IN THE SUPREME COURT OF THE STATE OF VERMONT
Docket No. 2017-284

Gregory Zullo,
Appellant

v.

State of Vermont,
Appellee

Appeal from Vermont Superior Court, Civil Division, Rutland Unit
Docket No. 555-9-14 Rdcv

Brief of the Appellant

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STATEMENT OF THE CASE

On the afternoon of March 6, 2014, Gregory Zullo, an African-American Rutland native, was pulled over by a Vermont State Police Trooper because snow obscured the registration sticker on his rear license plate. Ruling on Mot. for Summ. J. 2 (May 9, 2017). As the trooper approached Mr. Zullo's vehicle, he claimed to detect the faint scent of burnt marijuana. *Id.* During questioning, Mr. Zullo gave no indication that he had used or possessed marijuana that day and refused to answer questions about where he was going. *Id.* In the front-seat area, the trooper observed an air freshener and a bottle of eye drops. *Id.*

The trooper ordered Mr. Zullo from his vehicle. Mr. Zullo consented to a search of his person, shoes, and wallet, revealing no evidence. *Id.*; Pl.'s Opp. to Def.'s Mot. for Summ. J. at Pl.'s Stmt. of Undisputed Facts ¶ 33 (Sept. 2, 2016) (undisputed in Def.'s Resp. to Pl.'s Stmt. of Undisputed Facts (July 21, 2016)). The trooper then stated an ultimatum: consent to a vehicle search or your car will be seized. Ruling on Mot. for Summ. J. 3. Mr. Zullo refused to consent and his vehicle was seized. *Id.* The trooper applied for and received a warrant to search Mr. Zullo's car. *Id.* The search revealed nothing criminal. *Id.*

Mr. Zullo walked and hitchhiked eight miles home. *Id.* At approximately 10 p.m., after Mr. Zullo paid a $150 tow fee, the State Police released his vehicle without citation. *Id.*

* * * * *

Mr. Zullo filed suit against the State, challenging his seizures under Article 11 of the Vermont Constitution. Compl. ¶¶ 75-78 (Sept. 12, 2014). The State moved to dismiss

Counts 2-4. Def.'s Mot. to Dismiss (Nov. 17, 2014). Dismissal was granted for Count 4. Decision on Mot. to Dismiss 8 (Mar. 10, 2015). After Mr. Zullo amended his complaint, the State moved for summary judgment, asserting that the vehicle search and each seizure were done in good faith and were supported by reasonable suspicion and probable cause. Ruling on Mot. for Summ. J. 1. Mr. Zullo cross-moved for summary judgment, asserting that the seizures were executed without reasonable suspicion or probable cause. *Id*. The superior court granted summary judgment to the State, denying Mr. Zullo's cross-motion. *Id*. at 22.

Mr. Zullo appeals the superior court rulings on Count 1 because an officer's mistake of law cannot justify a traffic stop, and Counts 2-4 because exit orders, vehicle seizures, and vehicle searches are unreasonable without evidence of an actual crime.

STANDARD OF REVIEW

The trial court's grant of summary judgment for the State, denial of summary judgment for Mr. Zullo, and dismissal of Mr. Zullo's Count 4 are reviewed by this court de novo, applying the same standards of review as the trial court. *Madowitz v. Woods at Killington Owners' Ass'n*, 2010 VT 37, ¶ 9; *Birchwood Land Co., Inc. v. Krizan*, 2015 VT 37, ¶ 6.

ARGUMENT

I. The State's Employee Violated Article 11 When He Stopped Mr. Zullo Without Suspicion of Any Violation

In *Heien v. North Carolina*, 135 S. Ct. 530 (2014), the U.S. Supreme Court ruled that an officer's reasonable mistake of law can provide the reasonable suspicion necessary for a traffic stop.

Along with the majority of courts to rule on the question pre-*Heien*,[1] the Vermont Supreme Court had never held that the constitution offered no protection against being stopped while committing no offense whatsoever based on a law enforcement officer's mistake of law, reasonable or otherwise. The State now invites this Court to change course, dramatically expanding Vermont officers' already-vast discretion by giving a constitutional stamp of approval to stops for conduct that violates no law. Because *Heien*'s new rule is fundamentally incompatible with Article 11, and because it would cause significant and unnecessary harms to Vermonters and to our system of law, the Court must decline the invitation.

