral Ruling Denying Drug Court Application Transcript

4T – October 5, 2016 Motion Hearing Transcript

5T – February 15, 2017 Plea Transcript

6T – April 20, 2017 Sentencing Transcript

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PRELIMINARY STATEMENT

Darius Carter was the subject of a pretextual traffic stop. The reason given was tenuous: the license plate frame on his vehicle was covering New Jersey's state slogan, "Garden State." This, the arresting officer contended, violated New Jersey law, meriting the roadside seizure of Mr. Carter, his vehicle, and his three passengers.

The stop was based on an unreasonably expansive reading of N.J.S.A. 39:3-33, New Jersey's license plate statute. According to this exaggerated interpretation, the license plate statute is aimed not at ensuring that registration numbers are visible but at protecting every bit of paint on a license plate – up to and including the State's cosmetic designs.

That reading, leveraged by the officer and now advanced by the State, is wrong. What the State calls a "plain-text interpretation" in fact irreconcilably conflicts with the statutory language, not only of N.J.S.A. 39:3-33, but also of various other provisions of the statutory scheme. The product is an unrealistic and hopelessly unadministrable statute, so far-reaching that it trammels numerous constitutional rights.

Worse still, such a statute casts a net so wide that it scoops up a vast portion of New Jersey's drivers, leaving law enforcement to pick and choose who they wish to seize. Definitionally, such a law is fertile ground for arbitrary and

capricious enforcement and the racially disproportionate outcomes that inevitably follow.

All of these problems, any one of which is fatal to the interpretation advanced by the State, are easily eliminated by Defendant and amici's circumspect and reasonable interpretation of N.J.S.A 39:3-33: that the license plate statute is designed to ensure that registration numbers, not ornamental images and slogans, are always visible. This reading accounts for statutory context and legislative intent, thus abiding by the rules of statutory construction and harmonizing with the entirety of the statutory scheme. It is narrow enough that it is easily administrable and will not so flagrantly encourage arbitrary or discriminatory enforcement. Most importantly, it rescues the statute from unconstitutionality, allowing the legislative intent to be actualized.

A proper review of N.J.S.A. 39:3-33 leaves no doubt that the State's reading does not hold water and that a car stop based on the obstruction of the words "Garden State" is impermissible. Because the stop of Mr. Carter's vehicle was based on a misreading of the statute, the inescapable conclusion is that he was seized without justification. As such, the denial of his motion to suppress must be reversed, his conviction overturned, and the misguided interpretation of the New Jersey law put to rest for good.

PROCEDURAL HISTORY

March 24, 2015, Burlington County Indictment Number 15-04-0319-I charged Darrius Carter, with: one count of fourth-degree Tampering with Evidence contrary to N.J.S.A. 2C:28-6(1); one count of second-degree Possession of a Controlled Dangerous Substance with Intent to Distribute contrary to N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2); one count of third-degree Manufacturing/Distribution of a Controlled Dangerous Substance contrary to N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3); two counts of third-degree Possession of a Controlled Dangerous Substance contrary to N.J.S.A. 2C: 35-10(a)(1). (Da at 5-9).

Mr. Carter moved to suppress the evidence underpinning Indictment No. 15-04-0319-I as the fruits of an illegal stop. (4T). On October 5, 2016, the court denied the motion. (Da 25). On February 15, 2017, following an unsuccessful application to drug court, Mr. Carter plead guilty to one count of second-degree Possession of a Controlled Dangerous Substance with Intent to Distribute contrary to N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2). (Da at 24; 32-39) (3T; 5T). He simultaneously plead guilty to a single count of third-degree Possession with Intent to Distribute, thereby resolving the unrelated Burlington County Indictment No. 15-03-0322. (5T).

On April 20, 2017, the court sentenced Mr. Carter in accordance with his plea, to a ten-year term of imprisonment

with a five-year period of parole ineligibility for Indictment No. 15-04-319. (6T at 3-14 to 18) (Da at 36). This sentence was to run concurrently to a five-year term of imprisonment with a two-year period of parole ineligibility for Indictment No. 15-03-0322 and an unspecified term for an unrelated Camden County charge. (6T at 7-8 to 15). (Da at 36).

On February 22, 2018, Mr. Carter filed notice of appeal. (Da at 40). On June 24, 2019, the Appellate Division affirmed his conviction and his rejection from drug court. (Pa at 1-17). On July 3, 2019, Mr. Carter filed Notice of Petition and Petition for Certification, limited to the denial of the motion to suppress. (Pa at 19).

On December 6, 2019, this Court requested additional briefing on constitutional issues related to the question presented. (Dsa at 2). Mr. Carter filed the requested briefing on January 27, 2020.

On May 19, 2020 this Court granted defendant's petition for certification. (Dsa at 1).

STATEMENT OF FACTS

On September 28, 2014, Darius Carter, like countless other New Jerseyans, was driving a vehicle with the words "Garden State" obscured on the license plate. (4T at 9-15 to 23, 26-7 to 8, 15-16).[6] Unlike countless other New Jerseyans, Mr. Carter was pulled over as a result. (4T at 26-11 to 13; Pa at 12). In the aftermath, 14.94 grams of heroin was found on his person. (Pa at 3). When called upon to justify this warrantless seizure, the State relied on N.J.S.A. 39:3-33, which reads: "No person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration."

Mr. Carter's vehicle bore a frame which, while not obstructing the identification number, covered the words "Garden State." (Pa at 5).[7] While finding that the justification was "miniscule" and reliance on N.J.S.A. 39:3-33 was "pretextual," the trial court "bit[] the bullet" and ruled that the stop was nonetheless legal. (T4 at 26-7 to 20).

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[6] No testimony was taken at the suppression hearing, leaving a thin factual record. (Pa at 3).

[7] Because no fact-finding was conducted below, the record does not reveal the identity of the vehicle's owner. Indeed, there is reason to believe that the vehicle belonged to the mother of one of the passengers. Purely for convenience, this brief will refer to it as Mr. Carter's vehicle.

LEGAL ARGUMENT

POINT I

BECAUSE THE TRIAL COURT FAILED TO CONSTRUE N.J.S.A. 39:3-33 IN ITS PROPER CONTEXT AND THROUGH THE LENS OF COMMON SENSE, IT ERRONEOUSLY CONCLUDED THAT THE LEGISLATURE INTENDED TO PROHIBIT COVERING THE COSMETIC SLOGANS AT THE BOTTOM OF LICENSE PLATES. PROPERLY CONSTRUED, THE STATUTE DID NOT AUTHORIZE THE STOP OF MR. CARTER'S VEHICLE.

The error below is a product of simple but critical misunderstanding of the statutory interpretation process. The goal of statutory interpretation is to "ascertain and effectuate the Legislature's intent." Cashin v. Bellow, 223 N.J. 328, 335 (2015). It is an oft-repeated refrain that the first stop on the search for legislative intent is the plain language of the statute. Town of Morristown v. Woman's Club of Morristown, 124 N.J. 605, 610 (1991). But starting with the text does not mean cherry-picking a few words from the statute, reading them out of context, and declaring that the court's work is finished. State v. Friedman, 209 N.J. 102, 117-18 (2012) (citations omitted). As this Court held:

> Courts thus do not slavishly limit themselves to the dry words of legislation nor rely on mere abstract logic to determine what interpretation of a statute would fulfill the Legislature's purpose. More is called for than a merely mechanical analysis. Machines can perform mechanical tasks, but judgment is necessary to reach a result informed by intelligence.

Id. at 118. Instead, a court must always (1) examine the statutory context and (2) ask whether a proposed interpretation comports with simple common sense. Ibid.; Haines v. Taft, 237 N.J. 271, 283 (2019).

The trial and appellate courts in this case eschewed these indispensable considerations. The resulting reading – that N.J.S.A. 39:3-33 forbids covering the cosmetic slogan on the bottom of a license plate – is a reading that does not comport with the legislature's intent. Only the conclusion that the relevant portions of the license plate statute applies to registrations numbers and excludes cosmetic slogans comports with this Court's interpretive precedent and effectuates the Legislature's intent.

The traffic stop in this case was premised on an erroneous reading of the statute and, by extension, on behavior that did not violate the law. Such a stop, unsupported by probable cause, is squarely unconstitutional. U.S. Const., amend. IV; N.J. Const., art. I, para. 7. The evidence recovered as a result must be suppressed. State v. Bacome, 228 N.J. 94, 103 (2017).

A. The Language of N.J.S.A. 39:3-33, When Read As A Whole and In Its Proper Statutory Context, Demonstrates That the Legislature Did Not Intend to Mandate the Display of Decorative Slogans.

The minute focus urged by the State amounts to interpretive blinders, ignoring the vast majority of the statutory provision,

the interrelated sections of the legislative scheme, and even the rest of the sentence in which the words "any part of any marking" are found. The Legislature itself has been clear that this is not permissible, prescribing that "In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context." N.J.S.A. 1:1-1; State v. Bolvito, 217 N.J. 221, 230 (2014) (explaining that the word "shall" denotes a mandatory command); Grogan v. De Sapio, 11 N.J. 308, 323 (1953) (explaining that N.J.S.A. 1:1-1 obliges courts to construe statutory language "with the context of the whole statute"). Decades of precedent are equally clear: courts must "read the statute as a whole and not seize upon one or two words." Friedman, 209 N.J. at 117 (citation omitted). When N.J.S.A. 39:3-33 is given its proper context, it becomes clear that it was never meant to refer to cosmetic slogans.

1. When Read Together With The Rest of N.J.S.A. 39:3-33, The Term "Marking" Cannot Reasonably Include The "Garden State" Slogan.

When a court begins its quest to discern legislative intent, it will start with the text. The court below construed this to mean starting (and indeed ending) with 3-6 words. But there is a reason that this Court's well-worn precedent commands us to start with the "language of the statute," not the language of a sentence. State v. Shelley, 205 N.J. 320, 323 (2011). The

courts' duty is to effectuate "an enactment of Legislature," not a single half-phrase as though it were codified on its own. Marino v. Marino, 200 N.J. 315, 329 (2009). As this Court explained, a contextual reading is indispensable because it allows "a sensible meaning may be given to the whole of the legislative scheme." Manzano, 209 N.J. at 572.