A. Article 11 Is More Protective of Individual Rights Than the Fourth Amendment

Mr. Zullo's allegedly obscured registration sticker did not violate Vermont law at the time of the stop. The Legislature has since added a new provision to the motor vehicle code to require that the registration sticker be unobstructed, *see* 23 V.S.A. § 511(b) (effective July 1, 2014), but that was not the law when Trooper Hatch stopped Mr. Zullo. *See infra* Part I.E (explaining that § 511 did not address registration stickers

[1] *See Heien*, 135 S. Ct. at 544 & n.1 (Sotomayor, J., dissenting) (noting that five federal circuits and five states had held that "police mistakes of law are not a factor in the reasonableness inquiry," with only one circuit holding the opposite).

and that any belief to the contrary was unreasonable). The superior court nevertheless held that Mr. Zullo's constitutional rights were not violated when he was stopped for no reason other than that Trooper Hatch did not know the law he purported to enforce. The "constitutional imperative of requiring individualized, accountable decisionmaking for every governmental intrusion upon personal liberties" requires that this Court reverse. *State v. Sprague*, 2003 VT 20, ¶ 16.

Indeed, interpreting the very statute at issue here, this Court affirmed suppression of evidence without even asking whether an officer's mistaken interpretation of law was reasonable. *State v. Tuma*, 2013 VT 70. In *Tuma*, an officer stopped a driver whose license plate was one to two inches lower on one side than the other, believing that the fact that the plate was not level violated 23 V.S.A. § 511's requirement that license plates "shall be kept horizontal." *Id.* ¶ 1. The Court interpreted that requirement as being violated only "when the angle of the license makes it difficult for a person with normal vision to read it." *Id.* ¶ 14. Although this was a new interpretation of the statute, and although there was no dispute that the officer had acted in good faith, the Court nevertheless held that evidence resulting from the stop was properly suppressed.

Nothing in *Heien* supports departing from this Court's treatment of mistakes of law. As this Court has repeatedly held, Article 11, Vt. Const. ch. I, art. 11, is more protective of individual rights than the Fourth Amendment, U.S. Const. amend. IV. *See, e.g.*, *State v. Cunningham*, 2008 VT 43, ¶ 16 ("We have consistently held that Article 11 provides greater protections than its federal analog . . . ."); *State v. Bauder*, 2007 VT 16, ¶ 10 ("[W]e have also long held that our traditional Vermont values of privacy and individual freedom—embodied in Article 11—may require greater protection than that

afforded by the federal Constitution."); *see also State v. Jewett*, 146 Vt. 221 (1985) (stressing importance of independent analysis of state constitutional provisions, in particular Article 11, that may provide greater protections than their federal counterparts).

So, while the Fourth Amendment may allow warrantless, suspicionless DNA collection from certain arrestees, Article 11 does not permit the same for felony arraignees. *State v. Medina*, 2014 VT 69, ¶ 2 (rejecting *Maryland v. King*, 569 U.S. 435 (2013), based on Article 11's heightened standards and requirements rather than on distinctions between the two laws at issue). The Fourth Amendment may not require suppression of evidence obtained pursuant to a search warrant later determined to have been issued without probable cause, but Article 11 does. *State v. Oakes*, 157 Vt. 171 (1991) (rejecting the good-faith exception to the exclusionary rule articulated in *United States v. Leon*, 468 U.S. 897 (1984)). The Fourth Amendment permits warrantless searches of containers found in vehicles on probable cause, but Article 11 forbids them absent a heightened showing of exigent circumstances. *State v. Savva*, 159 Vt. 75, 87 (1992) (rejecting *California v. Acevedo*, 500 U.S. 565 (1991), and *United States v. Ross*, 456 U.S. 798 (1982)). And, as one last example particularly relevant to this case, *see infra* Part II.A, while the Fourth Amendment tolerates exit orders absent reasonable and particularized suspicion of criminal activity or risk to the officer, Article 11 does not. *Sprague*, 2003 VT 20, ¶ 16 (rejecting *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)); *State v. Caron*, 155 Vt. 192 (1990).[2]

[2] *See also Bauder*, 2007 VT 60, ¶ 20 (rejecting *New York v. Belton*, 453 U.S. 454 (1981), which allows warrantless search of car upon arrest of the driver without requiring showing of need to protect officer safety or preserve evidence); *Kirchoff*, 156 Vt. at 10 (rejecting per se rule that a person can never have a protected privacy interest in "open fields" announced in *Oliver v.*

Likewise, while *Heien* may pass Fourth Amendment muster, that does not answer the Article 11 question.

B. *Heien*'s New Rule Does Not Do Justice to Article 11's Core Values

When construing constitutional provisions, this Court's "duty is to discover and protect the core value that gave life to Article 11. In the case of Fourth Amendment–Article 11 jurisprudence, the value traditionally protected is freedom from unreasonable government in[]trusions into . . . legitimate expectations of privacy." *State v. Kirchoff*, 156 Vt. 1, 6 (1991) (citations and internal quotation marks omitted). When federal precedents "fail to do justice to the values underlying Article 11," *Savva*, 159 Vt. at 87 (citation and internal quotation marks omitted), the Court hasn't hesitated to reject them. A rule that says Article 11 is not offended by stops of law-abiding motorists based solely on an officer's failure to understand, and the legislature's failure to clearly draft, the law does not do justice to Article 11's core values.

In rejecting *Leon*'s good-faith exception to the exclusionary rule, this Court carefully considered, and flatly rejected, each of *Leon*'s supposed justifications for its departure from prior practice, finding that Article 11 required more. *Oakes*, 157 Vt. at 187-83. The *Oakes* Court noted, but found unpersuasive, *Leon*'s statement that the deterrent effect of the exclusionary rule would not be well served by penalizing an officer for objectively reasonable conduct. *Id.* at 18. That missed the point; the purpose of the exclusionary rule is not to "penalize" mistaken officers, but rather to "create[] an incentive for the police as an institution to train its officers to conform with the

United States, 466 U.S. 170, 179 (1984)); *State v. Neil*, 2008 VT 79, ¶¶ 8-10 (rejecting *United States v. Robinson*, 414 U.S. 218 (1973), which permitted full, warrantless search incident to arrest, regardless of exigency).

Constitution," an incentive that the good-faith exception would diminish. *Id.* at 180; *see also State v. Lussier*, 171 Vt. 19, 33 (2000) ("[W]e seek to provide an enforcement mechanism for constitutional rights that protect citizens against unlawful government intrusions. This Court's enforcement of those rights does no more disservice to law enforcement officers than the existence of the rights themselves."). Likewise, *Leon*'s rule may lead to less careful review of warrant applications by magistrates, who would know that their probable cause determinations would be shielded from subsequent review. *Oakes*, 157 Vt. at 181-82. And the lack of such review would hinder the development of the law, as, rather than determining whether there was adequate probable cause, reviewing courts would skip that part of the analysis in favor of holding that, even if probable cause were lacking, the officer was reasonable in relying on the magistrate's determination. *Id.* at 182-83 & n.13. This is most likely to happen exactly where clarification is needed most—in those close cases that present difficult questions. *Id.* at 182.

The *Heien* rule suffers all the same deficiencies, and more. Rejecting it is not about penalizing officers for their reasonable mistakes, but about promoting institutional compliance with Article 11's mandate. Law enforcement officers have less incentive to carefully study, and their employers have less incentive to carefully teach, the laws they are entrusted to enforce if their mistakes of law do not invalidate a stop. And *Heien*, like *Leon*, creates bad incentives for other governmental actors—in this case, legislators, who may consequently have less motivation to draft clear and unambiguous laws: "If the police misinterpretation is reasonable, then it is nearly inevitable that the legislature did a poor job of drafting the statute . . . but *Heien* allocates the loss not on the legislature or any part of government, but on the citizen who is stopped for being

suspected of something that is perfectly legal." Richard H. McAdams, *Close Enough for Government Work?* Heien*'s Less-than-Reasonable Mistake of the Rule of Law*, 2015 Sup. Ct. Rev. 147, 188-89. As we have already seen in *Heien*'s application, courts routinely decline to provide a definitive interpretation of ambiguous laws, holding only that the mistake, if any, was reasonable. *See, e.g.*, *State v. Dopslaf*, 356 P.3d 559, 563-64 (N.M. Ct. App. 2015) (declining to determine meaning of statute because it "would require extensive interpretation"); *Dowdy v. State*, 83 N.E.3d 755, 760-63 (Ind. Ct. App. 2017) (same); *Stadler v. State*, 353 P.3d 471, 2015 WL 4487059, at *5 (Kan. Ct. App. 2015) (unpublished table decision) (per curiam) (same); *see also Heien*, 135 S. Ct. at 544 (Sotomayor, J., dissenting) (predicting "perverse effect of preventing or delaying the clarification of the law. . . , [a result that] is bad for citizens, who need to know their rights and responsibilities, and it is bad for police, who would benefit from clearer direction").[3]