On the other hand, "to take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute." United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940). Statutory text cannot "be read in isolation, but in relation to other constituent parts." Manzano, 200 N.J. at 329; see also N.J.S.A. 1:1-1. Thus, when "discerning that [legislative] intent we consider not only the particular statute in question, but also the entire legislative scheme of which it is a part." Roig, 135 N.J. at 515 (alteration in original) (quoting Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129 (1987)).

The insistence on considering statutory context makes sense. If particular language is not read in context, the interpreting court risks doing a good deal of collateral damage, contravening the legislative intent behind countless statutes simply because it hasn't looked beyond a single phrase. Manzano, 209 N.J. at 572; see also DiProspero, 183 N.J. 492 (citing

Chasin, 159 N.J. at 426-27) (same). Such a result would not comport with this Court's rule that where a literal, uncontextualized construction of certain words will lead to a result inconsistent with the overall purpose of the statute and legislative scheme, it must be rejected. New Jersey Builders, Owners, & Managers Assn v. Blair, 60 N.J. 330, 338 (1972) ("[When a] rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter."); accord Hubbard, 168 N.J. at 392-93 (citing Turner v. First Union Nat'l Bank, 167 N.J. 75, 84 (1999)). Without reading the entire scheme before settling on a definition, courts risk stumbling blindly into results that this principle precludes.

For all of these reasons, the statutory provisions which contextualize the language at issue are not "extrinsic aides," only to be consulted if the dictionary yields no answers. (Pa at 13). They are first-order considerations which must be a part of every statutory examination. E.g., Haines, 237 N.J. at 282-83 (reading the statutory language in context and then finding extrinsic aids, like Legislative History, necessary "because of the latent tension" with a related provision and "the consequences that would flow from interpreting" the statute a certain way). The term "any marking" must therefore be evaluated in relation to both the surrounding language within N.J.S.A.

39:3-33 and the additional statutory provisions which are a part of the same legislative scheme.

While the courts below focused on defining the term "any marking," this language must be read in the context both of the particular provision in which it appears and the broader statutory scheme of which it is a part. Both confirm that the statute cannot be construed to prohibit covering the "Garden State" slogan.

First, the term "any marking" must be construed alongside the entire text of N.J.S.A. 39:3-33. Manzano, 209 N.J. at 572. The statute provides that "No person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration plate." N.J.S.A. 39:3-33. The definition of "any marking" must therefore be informed by the meaning of "conceals or otherwise obscure any part."

When read together, an irreconcilable conflict emerges: a single definition of the term "conceals or otherwise obscures any part of" cannot plausibly apply both to a license plate number and to cosmetic slogans and markings like "Garden State." Therefore, the only way to include "Garden State" within the definition of "any marking" would be to assert that "conceal[] or otherwise obscure[]" means one thing with respect to a plate number and another with respect to a cosmetic slogan.

This Court has long warned that a single statutory term should not be given two separate definitions, even when it is found in multiple places within the same statute. State v. Thomas, 166 N.J. 560, 567-68 (2001) (superseded by statute on other grounds). The contention that the Legislature intended for a single instance of the word to have multiple meanings is a bridge too far. McDonald v. Bd. Of Chosen Freeholders, 99 N.J.L. 170, 174 (1923) ("While [a word] used at one place in a section, may have a different meaning from the same word in another place, we are not ready to give it...an alternative meaning according to the particular object specified.").

By testing each possible definition of "conceals or otherwise obscures any part of" for compatibility with the possible definitions of "any marking" it becomes clear that the State's proffered interpretation violates the proscription against inconsistent meanings. "Conceals or otherwise obscures any part of" could – for the purpose of argument – be susceptible to three meanings. First, it could mean that in order to violate the statute, a marking must be entirely covered. While this definition would be unremarkable in the context of the cosmetic slogans, it would be wholly absurd as applied to the license plate number itself where, obscuring a single letter would impact the plate's functionality.

However, the alternative position – that "conceals or otherwise obscures any part of" means that even the most minute infringement of a cosmetic slogan violates the statute – is no more reasonable. The State proposed just such a definition in State v. Roman-Rosado, currently pending before this Court, where the defendant was stopped for having a license plate frame which covered a fraction of the bottom of the words "Garden State." 462 N.J. Super. 183, certif. granted 241 N.J. 501 (2020). As the Appellate Division found in that case, this would both be misreading of the plain language of the statute (rendering the words "obscure" and "conceals" functionally meaningless) and also be contrary to the purpose of the statute. Id. at 198-200; see also State v. Donis, 157 N.J. 44, 55 (1998) (explaining that the purpose of N.J.S.A. 39:3-33 is to allow police to ascertain "the status of the vehicle, and the status of the registered owner;" to wit, "whether the car is registered stolen, and whether the registered owner is licensed").

Moreover, as applied to the "Garden State" slogan, this definition would be unworkable and leave both officers and members of the public with little idea of when the law will apply. As the State pointed out in its letter-brief in response to this Court's December 6 letter, license plates can be more or less difficult to read from an angle. (SSl at 4). For example, from "a higher angle, such as the vantage point of a truck or

bus, it might be very difficult to see the words." (Ibid.). Quite so. Indeed, from a sufficient angle (say, the driver of a low-slung sedan looking at the plates of a passing boosted Jeep) any frame composed of three-dimensional material would cause a de minimis obstruction of the borders of the plate. This construction would thus imply that the statute bars *all* license plate frames. But this is not what the statute says. Such a reading would read the "conceals or otherwise obscures" out of it entirely. Cast Art Industries, LLC v. KPMG LLP, 209 N.J. 208, 224 (2012) (citation omitted) ("Courts 'must presume that every word in a statute has meaning and is not mere surplusage.'").

In the alternative, did the Legislature mean to prohibit frames which obstruct "Garden State" only if viewed from certain angles? If so, which? Directly behind and at the same height of the vehicle? At a 15-degree angle? 30? 45? Should the theoretical viewer be assumed to be in a sedan – say, a Crown Victoria or Interceptor – or a taller vehicle – say, a Tactical Unit or Rescue Truck? Should the driver calculate his angles differently depending on the size of his own vehicle? Should he re-measure when the bed of his truck is full of heavy material for a home improvement project? The statute would answer none of these questions. Not only would such an ambiguous statute risk unconstitutionality but a reading which unravels a statute, making it more uncertain instead of less cannot be said to be a

fair plain-language reading. Thus, defining "conceal or otherwise obscure any part of" so broadly that it would encompass hardware which, from certain angles in certain situations, might touch the barest sliver of a single letter – without regard to whether there is any impact on legibility – is incompatible with a definition of "any marking" which includes the cosmetic slogans at the edge of registration plates.

If neither extreme is correct, the only remaining potential interpretation is somewhere in the middle, i.e., that a frame which materially effects the readability of the text. But this construction would, if applied to an identification number and to "Garden State" alike, run headlong into the same problem as the de minimis interpretation. From certain angles, nearly any plate could, in theory, affect the readability. What's more, the meaning of the term "readability" would likely be different in the context of a plate number and a cosmetic slogan. For example, if the bottom 10% of the (fictitious) plate number "EFE-1TI" were covered, the plate would be wholly unreadable. By contrast, covering 10% of "Garden State" would have no impact on its decipherability. Therefore, under this compromise definition, "conceal or otherwise obscure any part of" would have one meaning with respect to a plate number and another with respect to cosmetic elements like the "Garden State" slogan.

Because no single definition of "conceals or otherwise obscures any part of" can apply to both a license plate number and the "Garden State" slogan, an interpretation of N.J.S.A. 39:3-33 which includes such slogans is simply untenable. Thomas, 166 N.J. at 567-58; McDonald, 99 N.J.L. at 174. This contextual reading shows the interpretation adopted by the trial and appellate court for what it is: a definition that will survive only as long as it is in a vacuum. When the full plain text of the statute is consulted, it shows that this exaggerated interpretation urged by the State would be at odds with the wording of the statute, would create a rule in a constant state of fluctuation, and is therefore foreclosed. Only a definition which excludes the "Garden State" slogan is sustainable.

2. Accompanying Elements of the Statutory Scheme Confirm that the Legislature Did Not View "Garden State" as A Legally Required "Marking".

In addition, the notion that the Legislature intended to require "Garden State" to be visible would be inconsistent with neighboring provisions that explicitly anticipate license plates that do not display this slogan. As the United State Supreme Court has counseled, it is unlikely that a Legislature would intend to create internally inconsistent statutory schemes. Abbott v. United States, 562 U.S. 8, 25 (2010); cf. Union City Assocs. v. Union City, 115 N.J. 17, 25 (1989) (advising that a construction which "render[ed] the statutory scheme internally

inconsistent" would "render [a] part of the statue inoperative, superfluous or meaningless"). As such, the Court advised to "resist attributing to Congress and intention to render a statute...internally inconsistent." Greenlaw v. United States, 554 U.S. 237, 251 (2008) (citing W. Air Lines Inc. v. Bd. of Equalization of S.D., 408 U.S. 123, 133 (1987)); cf. State v. Des Marets, 92 N.J. 62, 79 n.16 (1983), superseded by N.J.S.A. 2C:43-6.2 (excising certain statutory language where it would render the statute "internally inconsistent" and would "make no sense"). The wisdom is sound, growing out of the bedrock assumption that the inconsistent and illogical results of a proffered interpretation "argue strongly against the conclusion that Congress intended th[o]se results." Ibid. (alterations in original).

In this case, the notion that the Legislature meant to control what cosmetic text was visible on license plates is belied by the literally unlimited variations of plates that the statutory scheme authorizes. Most notably, the Legislature itself provided for the issuance of plates advertising and supporting the "Wildlife Conservation Fund." N.J.S.A. 39:3-33.10. The Statute specifically directs the Division of Motor Vehicles to issue:

> ...wildlife conservation license plates bearing, in addition to the registration number and other markings or identification otherwise prescribed by law, words or

> a slogan and an emblem, to be designed by the Commissioner of Environmental Protection and approved by the Director of the Division of Motor Vehicles, indicating support for, or an interest in, wildlife conservation. Issuance of wildlife conservation license plates in accordance with this subsection shall be subject to the provisions of chapter 3 of Title 39 of the Revised Statutes, except as hereinafter otherwise specifically provided.

N.J.S.A. 39:3-33.10(A) (emphasis added). These license plates, mandated to display "all markings required by law," do not display the words "Garden State". (DSa at 9) The statute contains no special provision authorizing the removal. Clearly, then, the Legislature does not view the statutory scheme as requiring "Garden State" to be displayed.

What's more, as defense counsel pointed out to the trial court, the Legislature has authorized the Director of the Division of Motor Vehicles to issue any number of alternative plate designs. (4T at 7-17 to 8-14).[8] A notable option is the "Treasure our Trees" plate, available to both passenger and commercial vehicles. Ibid. Additional plates are available advertising service organizations (e.g., "American Legion"), community organizations (e.g., "NJ Choose Life," "Freemason," "Square Dancer"), alumni groups (e.g., "Alpha Kappa Alpha Sorority"), and professions ("Podiatrist").[9] Branded plates are

[8] https://www.state.nj.us/mvc/vehicles/dedicated.htm (last visited October 23, 2020)

[9] https://www.state.nj.us/mvc/vehicles/organizational.htm (last visited November 7, 2020);

available for sports teams, including the Philadelphia Phillies, the New York Jets, and NASCAR's Ford Racing team.[10] For each, the chosen slogan, identifier, organization name, or logo replaces the words "Garden State."

While dozens of options currently exist, there is no legislation limiting the plates that the Director is authorized to create for private organizations, for-profit companies, or hobbies. Indeed, no law bars the Director from creating plates that simply replace the words "Garden State" with her own name or a lone hyphen. The Legislature's choice to issue carte blanche for any license plate design to exist is simply inconsistent with the idea that it intended to penalize any private citizen who marred one of the slogans. The Legislature's disinterest in controlling cosmetic plate design, combined with its manifest belief that "Garden State" was not required by law, shows that the reading adopted by the courts below was inconsistent with the statutory scheme of which it is a part.

Thus, the context both of N.J.S.A. 39:3-33 on its own and of the statutory scheme as a whole demonstrate that the statutory terms do not require the optional cosmetic slogans like "Garden State" to be displayed. Unfortunately, neither the

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https://www.state.nj.us/mvc/vehicles/professionals.htm (last visited November 7, 2020).

[10] https://www.state.nj.us/mvc/vehicles/sport.htm (last visited October 23, 2020)

trial nor the appellate court consulted this crucial context. The trial court held: "The statute is not ambiguous. The statute is clearly there. It says any part of the license plate." (4T at 26-5 to 6). Despite defense counsel pointing out that the court's interpretation would be in tension with the existence of dozens of alternative license plate designs, the court did not address the impact of such contradictions, focusing exclusively on the words "any part of the license plate" without regard for the remainder of the legislative scheme. (4T at 19-12 to 20-3; 26-5 to 6).

The Appellate Division's statutory analysis was similarly cursory. The court wrote:

> Defendant contends a "common sense" reading of N.J.S.A. 39:3-33 requires that a violation can only occur when the letters and numbers composing the vehicle's registration are obstructed. We reject this argument. As previously discussed, only when the language of a statute is ambiguous will courts look beyond the literal language and consider extrinsic factors, such as the statute's purpose, legislative history, and statutory context to determine the legislative intent.

(Pa at 13). By its own admission, the court focused on a few words to the exclusion of any contextualizing statutory language, contrary to the longstanding instruction of both this Court and the Legislature itself. E.g., N.J.S.A. 1:1-1 ("In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context"); Haines, 237 N.J.at 283 (citing Roig v. Kelsey,

135 N.J. 500 (1994)) ("When 'discerning that [legislative] intent we consider not only the particular statute in question, but also the entire legislative scheme of which it is a part.'") (alteration in original).

The superficial nature of these analyses is ultimately fatal. The courts erred, not in starting with a few statutory terms, but in ending with them. By failing to consider the term "any marking" in the context of the specific subsection in which it is found (N.J.S.A. 39:3-33) and the legislative scheme of which it is a part (N.J.S.A. 39:3-33 to 39:3-33.11), the court missed crucial content which, when considered, demonstrates that the statute does not apply to the "Garden State" slogan.

B. The Court Erred In Discounting Realism and Common Sense Which Likewise Would Have Confirmed That the Statute Does Not Apply to the "Garden State" Slogan.

Just as they declined to consider statutory context, so too did the courts below deny the relevance of simple common sense. In doing so, the courts again contravened this Court's binding precedent. When these interpretive tools are properly applied, it becomes even clearer that N.J.S.A. 39:3-33 does not apply to cosmetic slogans.

1. Statutory Construction Cannot Be Performed Without the Courts' Common Sense.

To read language in the context of the statutory scheme is not the court's only obligation. Any interpreting process must

also consider whether the proposed interpretation will comport with "the commonsense of the situation" and whether the resulting statute will yield "absurd results." Friedman, 209 N.J. at 118 (quoting LaFage v. Jani, 166 N.J. 412, 431 (2001)); P.O.P.A., 55 N.J. at 100; State v. Provenzano, 34 N.J. 318, 322 (1961). When a conflict emerges between a literal reading and a common sense one, the latter will win out. see also New Jersey Builders, Owners, & Managers Assn, 60 N.J. at 338 ("Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter."). In essence, a court must read the language in the context of reality, the concrete factual background against which it will be administered. To do otherwise would seriously and needlessly hamper the court's search for legislative intent.

The value of common sense (whether in the interpretive context or otherwise) should not need to be argued for. The danger of privileging literal readings over common sense ones has been long recognized. As Judge Learned Hand observed, "[t]here is no surer way to misread any document than to read it literally." Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring), aff'd sub nom., Gemsco, Inc. v. Walling, 234 U.S. 244 (1945); see also Friedman, 209 N.J. at 117 (noting the same). Or, more poetically: "Woe to the makers of

literal translations, who by rendering every word weaken the meaning! It is indeed by so doing that we can say the letter kills and the spirit gives life." Voltaire, documented in Robert Andrews, The Columbia Dictionary of Quotations 920 (1993). Presciently, therefore, this Court has always affirmed that the realistic readings will be preferred to their technical counterparts. E.g., Haines, 237 N.J. at 283 ("Statutes are to be read sensibly rather than literally."); Roig, 135 N.J. at 515 (holding the same and advising that realistic intent "controls over plain language"); State v. State Troopers Fraternal Ass'n, 134 N.J. 393, 418 (1993) (same); Schierstead v. Brigantine, 29 N.J. 220 (1959) (citing, in sequence, Morris Canal & Banking Co. v. Central R.R. Co., 16 N.J. Eq. 419, 428 (Ch. 1863); In re Merril, 88 N.J. Eq. 261, 273 (Prerog. Ct. 1917); May v. Bd. of Comm'rs of Town of Nutley, 111 N.J.L. 166, 167 (1933); Lloyd v. Vermeulen, 22 N.J. 200, 205 (1956)). For example, in Delisa v. County of Bergen, this Court ruled that a textual loophole that would leave certain whistleblowers unprotected by the Conscientious Employee Protection Act (CEPA) was inconsistent with the purpose of the Act as a whole. 165 NJ. 140, 145-47 (2000). Thus, this Court ruled that such a reading would not be adopted because, regardless of the literal meaning of an isolated passage, common sense dictated that such a reading would not have been intended by the Legislature. Id. at 147-48.

The insistence on reasonable interpretation follows naturally from the respect due between coequal branches and the corollary assumption that the Legislature does not spend its time passing statutes that it knows are nonsensical. Thus, it is a fundamental canon of this court's jurisprudence that "the controlling legislative intent is to be presumed as consonant to good reason and good discretion." Morris Canal & Banking Co., 16 N.J. Eq. at 428; accord Haines, 237 N.J. at 283; see also Delisa, 165 N.J. at 147-48; Friedman, 209 N.J. at 117; State v. Haliski, 140 N.J. 1, 16-17 (1995). If a blinkered, text-only reading yields a result which common sense tells us the legislature is unlikely to have intended, the reading should be avoided in favor of a more sensible result.

For similar reasons, this Court has declined to adopt a reading that, even if apparently clear on paper, would lead to absurd results in reality. Provenzano, 32 N.J. at 322 ("It is axiomatic that a statute will not be construed to lead to absurd results"). Thus, where "a literal reading of the law would lead to absurd results," that reading will not be adopted. State v. Harper, 229 N.J. 228 (2017) (declining to interpret a gun-control statute literally when the literal reading would create a 180-day amnesty period for all possessory offenses – an "absurd result").

Viewed through that lens of this venerable precedent, it is clear that the "text-first" approach is a means, not and end and, like all tools, must be thoughtfully applied. While it would certainly be less strenuous to allow simple and literal definitions to stop courts from even *considering* something as basic as common sense, it would not serve the goal of discerning legislative intent, the lodestar which must guide all interpretive rules. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009). Thus, contrary to the assumption of the court below, tools like common sense are not "extrinsic" aides to be kept waiting in the wings. Instead, it is an indispensable part of the first stage of statutory construction. Haines, 237 N.J. at 282-83 (reading the statutory language in context and then finding extrinsic aids necessary "because of the latent tension" with a related provision and "the consequences that would flow from interpreting" the statute a certain way). If it were not, how would this Court in Haines, Roig, or Lafage have discovered the conflict between the literal and common-sense reading of the statutes at issue? Simply, they would not have.

Even if the statute were clear on its face, a rule that allowed consultation of common sense only in the case of linguistic ambiguity would require judges to check their wisdom at the door when they ascend the bench and intentionally rob themselves of their own reasoning abilities. The idea that this

is consonant with the goal of "effectuat[ing] the Legislature's intent" strains credulity. Shelley, 205 N.J. at 323; see also Adam M. Samaha, *If the Text is Clear – Lexical Ordering in Statutory Interpretation*, 94 Notre Dame L. Rev. 155 (2018) (explaining the complexities and pitfalls of a totalistic or narrowly-conceived "text first" approach). Presciently, then, this Court has foreclosed such a willfully blind approach in favor of a more fulsome, truth-seeking procedure.

2. A Statutory Reading That Incorporates Common Sense Must Conclude That Covering The "Garden State" Slogan Is Not Prohibited.

The trial court grappled with the question of whether to consider the reasonableness of the proffered constructions. Indeed, it acknowledged that the defendant's construction was "frankly, a good common sense argument." (4T at 25-10 to 11). But it concluded that this was not relevant, remarking that the good common sense argument "doesn't bring us any closer to a conclusion." (4T at 13 to 14). Instead, the court found that "the statute is not ambiguous" and that because the language was clear, no more need be asked. (4T at 26-5 to 6). In so doing, it came to its conclusion based exclusively on truncated portion of the text, without asking whether the construction comported with common sense or would lead to absurd results, contrary to this Court's express instructions.