Perhaps most fundamentally, unlike *Leon*, which limited a judicially created remedy for Fourth Amendment violations,[4] *Heien* degrades the core protections of the right itself. And it does so in service of a less defensible type of error: *Leon* excuses an officer's mistaken-but-reasonable reliance on the probable-cause determination of a detached and neutral magistrate, while *Heien* excuses an officer's reliance on his own mistaken belief that entirely lawful conduct is unlawful. *See, e.g.*, *Commonwealth v.*

[3] The stultification of legal analysis is mirrored in qualified immunity analyses after the U.S. Supreme Court held that it was no longer necessary to first determine whether there was a constitutional violation and before determining whether the law establishing that violation, if any, was clearly established. *Pearson v. Callahan*, 555 U.S. 223 (2009), *overruling Saucier v. Katz*, 533 U.S. 194 (2001).

[4] *But see Oakes*, 157 Vt. At 173-75 (expressing skepticism about the U.S. Supreme Court's treatment of the exclusionary rule as a judicially created remedy to effectuate Fourth Amendment rights as opposed to a component of the right itself).

Censullo, 661 N.E. 2d 936, 939 (Mass. App. Ct. 1996) (rejecting argument that *Leon* should extend to officers' own mistakes of law because, "[u]nlike the *Leon* situation where the magistrate who issued the warrant acts as a buffer to protect an individual's Fourth Amendment rights, here there is no safeguard"). This Court should not allow a similar degradation of Article 11's protections.

C. Mistakes of Law are Fundamentally Distinct from Mistakes of Fact

Heien, without analysis, opined that there was "no reason" to treat police officers' mistakes of law differently from their mistakes of fact. 135 S. Ct. at 536. On the contrary, there are good reasons to distinguish them. The reasonable suspicion inquiry asks whether the facts, as the officer reasonably believed them to be, justified a belief that a crime was afoot. That inquiry requires those believed facts to be compared against a "fixed legal yardstick": the "actual state of the law. . . not an officer's conception of the rule of law, and not even an officer's reasonable misunderstanding about the law, but the law." *Heien*, 135 S. Ct. at 542 (Sotomayor, J., dissenting).

The mistake-of-fact doctrine is justified as a necessary accommodation to the fact that police officers often must make split-second assessments in rapidly evolving circumstances and "have the expertise to dra[w] inferences and mak[e] deductions . . . that might well elude an untrained person." *Id.* at 543 (citation and internal quotation marks omitted); *see also Brinegar v. United States*, 338 U.S. 160, 176 (1949) (because factual scenarios are often "more or less ambiguous" and officers must aggregate factual observations, make credibility assessments, and draw "conclusions of probability," there must be some leeway for error in assessing whether the officer reasonably suspects a crime); *Graham v. Connor*, 490 U.S. 386, 396-397 (1989).

But the law is not constantly changing and its interpretation requires no probabilistic assessment; on the contrary, "'the notion that the law is definite and knowable' sits at the foundation of our legal system."[5] *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991)). Officers need not arrive at legal conclusions on the scene because they have the opportunity and obligation to study the law in advance of enforcing it. In fact, for the law to have any practical meaning, for police or the general public, officers must know it before enforcing it.

Mistakes of law can also have considerably greater practical impacts than mistakes of fact. A mistake of fact will likely be cleared up quickly on the scene, at which point the officer must terminate the encounter absent reasonable cause to believe a different offense is afoot. *See State v. Alcide*, 2016 VT 4, ¶ 4; *Sprague*, 2003 VT 20, ¶ 17. But mistakes of law will likely not be cleared up until long after the officer terminates the stop, resulting in much greater incursions on Article 11's protections. Moreover, individuals will likely be more indignant about mistakes of law than fact, possibly leading to unnecessary and often dangerous confrontations, because citizens justifiably expect officers to know the laws they are enforcing. These greater impacts counsel against a rule that would disincentivize careful study of the law.

Because mistakes of law are categorically and practically distinguishable from mistakes of fact, this Court should continue to require that different rules apply to each.