Likewise, the Appellate Division not only failed to attribute any weight to common sense or legislative purpose but explicitly denied its applicability. The court acknowledged that "Defendant contends a 'common sense' reading of N.J.S.A. 39:3-33 requires that a violation can only occur when the letters and numbers composing the vehicle's registration are obstructed." (Pa at 13). The court asserted, however, that "only when the language of a statute is ambiguous will courts look beyond the literal language." Ibid. The court found that "defendant's 'common sense' reading is not consistent with the statute's plain language," and therefore rejected common sense in favor of literalism. Ibid. By failing to accord due weight to legislative purpose and common sense, both courts flatly contravened this Court's precedent.

Had the courts afforded simple common sense its proper weight, they would have discovered the manifold ways in which the State's proffered construction fell short. First, any interpreter would be remiss in ignoring how New Jerseyans in general are interpreting the law. As defense counsel noted and he trial court acknowledged, "If you just go in the parking lot of the courthouse, about 90 percent of the plates have the plate cover over it.". (4T at 9—15 to 23) There is a good reason for this: all signs point to license plate frames being permissible. For example, a substantial number of license plate frames are

affixed by car dealers before they are ever purchased.[11] New Jerseyans understandably presume that they are being sold street-legal cars without prohibited devices bolted to their bumper. Likewise, even the State of New Jersey, through Rutgers University, sells license plate frames that could infringe the cosmetic "Garden State" slogan.[12]

Perhaps most tellingly, police vehicles across the state use license plate holders that cover up the text on the edges of their license plates. (4T at 9-24 to 25). For example, both tactical rescue vehicles and parade trucks used by the Gloucester Police use holders that block out the words "New Jersey" entirely. (DSa at 7, 8). One hundred miles away, the Nutley Police Department does the same. (DSa at 6). Indeed, both departments not only use these vehicles in the field but post photos of them prominently on their social media platforms and official town websites.[13] This suggests that police may be

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[11] E.g., https://www.jackdanielsmotors.com/certified/Volkswagen/2017-Volkswagen-Jetta-235352da0a0e0adf56634e932e92b314.htm (last visisted October 23, 2020)

[12] Rutgers Scarlet Knights 150th License Plate Frame, Rutgers Team Shop, https://shop.scarletknights.com/product/rutgers-scarlet-knights-150th-license-plate-frame-130011 (last visited October 23, 2020)

[13] See, respectively Nutley Township Police Facebook Page, https://www.facebook.com/NutleyPD/photos/a.172024296318119/172039736316575/?type=1&theater Nutley, New Jersey – Police Department, https://www.nutleynj.org/media/www.nutleynj.png and

ambivalent about the meaning of the law. Certainly, it would suggest to citizens that it is not illegal to use a license plate holder that covers the words on the edge of a plate.

Likewise, common sense tells us that the State's construction would not be consistent with the purpose of the statute. New Jersey Builders, Owners, & Managers Assn, 60 N.J. at 338 ("Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter."). As this Court observed in State v. Donis, the Legislature's purpose in enacting N.J.S.A. 39:3-33 was to allow police to ascertain "the status of the vehicle, and the status of the registered owner;" to wit, "whether the car is registered stolen, and whether the registered owner is licensed." 157 N.J. at 55. The State contended, in its January 6 letter to this court, that the legislature intended the slogan at the bottom of a license plate to be one of the means by which a license plate is identified. Common sense tells us that this is not the case. As discussed in Point I.2.b, the Legislature and the Director of the Division of Motor Vehicles, acting under its auspices, have made numerous alternative plate designs available. Between special interest

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Gloucester Township Police Facebook Page, https://www.facebook.com/GloucesterTownshipPolice/photos/a.125584060787739/3477231635622948/?type=3&theater (each last visited October 23, 2020)

plates (17), service organizations (20), community organizations (18), alumni organizations (10), sports teams (11), occupations (8), and the default "Garden State," 85 different New Jersey license plate designs are on the roads at any given time.

Even if a police officer somehow memorized every one of those 85 plates, they would still serve no identifying purpose because many of the most common among them are also available in other states. Plates displaying identical area sports team names, veteran status, alumni organizations, and more are available from neighboring states.[14] The slogan at the bottom of a plate simply cannot serve an identifying purpose in light of the myriad other slogans and designs available, many of which are not unique to the state.

Moreover, if the state's construction of the words "any part of any marking" are taken to their logical conclusion, one wonders what is to be made of the pictorial marking available on some New Jersey plates. "Conserve Wildlife" plates, for example, show a bald eagle, pine boughs, and a blue lake, which not only

[14] Special License Plates, Delaware Division of Motor Vehicles, (https://www.dmv.de.gov/VehicleServices/registration/index.shtml?dc=ve_reg_sp_tags) (last visited October 23, 2020);
Custom Plates, New York Department of Motor Vehicles, (https://dmv.ny.gov/nav/custom-plates) (last visited October 23, 2020);
Registration Plates, Pennsylvania Department of Transportation (https://www.dmv.pa.gov/VEHICLE-SERVICES/Registration%20Plates/pages/default.aspx) (last visited October 23, 2020).

are printed up to the very edge of the plate but also surround the bolt holes used to affix the plate to a vehicle. (DSa at 9). Very strictly speaking, even a bolt-head would cover part of these imprinted images, let alone the most narrow and modest of frames. Of the seventeen special-interest plates available, 15 contain printed images that go either to the edge of the plate, around the bolt holes, or both. Under the State's construction, there is no principled, textual way to distinguish these cosmetic images from the cosmetic slogans, leading to a license plate statute that prohibited using bolts to attach plates to vehicles. This, quite clearly, is an absurd result. Because the line of reasoning adopted below and by the State terminate in absurdity, it cannot be adopted. Provenzano, 32 N.J. at 322.

The interpretations of the statute by the trial and appellate courts in this case are textbook examples of literalism shutting out common sense. The construction adopted was an extreme position, infected with unacknowledged consequences, wholly at odds with a commonsense appraisal of the Legislature's intent. Moreover, it adopts a standard that not even police departments follow. When simple reason is brought to bear, it becomes clear that the courts below not only erred procedurally by failing to accord common sense any weight but, as a result of that omission, came to a substantively wrong conclusion. Instead, the common-sense conclusion that N.J.S.A.

39:3-33 does not apply to cosmetic slogans allow reason to triumph over rigid literalism, thereby effectuating the Legislature's intent.

C. Because the License Plate Frame In This Case Did Not Violate the Correctly-Construed N.J.S.A. 39:3-33, the Stop Was Unconstitutional and Its Fruits Must Be Suppressed.

In construing a statute, legislative purpose, statutory context, and purposivism are not optional considerations. When read in the appropriate context and with the appropriate dose of common sense, the Legislature can only have intended the relevant section of N.J.S.A. 39:3-33 to apply to license plate numbers, not cosmetic advertising material. Such a construction comports with the purpose of the law, is consonant with the related statutory provisions, precludes internal inconsistency, can be applied evenly, and avoids absurd results.

All parties agree that the license plate frame in this case did not infringe in the slightest upon the vehicle's registration number. (Pa at 5). Because the license plate frame did not violate N.J.S.A. 39:3-33, no law was being broken and, as such, the stop of the vehicle was not supported by reasonable suspicion. State v. Locurto, 157 N.J. 463, 468 (1999). As a result, the seizure of Mr. Carter, his passengers, and their vehicle was unconstitutional, and the evidence recovered as a result must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963); Bacome, 228 N.J. at 103.

POINT II

BECAUSE THE CAPACIOUS, EXAGERATED INTERPRETATION URGED BY THE STATE RISKS VIOLATING DUE PROCESS, EQUAL PROTECTION, AND FREE SPEECH RIGHTS, THE CANON OF CONSTITUTIONAL AVOIDANCE COMPELLS A NARROWER CONSTRUCTION.

Even if the basic text and context discussed above were not sufficient to compel reversal, the application of a cardinal rule of statutory construction – the doctrine of constitutional avoidance – would produce the same result. The doctrine specifies that when presented with two alternative statutory interpretations, one of which has the potential to create constitutional violations, the other will be adopted so long as it is colorable. State v. Johnson, 166 N.J. 523, 540 (2001); Silverman v. Berkson, 141 N.J. 412, 417 (1995); accord Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988). This is such a case. The interpretation adopted below risks unconstitutionality because of its overbreadth, the poor fit between its means and its ends, the inequitable pattern of enforcement to which it is prone, and its infringement upon the right to free speech, contrary severally to U.S. Const. amends. I, V, and XIV, and N.J. Const. art. 1, paras. 1, 6, and 7. Since the court is presented with a readily available and wholly reasonable alternative in the

interpretation advanced by Mr. Carter and amici, the doctrine of constitutional avoidance compels that it be adopted.

A. Where One Statutory Construction Would Imperil the Constitutionality of a Statute, the Canon of Constitutional Avoidance Precludes Its Adoption.

Both this Court and its federal counterpart have long mandated that "[u]nless compelled to do otherwise, courts seek to avoid a statutory interpretation that might give rise to serious constitutional questions." Silverman, 141 N.J. at 417; see also Edward J. DeBartolo Corp., 485 U.S. at 575 (tracing the doctrine as far back as Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804) and collecting numerous accordant cases); Right to Choose v. Byrne, 91 N.J. 287, 311 (1982); State Bd. of Higher Ed. V. Bd. of Dir. Of Shelton College, 90 N.J. 470, 478 (1982). As a result, when "an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." Edward J. DeBartolo Corp., 485 U.S. at 575 (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)); Johnson, 166 N.J. at 540.

The constitutional avoidance doctrine is an expedient tool by which the interests of substantive justice and judicial economy are advanced. But it is more than that: it is a recognition that the legislature, "like [the] Court, is bound by

and swears an oath to uphold the Constitution," and should not be presumed to have intended unconstitutional results. Edward J. DeBartolo Corp., 485 U.S. at 575. Thus, "the power and obligation inherent in this State's constitutional doubt doctrine 'begins with the assumption that the legislature intended to act in a constitutional manner.'" Right to Choose, 91 N.J. at 311. It is a simple syllogism: "A court's responsibility 'is to give effect to the intent of the Legislature." Harper, 229 N.J. at 237 (quoting State v. Morrison, 227 N.J. 295, 308 (2016)). Any legislature operating in good faith "would want [the court] to construe the statute in a way that conforms to the constitution." State v. Pomianek, 221 N.J. 66, 91 (2015) (citation omitted). Therefore, the constitutional interpretation is the one which the Legislature must have intended. The harmonious cooperation between the coequal branches of government requires no less.

Because of theese critical underlying concerns, the doctrine is liberally applied. First, it will apply not only when the constitutional defect in a proposed reading is clear, but whenever it is vulnerable to meaningful doubt. As this Court explained, constitutional avoidance will preclude any interpretation which, if adopted, would "give rise to serious constitutional questions." Johnson, 166 N.J. at 540 (citing Silverman, 141 N.J. 412). Thus, it must be invoked "so as to

avoid not only the conclusion that [the statute] is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); Edward J. Bartolo Corp., 485 U.S. at 575 (same).

Second, it applies not only as a tiebreaker when two possible interpretations are in equipoise. Where one interpretation would raise constitutional questions, any "fairly possible" interpretation which will save the bulk of the statute must be adopted. Jin Fuey Moy, 241 U.S. at 401. Indeed, "the elementary rule is that every reasonable construction must be resorted to, in order to save the statute from unconstitutionality." Hooper v. California, 115 U.S. 648, 657 (1895). In this way, a constitutional interpretation will triumph over an unconstitutional one – even if the latter is otherwise more compelling – so long as the constitutional interpretation yields a reasonable conclusion.

B. The Construction Advanced By the State Raises Serious and Diverse Constitutional Concerns.

The interpretation adopted below poses precisely the kinds of dangers against which the doctrine of constitutional avoidance was designed to guard. First, such a statute would be wildly overbroad, imperiling due process rights. Second, the ubiquity of potential violators paired with an as-yet intractable pattern of racially discriminatory enforcement

raises serious equal protection concerns. Third, the compelled display of the State's advertising slogan would abridge free speech rights. While any one would be sufficient to bring the constitutional avoidance doctrine into play, the three together leave no doubt that it must be applied.

1. The Overbreadth of the Statue as Construed by the State Would Allow and, Indeed, Necessitate Arbitrary and Capricious Enforcement.

When a statute stretches wide and prohibits a particularly common behavior, it not only permits but necessitates arbitrary or selective enforcement. It is simply a matter of numbers: If an unlawful behavior is common, the number of violations will far exceed the possible number of enforcement actions. As a result, individual officers must pick and choose among a panoply of New Jerseyans to seize and have the option to exercise that vast discretion in an arbitrary and discriminatory way. The constitution abhors such a result.

Indeed, as early as 1876, the Court advised that: "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to" police, prosecutors, or even courts to take their pick of possible enforcement-targets. United States v. Reese, 92 U.S. 214, 221 (1876). Yet despite this warning, courts from state trial to United States Supreme, are constantly called upon to beat back such legislation. In 1948, Justice Frankfurter, discussing an

unconstitutional New Jersey vagrancy law, observed that the law was written "so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although [otherwise] not chargeable with any particular offense." Winters v. New York, 333 U.S. 507, 540 (1948) (discussing a statute struck down in Lanzetta v. New Jersey, 306 U.S. 451 (1939)).

In Papachristou v. Jacksonville, the court struck down another statute for the same reason, observing that "the net cast is large…to increase the arsenal of police". 405 U.S. 156, 166 (1972). Such broad laws, the Court held, impermissibly "encourage[] arbitrary and erratic arrests and convictions." Id. at 161 (citing Thornhill v. Alabama, 310 U.S. 88 (1940), then citing Herndon v. Lowry, 301 U.S. 242 (1937)). In 1999, the Court held yet again that an ordinance that "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat," permits of arbitrary and discriminatory enforcement and thus is unconstitutional on its face. City of Chicago v. Morales, 527 U.S. 41, 60 (1999) (quoting in part Kolender v. Lawson, 461 U.S. 352, 58 (1983)).

If N.J.S.A. 39:3-33 is construed to prohibit obstruction of "Garden State," this Court will be fighting that battle again. The hypothetically-construed N.J.S.A. 39:3-33 is exceptionally broad: its sweep is wide, gathering up an enormous portion of

New Jersey drivers. Such a statute, authorizing the roadside seizure of innumerable travelers for the most trivial and inconsequential violations, would plainly force officers to pick and choose when and against whom to enforce the statute. The result would be a law that not only permitted but in fact encouraged arbitrary enforcement. Put another way: when you're handed a wide net, you go on a fishing expedition.

That minor Title 39 violations will be used as a pretext for traffic stops is not a matter of speculation. Indeed, even the Attorney General's own Eradicating Racial Profiling Companion Guide (hereinafter "AG Guide") recommends several ways in which an officer who "fortuitously observe[s] a very minor Title 39 violation" may lawfully effectuate a "pretext stop," "even though th[e] infraction is so minor that ordinarily, [the officer] would not bother to stop a vehicle." AG Guide, p. 104-06.[15] While pretextual stops are not unconstitutional on their own, State v. Dickey, 152 N.J. 468, 475 (1998), a statute which is so broad that its primary use is to enable pretextual stops runs afoul the constitution. Lanzetta, 306 U.S. 451.

[15] Eradicating Racial Profiling Companion Guide, Office of the Attorney General of New Jersey, available at https://www.nj.gov/oag/dcj/agguide/directives/racial-profiling/pdfs/ripcompanion-guide.pdf (last visited October 23, 2020). While the publication date of the AG Guide is not listed, it was authored by then- Assistant Attorney General Ronald Susswein and so at least pre-dates his 2016 investiture as a Superior Court judge.

The constitutional peril is compounded by the fact that the text of the statute is vague, as demonstrated by the confusion in the present case and the obvious public impression that frames that eclipse the words "Garden State" are not illegal. Vagueness in a statute "allows arbitrary and discriminatory enforcement of the laws." State v. Ramseur, 106 N.J. 123, 201 n.27 (1987) (citing severally Kolender, 461 U.S. at 357-58, Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983), and State v. Sharkey, 204 N.J. Super. 192, 199 (App. Div. 1985)). Where the statute is prone to multiple interpretations, it "may permit 'a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.'" Kolender, 461 U.S. 352, 358 (1983); see also United States v. Davis, 139 S. Ct. 2319, 2326 (2019) (warning that vague statutes put too much power in the hands of "relatively unaccountable police [and] prosecutors"). This kind of broad vagueness necessitates constant unguided judgment calls, provides plausible deniability against allegations of discriminatory enforcement, and all but guarantee uneven or unpredictable application.

The product of the interpretation adopted below would be the exact kind of statute that our jurisprudence has long warned about – a law totally unmoored from its original purpose and used instead as a convenient tool for policemen on the hunt for those they find "vaguely undesirable." Winters, 333 U.S. at 540.

Meanwhile, as discussed in Point I, the protection of cosmetic slogans would contribute little to the statute's actual and legitimate purpose of allowing police to ascertain "the status of the vehicle, and the status of the registered owner." Donis, 157 N.J. at 55. Over 140 years of consistent and clear precedent tell us that such a law could not stand.

2. Data Suggests Racially Disproportionate Enforcement Is Not Only a Possibility but a Reality.

Seldom is overbroad discretion more dangerous than in the case of racially disproportionate policing. It is painfully clear that at all levels of the criminal justice process, "systemic racism continues to contribute to disparate court experiences and outcomes." New Jersey Judiciary – Commitment to Eliminating Barriers to Equal Justice: Immediate Action Items and Ongoing Efforts, p. 1 (July 16, 2020) (hereinafter "Judiciary Commitment").[16] The problem starts at square one, with "decisions about arrests and prosecution... [T]hose early decision points affect the racial disparity that exists in New Jersey's jails where Black defendants still represent 55 percent of the jail population." Judiciary Commitment, p. 7. Car stops are a stark example of such decision points.

16 https://www.njcourts.gov/public/assets/supremecoutactionplan.pdf (last visited October 23, 2020)

Our courts have long acted as the grim chroniclers of the overlap between vehicle stops and racial profiling. E.g., Estate of Oliva v. N.J. Dep't of Law and Pub. Safety, Div. of State Police, 604 F.3d 788, 791-92 (3d Cir. 2010) (detailing how a New Jersey police officer was trained and required to "engage in racial profiling of motorists when making traffic stops"); Watson v. Abington Twp., 478 F.3d 144, 149-50 (3d Cir. 2007) (noting an officer's testimony that "it was 'common knowledge' that racial profiling in traffic stops was an easy way for an officer to increase the number of traffic tickets he issued"); Patterson v. Bd. of Trustees, State Police Ret. Sys., 194 N.J. 29, 36-38 (2008) (describing a black officer's observations of years of racist violence, intimidation, and policing tactics used by fellow officers); State v. Segars, 172 N.J. 481 (2002) (reversing defendant's conviction for driving with a suspended license where the officer's otherwise-discretionary choice to look up his license plate was motivated by race); State v. Carty, 170 N.J. 632, 646 (2002) (explaining the radically uneven rates of consent search requests); State v. Ballard, 331 N.J. Super. 529 (App. Div. 2000); State v. Kennedy, 247 N.J. Super. 21 (App. Div. 1991); State v. Soto, 324 N.J. Super. 66 (Law Div. 1996).

The hateful specter of racism – both overt and covert – has not vanished from our police, our courts, or our prisons. "[I]t

is clear that racial disparities still exist in the justice system, from children of color in our foster care system who wait longer to be placed in permanent homes to the disproportionate incarceration of black men and women in our jails and prisons." Statement of the New Jersey Supreme Court, p. 1 (June 5, 2020).[17] Studies show, overwhelmingly, that traffic stops foster such disparities.

For example, a 10-year, 50-state survey comprising nearly 100 million traffic stops published this year demonstrated that "decisions about whom to stop and, subsequently, whom to search are biased against black and Hispanic Drivers". Emma Pierson et al., A Large Scale Analysis of Racial Disparities in Police Stops Across the United States, 4 Nat. Hum. Behav. 736 (2020) (concluding, based on data collected across 10 years, 50 states, and nearly 1 million stops, that "); Derek A. Epp. et al., Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race, (Cambridge Univ. Press, 2018); Frank R. Baumgartner et al., Racial Disparities in Traffic Stop Outcomes, 9 Duke Forum L. & Social Change 21 (2017) (explaining that stops of black and Hispanic drivers are more likely to be escalated to searches etc.).