[5] Indeed, criminal laws that are not sufficiently definite are unconstitutionally vague. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

D. *Heien*'s Rule Would Have Harmful Real-World Implications in Vermont

When departing from Fourth Amendment precedent, this Court has carefully considered the impact the federal rule, if adopted, would have on the people subjected to it. The Court "strive[s] to honor not merely the words but the underlying purposes of constitutional guarantees, and to give meaning to the text in light of contemporary experience." *Kirchoff*, 156 Vt. at 6. For example, in ruling that police cannot automatically give an exit order in any traffic stop, the Court rejected the *Mimms* Court's view that the additional intrusion of an exit order was minimal, noting a variety of circumstances in which an exit order would impose a significant burden. *Sprague*, 2003 VT 20, ¶ 18. Equally important, *Sprague* noted the risk of "arbitrary, if not discriminatory, enforcement" that would arise from a rule allowing exit orders without reasoned explanation. *Id.* ¶ 19.

In this light, consider the real-world implications of a rule that says Article 11 is not violated by stops of motorists violating no law. Police are already granted vast discretion to initiate traffic stops, but, as this Court has recognized, traffic stops are meaningful incursions on liberty. *See Lussier*, 171 Vt. 19, 34 n.2 (rejecting view that "allowing police to briefly detain and question motorists for any or no reason at all would not be an affront to the constitutional privacy rights of Vermonters because investigatory stops are not as intrusive as searches or seizures"). And *Heien* means that even perfect compliance with the law cannot insure against these stops and the trauma that sometimes accompanies them. "One wonders how a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so." *Heien*, 135 S. Ct. at 540 (Sotomayor, J., dissenting). Moreover, the *Heien* rule fosters disrespect for the rule of law and those

who enforce it; it strikes people as fundamentally unfair and wrong. *See* Wayne A. Logan, *Cutting Cops Too Much Slack*, 104 Geo. L.J. Online 87, 91 (2015) ("Allowing police officers, the public face and embodiment of the law, to flout the laws they enforce surely will do nothing to instill community confidence in the fairness and competence of police."). And, as amici NACDL et al. powerfully demonstrate, the *Heien* rule exacerbates existing problems of discriminatory enforcement by expanding the officer discretion that far too often has been exercised in racially disproportionate ways, and by turning a blind eye to the implicit and explicit biases that cause people to look at people of color and see criminal conduct where there is none. *See* Brief of NACDL et al. as Amicus Curiae in Support of Petitioner.

This Court should not sanction such outcomes.

* * * * *

The U.S. Supreme Court has already gone far in weakening the Fourth Amendment's protections,[6] but this Court has time after time rejected these precedents. "Vermont's Constitution protects the rights and liberties of its citizens independent of the ebb and flow of the United States Supreme Court's constitutional jurisprudence." *State v. Neil*, 2008 VT 79, ¶ 9. The *Heien* rule is a bad rule for Vermont and has no place in Article 11 jurisprudence; this Court should reject it.

[6] In this vein, consider Justice Ginsburg's recent statement that the "Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection," and suggesting a need to reexamine "the path we charted in *Whren v. United States,* 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), and follow-on opinions, holding that an arresting officer's state of mind . . . is irrelevant to the existence of probable cause." *District of Columbia v. Wesby*, ___ U.S. ___, 2018 WL 491521 (Jan. 22, 2018) (Ginsburg, J., concurring in the judgment in part).

E. Trooper Hatch's Mistake of Law Was Not Reasonable Under *Heien*

Even if the Court were to adopt a *Heien*-type analysis as a matter of Vermont constitutional law, Trooper Hatch's stop of Mr. Zullo nevertheless violated Article 11 because his mistaken understanding of § 511 was not reasonable. The *Heien* Court stressed that the reasonableness inquiry for mistake-of-law purposes "is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation." 135 S. Ct. at 539. In an important concurrence, Justice Kagan emphasized that a mistake of law will only be reasonable if "the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work." *Id.* at 541 (Kagan, J., concurring); *see also State v. Hurley*, 2015 VT 45, ¶ 20 (quoting this language in resolving Fourth Amendment claim). Thus, "the statute must pose a really difficult or very hard question of statutory interpretation"—and "such cases will be exceedingly rare." *Heien*, 135 S. Ct. at 541 (citations and internal quotation marks omitted).