[17] https://njcourts.gov/pressrel/2020/pr060520a.pdf?c=zRp (last visited October 23, 2020)

Sadly, N.J.S.A. 39:3-33 has become a part of this pattern. As explained in Mr. Carter's January 27, 2020 letter to the Court, an Office of Law Enforcement Professional Standards ("OLEPS") report cataloging over 299,000 traffic stops shows that the statute is being used to pull over black drivers (like Mr. Carter) and non-white drivers in general far more than their white counterparts. (DSa at 5, "Table 1"; see also DSa at 4 for methodology). In summary: According to the Department of Labor, in 2016, approximately 74% of New Jerseyans were white, 26% were non-white, and 15% were black. According to OLEPS, only 59% of State Police car stops that year targeted white drivers (20% lower than would be expected based on state demographics), while 41% involved non-white drivers (57% higher than expected) and 20% targeted black drivers (29% higher than expected). The variance between population and stops was even more pronounced with respect to traffic stops for less dangerous "non-moving violations" (e.g., license plate violations or tinted windows as opposed to speeding or reckless driving), with only 57% targeting whites (23% lower than expected), 43% non-whites (66% higher than expected), and 24% blacks (55% higher than expected). The split was larger still when it came to N.J.S.A. 39:3-33 violations in particular with only 56% of stops targeting white drivers (25% less than expected), 44% targeting

non-white drivers (71% more than expected) and 25% targeting black drivers (63% more than expected).

The fact that the disparity is largest for non-moving violations, like violations of N.J.S.A. 39:3-33, is predictable. Stops can helpfully be divided into "safety stops" (for things like speeding, drunk driving, running red lights) and "investigatory stops," (ostensibly for things like equipment violations but often designed to give officers the opportunity to conduct unrelated investigations or searches). Charles R. Epp et al., Pulled Over 12-14 (John M. Conley & Lynn Mather eds, 2014); see also D.W. Miller, Poking Holes In The Theory Of "Broken Windows," The Chronicle Of Higher Educ., Feb. 9, 2001 (explaining that such "investigatory stops" have their roots in the widely-decried "broken windows" method of policing)[18] and AG Guide, supra n.11 at 104-06 (advising New Jersey authorities to use "minor traffic violations" as a pretext for investigation). Studies show that urgent "safety stops" have less racial difference and that discretionary "investigatory stops" have more. Id. This matches exactly the data provided by the New Jersey Police, which shows that while black drivers were stopped 29% higher than expected overall, they were stopped fully 55%

[18] Available at http://www.chronicle.com/article/Poking-Holes-in-the-Theoryof/13568 (last visited 9/26/2020)

higher than expected for non-moving violations, i.e., "investigatory stops". (DSa at 5).

New Jersey also matches national trends in that, once a vehicle is stopped, police are more likely to escalate the encounter if a black driver is involved. National surveys showing that once a vehicle is stopped, police "search black drivers at higher rates than they do whites, often dramatically higher." Baumgartner, at 26. Likewise, as detailed in the appended "Table 2," only 39% of cases where individuals are asked to exit the vehicle involve white drivers (48% below the rate expected based on population), while 61% involved non-white drivers (137% above the expected rate), and 39% involved black drivers (158% above the expected rate).

The same trend continues for arrests and charges. The most dramatic discrepancy involved obstruction charges, 31% of which (59% below the expected rate) were issued against whites, 69% were issued against non-whites (169% more than expected) and 52% were issued against blacks (fully 241% above the expected rate). Importantly, obstruction charges – unlike, for example, DWI, possession of a weapon, or possession of drug paraphernalia – arise *solely* from the interaction with police after a stop has taken place and do not depend on existing unlawful behavior.

In sum, the data shows that the exaggerated, unnecessarily-expansive interpretation of N.J.S.A. 39:3-33 and the arbitrary

"investigatory stops" that follow are among the means by which the racial disparity in our justice system propagates. If this Court endorsed the same interpretation, that effect will only grow. The result would be a system that inputs wholly "legal" stops and outputs systemic inequality. This Court has disapproved of precisely that outcome on a case-by-case basis, holding that even a search which is proper under the Fourth Amendment and Article 1, para. 7 may violate the Fourteenth Amendment and Article 1, para. 5 if undertaken on the basis of race. State v. Maryland, 167 N.J. 471, 484-84 (2001).

The statutory question at issue here presents all the same constitutional dangers but on a dramatically larger scale. By adopting a construction that focuses on ensuring that registration numbers – not cosmetic slogans – are clear, this Court can dramatically cabin the number of unknowing, harmless "violators" and, by extension, relieve officers of the need to enforce purely based on arbitrary discretion. Put another way, N.J.S.A. 39:3-33 can be withdrawn from the often-abused "investigatory stop" category and moved toward the more equitably enforced "safety stop" category. In so doing, the Court would save uncounted thousands of black and brown drivers from stops that they would not have undergone but for their race. Such constitutional violations are difficult to detect, prove, and remedy on the individual level, but can be

preemptively averted by adopting the wholly reasonable, moderate construction proffered by the defense.

3. A Statute That Forces Drivers to Display the State's Advertising Slogan Would Violate the First Amendment and Article 1, Para. 6.

Beyond the constitutional concerns surrounding the modes of enforcement, a law that mandated the display of the "Garden State" slogan would run headlong into the right to free speech protected by the First Amendment to the United States Constitution and Article 1, paragraph 6 of the New Jersey Constitution. Wooley v. Maynard, 430 U.S. 705, 714 (1977) (holding that a New Hampshire law that prohibited covering the state motto imprinted on license plates violated the constitution); Amusement Ctr. V. Verniero, 156 N.J. 254, 264 (1998) (explaining that the interpretation of Article 1, para. 6 is guided by analogous federal principles").

In Wooley, the Court dealt with a New Hampshire statute that forbade the obscuring of "the figures or letters on any number plate." 430 U.S. at 707 (quoting N.H. Rev. Stat. Ann. 262:27-c (Supp. 1975)). New Hampshire courts interpreted the statute to include the state motto, "Live Free or Die," printed on the bottom of the plate. Ibid. (citing State v. Hoskin, 295 A.2d 454 (N.H. 1972)). George Maynard, who objected to displaying the sentiment, covered the motto so it would not be

visible, and was thereafter issued multiple citations. Id. at 707-08.

The Court, called upon to review the statute, explained that the statute "in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message - or suffer a penalty." Id. at 715. Because the license plate was affixed to a personal vehicle, it would be associated with Maynard. Id. at 715, 717 n.15. Because automobiles are "a virtual necessity for most Americans," the statute amounted to compulsion. Id. at 712, 715. This, the Court explained, constituted coerced speech and implicated the First Amendment. Id. at 716.

In response, the State offered competing interests: "(1) facilitat[ing] the identification of passenger vehicles, and (2) promot[ing] appreciation of history, individualism, and state pride." Id. at 716. The Court expressed skepticism about the motto's ability to meaningfully advance the first interest but held that even if it could, the law would be far too wide to survive constitutional scrutiny. "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." Id. at 716-17 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). As to the second, the Court explained that the State's interest in "communicating to others an official view as to the proper appreciation of

history, state pride, and individualism" can never outweigh "an individual's First Amendment right to avoid becoming the courier for such message." Id. at 717.

In sum, the Court concluded, "the State...may not require [citizens] to display the state motto upon their vehicles license plates." Id. at 717. In explicit response to this holding, at least two State courts made a point of construing their cognate statutes narrowly, holding that the statutes could only require the display of the identifying registration number – not the accompanying slogan. Ortiz v. State, 749 P.2d 80, 82 (N.M. 1988) (explaining that a driver must be permitted to obscure New Mexico's slogan, "Land of Enchantment"); Berube v. Secretary of State, No. CV-82-435, 1983 Me. Super. LEXIS 238 (Me. Super. Ct. Dec. 5, 1983) (explaining the same for Maine's "Vacationland" slogan). None appear to have diverged.

The conclusion that the statute in Wooley (and, by analog, the exaggerated interpretation proposed in this case) violate the right to free speech follows effortlessly from the axiom that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." Wooley, 430 U.S. at 714. Because freedom of speech entails freedom of silence as well, compelled speech is as offensive to the constitution as prohibited speech. E.g., W.V. State Bd. Of Educ.

V. Barnetts, 319 U.S. 624 (1943) (holding that compelling children to recite the pledge of allegiance was unconstitutional); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (finding the same where a newspaper was required to afford space to political candidates).

It is no defense that the slogan "Garden State" (like New Mexico's "Land of Enchantment" or Maine's "Vacationland") may be a less bold slogan than "Live Free or Die." Ortiz, 749 P.2d at 82; Berube, 1983 Ne, Super. LEXIS 238. As the Wooley court explained, whether the motto is objectionable to most people "is not the test." 430 U.S. at 715. Rather, what matters is that the state is compelling private citizens to speak its own message, thus restricting his freedom of speech. Such is the case here.

The "mobile billboard" language in Wooley is particularly apt in this case since "Garden State" is, in essence, an advertisement designed to promote New Jersey generally and our agriculture generally. 430 U.S. at 715. The act of being forced to advertise implicates the first amendment. Indeed, even under the substantially less protective commercial speech standard, forced advertising has been held to be unconstitutional compelled speech. United States v. United Foods, 533 U.S. 405 (2001) (holding that mushroom producers could not be compelled to contribute to the government's "generic advertising to promote mushroom sales"). Further, the government in Wooley

described its goals in functionally identical terms: promoting "state pride" and "appreciation of history". 430 U.S. at 716. Thus, the issue here cannot be distinguished based on the content of the slogan.

Moreover, even if speech was required to have some sort of somber political quality to merit protection, it is a wholly reasonable political stance to resist displaying a government's advertising motto, no matter how anodyne it might seem. The State has chosen the slogan "Garden State" as its emblem. By covering the emblem, one may express their disagreement with and even disdain for a state or its policies. The protection of such critical expression was an original aim of the First Amendment and remains among its most sacred. Texas v. Johnson, 491 U.S. 397, 413-420 (1989); Street v. New York, 394 U.S. 576, 593 (1969); Barnette, 219 U.S. at 642; see also Saenz v. Playboy Enterprises, Inc., 653 F.Supp. 552, 555 (N.D. Ill. 1987) ("[T]he First Amendment is on the side of the critic of the government.").

Likewise, the ability to pay for a license plate with a different slogan than "Garden State" does not cure the injury. See N.J.S.A. 39:3-33.4; 39:3-33.10 (authorizing fees). First, a citizen cannot compel the state to issue a plate with the message of his choosing and is confined to speech of which the State approves. Walker v. Tex. Div. Sons of Confederate

Veterans, Inc., 570 U.S. 200 (2015). Second, numerous individuals are deprived of the opportunity to obtain alternative plates as a result of infractions as trivial as failure to pay a parking ticket, leaving them without this alternative. N.J.S.A. 39:3-33.5(c). More importantly, it has been long recognized that freedom of speech for which one must pre-pay is no freedom at all. E.g., Thomas v. Collins, 323 U.S. 516 (1945) (holding that requiring union organizer to pay for a permit before addressing an assembly was an unconstitutional violation of the right to free speech); Moffett v. Killian, 360 F. Supp. 228 (D. Conn. 1973) (finding the same in the context of lobbying).

Additionally, as the Wooley court explained, the act of obtrusively covering the State's motto may be the very political speech in which an individual intends to engage. 430 U.S. at 713 n.10 (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974) then citing United States v. O'Brien, 391 U.S. 367, 376 (1968)). Covering a slogan communicates criticism in a way that opting for different plate design does not. In such a case, issuance of alternative plates, even at no cost, would not cure the abridgment of speech. Ibid.

Thus, the State's proposed statute would imperil not only the rights to due process and equal protection, but to free

speech as well – a trifecta of violations which the Constitution will not tolerate.

C. The Defendant's Construction Eliminates These Dangers, Avoids Imputing Unconstitutional Intent on the Legislature, and Rescues the Statute from Potential Invalidation.

Because of its breadth, the iniquitous pattern of enforcement to which it is prone, and its infringement on protected speech the constitutionality of the State's proposed statute is dubious – at best. If it were codified, courts would inevitably be called upon to review its validity under the State and Federal Constitutions alike. But the Court need not put itself in such a position.

The moderate, context-conscious and carefully-constructed interpretation that focuses on ensuring that identification numbers are visible eliminates these constitutional problems while preserving the bulk of the statute, thus effectuating the result the Legislature intended. All that would be lost is an unconstitutional hypothetical statute and the fishing expeditions which it would authorize.

When one proposed construction "of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." Edward J. DeBartolo Corp., 485 U.S. at 575; Johnson, 166 N.J. at 540. This case calls for such a procedure. The Court is presented with two

alternative interpretations, one whose constitutional validity is unassailable, the other in doubt. To avoid the "serious constitutional questions" that would otherwise arise, while simultaneously preserving the beating heart of the statute, this court must reject the State's exaggerated interpretation. Silverman, 141 N.J. at 417.

POINT III

BECAUSE A POLICE OFFICER'S MISTAKE OF LAW CANNOT ERASE THE VIOLATION OF INDIVIDUALS' CONSTITUTIONAL RIGHTS, THIS COURT SHOULD NOT DEPART FROM STATE V. SUTHERLAND[19] IN FAVOR OF THE MURKIER, LESS-PROTECTIVE, HEIEN V. NORTH CAROLINA[20] STANDARD.

For all the above-discussed reasons, the officer who stopped Mr. Carter did so based on an erroneous understanding of N.J.S.A. 39:3-33. As a result, Mr. Carter's constitutional rights were violated. This must be the end of the inquiry. While federal courts have adopted a "mistake of law" doctrine that excuses constitutional violations, such a doctrine is wholly incompatible with New Jersey's jurisprudence. As it always has, the Court's interpretation of the law should win out and a mistake, even a good faith one, should not trump our citizens' constitutional rights.

In Heien v. North Carolina, the court adopted the "mistake of law" doctrine, allowing officers to stop and search suspects based on their own understanding of the law, regardless of its accuracy. 135 S. Ct. 530 (2014). Despite their similarities, federal law and New Jersey are not identical and Article 1, para. 7 is not the Fourth Amendment. See William J. Brennan, State Constitutions and the Protection of Individual Rights, 90

[19] State v. Sutherland, 231 N.J. 429 (2018).
[20] Heien v. North Carolina, 135 S. Ct. 531 (2014).

Harv. L. Rev. 489, 491 (1977) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law"). As this Court put it in State v. Hempele:

> [While Federal jurisprudence] may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.

120 N.J. 182, 196 (1990). Importantly, in its role as constitutional helmsman, this Court has long recognized the dangers surrounding errors made by law enforcement.

For example, unlike its federal counterpart, New Jersey jurisprudence does not penalize its citizens when an officer's mistake, though made in good faith, inserts errors in probable cause affidavits. Compare United State v. Leon, 468 U.S. 897, 926 (1984) (adopting the good-faith exception), with State v. Novembrino, 105 N.J. 95, 157-58 (1987) (roundly rejecting the same). Likewise, in two recent cases, this Court held that an officer's unreasonable – though honest – mistake of law cannot provide reasonable suspicion to justify a motor vehicle stop.

See State v. Sutherland, 231 N.J. 429, 432 (2018); Scriven, 226 N.J. at 36. As the Appellate Division has remarked, this is the only safe path: "[I]f officers were permitted to stop vehicles where it is objectively determined that there is no legal basis for their action, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive." State v. Puzio, 379 N.J. Super. 378, 384 (App. Div. 2005). "Simply put," such a stop "is not a good stop." Sutherland, 231 N.J. at 445.

The same should apply regardless of how understandable an officer's mistake of law might seem. Since the advent of Heien, the weakness and inadvisability of the "mistake of law" doctrine has been extensively discussed in the legal academy. Scholars note the schism between Heien and existing jurisprudence, including "the basic precepts of the rule of law." Richard H. McAdams, Close Enough For Government Work? *Heien*'s Less-Than-Reasonable Mistake of The Rule of Law, 2015 Sup. Ct. Rev. 147, 188 (2015). Sources severally note the likelihood that the reasonable mistake of law doctrine will lead to more pretextual traffic stops, undermine police-community relationships, and make citizens responsible for officers' ignorance and misapprehensions. Kit Kinports, *Heien*'s Mistake Of Law, 68 Ala. L. Rev. 121 (2016); George M. Dery III & Jacklyn R. Vasquez, Why Should an "Innocent Citizen" Shoulder the Burden of an Officer's

Mistake of Law? *Heien v. North Carolina* Tells Police to Detain First and Learn the Law Later, 20 Berkeley J. Crim. L. 301 (2015). Likewise, they illuminate the concern with what precisely will constitute a "reasonable mistake" and whether the doctrine will come into force whenever ambiguity exists on the face of the law. Karen McDonald Henning, "Reasonable" Police Mistakes: Fourth Amendment Claims And The "Good Faith" Exception After *Heien*, 90 St. John's L. Rev. 271 (2016); see also Eang L. Ngov, Police Ignorance and Mistake of Law Under the Fourth Amendment, 14 Stan. J. C.R. & C.L. 165 (2018); Note: The Supreme Court's Mistake On Law Enforcement Mistake Of Law: Why States Should Not Adopt *Heien v. North Carolina*, 6 Wake Forest J. L. & Pol'y 503 (2016) (same); Note: When The Police Get The Law Wrong: How *Heien v. North Carolina* Further Erodes The Fourth Amendment, 49 Loy. L.A. L. Rev. 297 (2016) (same); Note: The War Against Ourselves: *Heien v. North Carolina*, the War on Drugs, and Police Militarization, 70 U. Miami L. Rev. 615 (2016) (criticizing impact of *Heien*); Note: Do You Know Why I Stopped You?: The Future Of Traffic Stops In A Post-*Heien* World, 47 Conn. L. Rev. 1075 (2015) (same).

The same is true of at least two state courts, which have explicitly declined to take up Heien. In State v. Pettit, Idaho evaluated whether to adopt the Heien standard. 406 P.3d 370 (Idaho 2017) (review denied). It noted that (like New Jersey),

Idaho's interpretation of its own constitution[21] diverged from the Supreme Court's interpretation of the federal constitution in that Idaho increased search and seizure protections afforded to its citizens. Id. at 375. Particularly, it noted that, like New Jersey, Idaho rejects the "good faith" exception to the exclusionary rule in other contexts – like the warrant requirement. Ibid.; see State v. Guzman, 842 P.2d 660 (1992) (analogizing to Novembrino, 105 N.J. 95). It reasoned that its state constitution could likewise not brook the "mistake of law" doctrine and "decline[d] to follow Heien." Id. at 375; see also, State v. Carson, 404 P.3d 1017, 1019 n.2 (Or. Ct. App. 2017) ("declin[ing] the state's invitation" to adopt the Heien standard" for similar state-constitutional reasons).

Even courts following Heien have slowly rolled back its most sweeping position. See Sutherland, 231 N.J. at 441-42 (citing cases from Arizona, Indiana, North Dakota, and, notably, North Carolina – the state court which had been overturned in Heien – which likewise rely on the Supreme Court concurrence instead of majority). Indeed, Justice Kagan concurred in Heien to emphasize that the holding should be read as limited: that only "objectively reasonable" mistakes of law should be tolerated, and that this standard was an unforgiving one. 135 S.

[21] Idaho's Article 1, § 17 is identical both to New Jersey's Article 1, ¶ 7 and the federal Fourth Amendment.

Ct. at 540-41 (Kagan, J., concurring). The concurrence makes clear that only where the statute is truly confounding (a "vexata questio") and it requires significant and erudite labor to "overturn" the officer's interpretation is the exception available. Id. at 541. In sum, the concurrence emphasized that the analysis of Heien, requiring the decoupling of a complicated statute with both modern and archaic language, comparison of ancillary statutory provisions, and the partial endorsement and partial dismissal of the officer's interpretation, represented a corner case. Id. at 541-42; see also, Sutherland, 231 N.J. at 441-42 (acknowledging the same).