At the time of the stop, Vermont law provided in relevant part: "The number plates shall be kept entirely unobscured, and the numerals and the letters thereon shall be plainly legible at all times." 23 V.S.A. § 511(a) (2013). Vermont law is clear that the "primary purpose of motor vehicle number plates is vehicle identification." 23 V.S.A. § 304(b)(2)(B). This Court has repeatedly noted the same.[7] *See Tuma*, 2013 VT 70, ¶ 12 (quoting § 304(b)(2)(B) in holding that a slightly tilted license plate did not violate § 511's requirement that license plates "shall be kept horizontal" so long as the angle is not so extreme as to render reading the plate—and thus identifying the vehicle—

[7] Even in the laxer qualified immunity context, officers are charged with knowledge of relevant, binding interpretations of law. *Cf. Heien*, 135 S. Ct. at 540 (noting that the law in question "had never been previously construed by North Carolina's appellate courts").

difficult); *Martin v. State*, 2003 VT 14, ¶ 43 (Johnson, J., dissenting) ("[T]he stated goal of Vermont in issuing vanity plates, and all license plates, is to aid in vehicle identification." (citing *Perry v. McDonald*, 280 F.3d 159, 167 (2d Cir. 2001))). Therefore, "Vermont cases involving § 511 to date have been cases where the improper placement or display of license plates has decreased visibility, and correspondingly made the vehicle more difficult to identify." *Tuma*, 2013 VT 70, ¶ 13. As Trooper Hatch acknowledged, from his patrol car, he had no difficulty reading the letters and numerals that allowed him to identify the vehicle. Hatch Dep. 78:3-8 and 136:7-11, Ex. C. to Pl.'s Opp. to Def.'s Mot. for Summ. J (Sept. 2, 2016).

In addition to the caselaw establishing that § 511 is violated only when the manner of the plate's display defeats the goal of vehicle identification, reading § 511 together with other sections of the motor vehicle code reinforces the point. Another section of the motor vehicle code provides that "[e]ither a taillamp or a separate lamp shall be so constructed and placed as to illuminate with a white light all parts of the rear registration number plate on the vehicle so that all the numerals, letters, and marks on the plate are clearly visible and legible for at least 50 feet from the rear of the vehicle." 23 V.S.A. § 1248(b). Here, "all the numerals, letters, and marks" cannot encompass the registration sticker because no amount of light would render the text on a tiny registration sticker visible and legible from a distance of fifty feet. In § 511, as in § 1248(b), the numerals and letters required to be visible and legible are those that are used to identify the car—what is commonly referred to as the license plate number.

Similarly, 23 V.S.A. § 304(d) specifies that vanity plates "shall be issued in any combination or succession of numerals and letters, provided the total of the numbers and letters on any plate taken together does not exceed seven." Because the text on a

registration sticker would cause the plate to far exceed the seven-character limit on numerals and letters, § 304(d) further reinforces that the motor vehicle code's references to "numerals and letters" refer only to those that compose the license plate number.

The plain language of § 511—on its face and when read together with other sections of Title 23—and cases interpreting it all point to only one reasonable interpretation: § 511 had nothing to say about Mr. Zullo's registration sticker. This is not one of those "exceedingly rare" cases requiring "hard interpretive work" to answer "a really difficult or very hard question of statutory interpretation," *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring). Trooper Hatch's mistake of law was unreasonable and the stop violated Mr. Zullo's Article 11 rights.

II. The State Violated Mr. Zullo's Article 11 Rights When Its Employee Ordered Him From, Seized, and Searched His Vehicle

A. The State's Employee Ordered Mr. Zullo From His Vehicle Without Reasonable Suspicion of a Presently Occurring Crime

1. The Exit-Order Exception to the Warrant Requirement Is "Jealously and Carefully Drawn" to Address Present Crime or Safety Concerns

Unlike the Fourth Amendment, Article 11 of the Vermont Constitution defines warrantless seizures as "presumptive[ly] unconstitutional[]," and the Vermont Supreme Court "does not depart from the standard lightly." *Medina*, 2014 VT 69, ¶¶ 13-14; *see* Vt. Const. ch. I, art. 11; *Cunningham*, 2008 VT 43, ¶ 16. Exceptions are "jealously and carefully drawn." *Savva*, 159 Vt. 75, 85 (1991); *Medina*, 2014 VT 69, ¶ 13.