Tellingly, the courts that have either been bound or have chosen to follow Heien tend to quote the more modest concurrence in tempering the more sweeping, less protective majority. See, e.g., United States v. Lawrence, 675 Fed. Appx 1, 3 (1st Cir. 2017) (noting also the many authorities conflicting with the majority opinion); Scott v. Albuquerque, 711 Fed. Appx. 871, 877 (10th Cir. 2017); Flint v. Milwaukee, 91 F. Supp. 3d 1032, 1057 (E.D. Wisc. 2015) (citing the concurrence for the position that there are "condition[s] precedent to even asserting" the mistake of law exception); People v. Burnett, 432 P.3d 617, 621 (Co. 2019); State v. Hurley, 117 A.3d 433, 441 (Vt. 2015); State v. Houghton, 868 N.W.2d 143, 158 (Wisc. 2015). This evinces the same leeriness shown by courts that rejected the doctrine and

likewise counsels against its adoption; where even its adopters apply it grudgingly, this Court would be wise to avoid it altogether.

The chilly reception that Heien has received makes sense in light of the danger it poses to the efficacy of the exclusionary rule. As this Court put it in State v. Johnson, "the purpose of the exclusionary rule is to deter police misconduct and to preserve the integrity of the courts." 118 N.J. 639, 651 (1990). The Rule should thus be applied wherever it can serve that purpose. Cases involving a putative mistake of law fit the bill because mistakes of law can be deterred: laws can be studied ahead of time, trainings can be provided, officers can be encouraged to be precise. Conversely, the mistake of law doctrine actively disincentivizes knowledge of the law; if an officer can offer a colorable, good-faith, though self-serving interpretation, his stop will be blessed. If he has studied and knows that his interpretation is not correct, he cannot claim a "good-faith mistake." He is therefore better positioned not knowing the true meaning of the law, thereby allowing himself to transgress and, as the trial court found was the case here, effectuate a wholly pretextual stop. (4T at 26-7 to 8); George M. Dery III & Jacklyn R. Vasquez, Why Should an "Innocent Citizen" Shoulder the Burden of an Officer's Mistake of Law?

Heien v. North Carolina Tells Police to Detain First and Learn the Law Later, 20 Berkley J. Crim. L. 301 (2015)

This point can be helpfully illustrated by contrasting mistakes of law with the narrow carve-out our courts have adopted for mistakes of fact. In the latter context, where a mistake of fact is honest, "room must be allowed for some mistakes by police." State v. Handy, 206 N.J. 39, 54 (2011) (quoting Illinois v. Rodriguez, 497 U.S. 177, 186 (1980)); see also State v. Green, 318 N.J. Super. 346 (App. Div. 1999). The same is not true for mistakes of law. Sutherland, 231 N.J. 429; Scriven, 226 N.J. 20; Puzio, 379 N.J. Super. 33. This difference makes sense precisely because the exclusionary rule's deterrent purpose cannot be served in mistake-of-fact cases. For example, if an officer pulls over a driver for travelling alone in a carpool lane only to discover passengers asleep in the back seat, he has made a mistake of fact, which he could not have avoided by study or preparation ahead of time. If, conversely, he pulls over a car with three occupants under the mistaken belief that carpool lanes required four occupants, the error could have been averted by reviewing the relevant laws. This prophylactic behavior, which supports the efficient administration of our laws, is exactly the sort that exclusionary remedies are designed to promote. Johnson, 118 N.J. at 651.

The academy and the courts alike have recognized that Heien was a sea change, and one that did not serve to protect the interests of individuals. Prior to the upheaval brought about by that decision, every federal circuit and multiple states that had addressed the problem had found, appropriately, that an officer's mistake of law could not trump a citizen's rights. Heien, 135 S. Ct. at 530, 544 n.1 (Sotomayor, J., dissenting) (cataloging examples from the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits as well as Florida, Iowa, Kansas, Minnesota and Montana). New Jersey has even more reason to reject the doctrine, which is squarely incompatible with our search and seizure jurisprudence generally and with Novembrino, 105 N.J. 95, and Sutherland, 231 N.J. 429 specifically. Put simply: officers' good-faith mistakes are not excused in the fact-sensitive warrant context, they should not be excused in the context of legal interpretation. Given the incompatibility with Article 1 paragraph 7 jurisprudence, the threat it presents to New Jerseyans' constitutional rights, and the widely recognized inadvisability of the mistake of law doctrine, this court should not accept the state's invitation to tread on the rights that our citizens are guaranteed.

CONCLUSION

When all is said and done, the exaggerated interpretation of N.J.S.A. 39:3-33, which would mandate the display of the cosmetic "Garden State" slogan, does not hold water. It is inconsistent with the surrounding statute, contradicts clear indicia of legislative intent, and is an affront to simple common sense. The result is a proposed rule that is not only unrealistic but that is constitutionally dangerous as well. The interpretation proposed by defendant, which focuses on ensuring that a vehicle's registration number is visible, resolves each of these issues and does so by following the well-established rules of statutory interpretation.

Because the stop of Mr. Carter's vehicle was not premised on an actual statutory violation, the stop was illegal. In order to ensure that the rights guaranteed by Article 1, paragraph 7 remain inviolate, the fruits of the stop must be suppressed.

Respectfully submitted,

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Attorney for Defendant-Appellant

BY: /s/ *Joseph J. Russo*
JOSEPH J. RUSSO
Deputy Public Defender

Dated: November 25, 2020

SUPREME COURT OF NEW JERSEY
C-397 September Term 2019
083221

State of New Jersey,

Plaintiff-Respondent,

v.

O R D E R

Darius J. Carter, a/k/a
Buddah Buddah, and
Buddha J. Carter,

Defendant-Petitioner.

A petition for certification of the judgment in A-001295-17 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted; and it is further

ORDERED that the appellant may serve and file a supplemental brief on or before July 6, 2020, and respondent may serve and file a supplemental brief thirty (30) days after the filing of appellant's supplemental submission, or, if appellant declines to file such a submission, on or before August 5, 2020.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 19th day of May, 2020.

CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY

HEATHER JOY BAKER
CLERK

GAIL GRUNDITZ HANEY
DEPUTY CLERK

OFFICE OF THE CLERK
PO BOX 970
TRENTON, NEW JERSEY 08625-0970

December 6, 2019

Counsel on Attached List
Sent via email

Re: State v. Darius J. Carter (C-397-19; 083221)

Dear Counsel:

The Court is in receipt of defendant's petition for certification and the State's response brief thereto. The Court requests that you provide supplemental letter briefs stating your respective positions as to whether there exists a rational basis for the underlying statute (N.J.S.A. 39:3-33), which arguably would authorize a motor vehicle stop where the parties stipulate that the vehicle had a frame on the rear license plate that obstructed the words "Garden State," and further agree that the plate's registration letters and numbers were not covered. Please also address whether the law may authorize arbitrary and discriminatory enforcement.

Please serve and file your supplemental briefs on or before January 6, 2020.

Thank you,

Heather J Baker

Heather Joy Baker
Clerk

HJB/sb

c: All counsel of record

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Disproportionality of State Police Traffic Enforcement (2016)
Sources and Methodology

Sources

- **Population Data:** sourced from "Population Estimates by Sex, Race, and Hispanic Origin: April 2010 to July 1, 2018", Population & Household Estimates, New Jersey Department of Labor and Workforce Development. Available at https://www.nj.gov/labor/lpa/dmograph/est/nj_srh2018.xlsx
- **Enforcement Data:** sourced from "Fifteenth Aggregate Report of Traffic Enforcement Activates of New Jersey State Police," New Jersey Office of Law Enforcement Professional Standards. Available at https://www.nj.gov/oag/oleps/pdfs/OLEPS-2018-Fifteenth-Aggregate-Report_TEA_njsp.pdf

Methodology & Notation

- The column labeled "δ" (delta) for rows "White, Non-White, Black," describes the percent difference between the expected value based on population demographics and actual value.
- 2016 is used as the exemplar year because it is the last one for which OLEPS produced the "Aggregate Report of Traffic Enforcement Activities."
- The Department of Labor population data is self-identified and allows for individuals to identify as belong to one race or to two or more races. In 2016, approximately 2% of the population did so. The New Jersey State Police data underlying the OLEPS report does not identify individuals as multi-racial. Therefore, multiracial individuals are excluded from the population-wide data to eliminate confounding variables.
- While the Department of Labor data recognizes "Hispanic" as an ethnicity and not a race, it allows individuals to identify as Hispanic in addition to their race. It is unclear whether the State Police data underlying the OLEPS report allows for this. However, the report itself proceeds by considering "Hispanic" a race (i.e., reporting that of the individuals stopped, 59% were white, 20% black, 14% Hispanic, 6% Asian, 0% American Indian, and 1% other, adding up to 100%). Because the definitions for "Hispanic" clearly to not map onto each other, no attempt has been made to compare expected vs reported enforcement rates against Hispanics. Thus, the category "non-white" includes individuals designated by the State Police data as "Hispanic" and not as "white."
- It may be observed that the data for each successive phase is a subset of the prior phase (i.e., each non-white person stopped for a 39:3-33 violation is a constituent of the group of non-white people stopped for non-moving violations). This introduced some endogeneity. However, this is not a flaw in the calculations; rather, the tables are designed to show the multiplying effects of disproportionality. In any event, the fact that variance increases in each successive phase shows that additional disparities are added at every step, even once endogenous variables are accounted for.

Disproportionality of State Police Traffic Enforcement by Population (2016)

Table 1: Stops

	Population			Stops			Non-Moving Violations			39:3-33		
	Number	%	δ	Number	%	δ	Number	%	δ	Number	%	δ
Overall	8,682,950			299,596			62,033			4,613		
White	6,446,880	74%		178,173	59%	-20%	35,463	57%	-23%	2,580	56%	-25%
Non-White (Any)	2,236,070	26%		121,423	41%	57%	26,570	43%	66%	2,033	44%	71%
Black	1,325,075	15%		58,841	20%	29%	14,697	24%	55%	1,149	25%	63%

Table 2: Post-Stop Outcomes

	Vehicle Exits			Arrests			Charges			Obstruction Charges		
	Number	%	δ	Number	%	δ	Number	%	δ	Number	%	δ
Overall	11,605			13,895			16,733			6,693		
White	4,523	39%	-48%	5,098	37%	-51%	6,704	40%	-46%	2,049	31%	-59%
Non-White (Any)	7,082	61%	137%	8,797	63%	146%	10,029	60%	133%	4,644	69%	169%
Black	4,571	39%	158%	5,935	43%	180%	6,775	40%	165%	3,482	52%	241%


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