Accordingly, the Vermont Supreme Court, rejecting *Mimms*, 434 U.S. at 111, held that Article 11 requires reasonable suspicion of a present crime or safety risk to justify vehicle exit orders. *See Caron*, 155 Vt. at 500-01. Like the *Mimms* dissent, this Court

believed that exit orders were a "further seizure" beyond a *Terry* stop, and therefore must at least satisfy the same suspicion standard as *Terry* stops. *Caron*, 155 Vt. at 500 (citing *State v. Jewett*, 148 Vt. 324, 330 (1987)). The exception is carefully drawn in recognition that exit orders are invasions of liberty. *Sprague*, 2003 VT 20, ¶ 16. And, although "reasonable suspicion requires something less than evidence sufficient to prove guilt by a preponderance of the evidence, [it] must be more than an inchoate and unparticularized suspicion or hunch.'" *State v. Sullivan*, 2013 VT 71, ¶ 18 (quoting *State v. Warner*, 172 Vt. 552, 554 (2001)).

The Court has further clarified the standards for determining reasonable suspicion, requiring that it be associated with a presently occurring crime. *Cunningham*, 2008 VT 43, ¶ 22 (requiring reasonable suspicion that "crime was afoot"); *State v. Winters*, 2015 VT 116, ¶ 14 (officers can extend stop with reasonable suspicion that "criminal activity is afoot"); *State v. Manning*, 2017 VT 124, ¶ 12 (if officer has reasonable suspicion that "criminal act is occurring," detention may be extended). Exit orders must always be "necessary to protect the officer's safety or to investigate a suspected crime." *Bauder*, 2007 VT 16, ¶ 11.

Vermont courts consistently invalidate exit orders absent evidence of safety risks or "indication[s] that [the] defendant was engaged in [a] criminal offense requiring further investigation." *Sprague*, 2003 VT 20, ¶ 22. For example, in *Sprague*, an officer had no more than vague safety concerns, no evidence of an occurring crime, and no apparent reason for the exit order. *Id.* ¶ 1. Therefore, the exit order violated Article 11. *Id.* Conversely, in *Caron*, when facts supported suspicion that two vehicle occupants committed a violent robbery, the exit order was justified. 155 Vt. at 500.

In this case, the State has never raised a safety justification for the exit order. Instead, it has argued that the "faint odor of burnt marijuana" provided objectively reasonable suspicion that Mr. Zullo was violating 18 V.S.A. § 4230 (a misdemeanor) or 18 V.S.A. § 4230a (a civil violation). Def.'s Summ. J. Reply 12-13 (Oct. 19, 2016). However, even if the "faint odor of burnt marijuana" provides a rational inference of marijuana's presence, this Court still cannot agree it simultaneously permits a rational inference of two fundamentally distinct offenses: a general civil violation (possessing an ounce or under, however minimal) and a specific crime (possessing more than one ounce)—especially given the impact of that distinction on Article 11 interests. As describe *infra*, Article 11 prohibits exit orders to investigate civil violations because it requires officers to articulate reasonable suspicion of an actual *crime*. And, in this case, because the trooper did not have reasonable suspicion of a § 4230 crime and could not constitutionally make an exit order to investigate a § 4230a civil violation, the exit order violated Article 11.

2. The State's Employee Did Not Have Sufficient Articulable Facts to Reasonably Believe Mr. Zullo Had Committed a Crime

Accepting the State's assertions,[8] and considering the totality of the circumstances, there were no articulable facts indicating that Mr. Zullo possessed more than one ounce of marijuana, violating § 4230. According to the State, the trooper detected the faint odor of burnt marijuana upon approaching the vehicle. In the front seating area, he saw one car air freshener and a bottle of eye drops. The trooper immediately began a criminal drug investigation. In response to questioning, Mr. Zullo

[8] The superior court's findings of fact were more limited, but the outcome should nonetheless be the same. Ruling on Mot. for Summ. J. 2-3.

never indicated he smoked or possessed marijuana that day. He refused to respond to questions about where he was going or who he was going to see. On checking Mr. Zullo's identification, the officer learned of a prior arrest for drug possession.

It is not reasonable to infer from these facts that Mr. Zullo possessed more than one ounce of marijuana.[9] The State argued, and the trial court agreed, that the odor of burnt marijuana alone is nevertheless sufficient to justify an exit order. But, in doing so, the court and State cited inapposite cases that are either factually distinguishable, are based on Fourth Amendment jurisprudence, were decided before pre-decriminalization, or were decided in jurisdictions where marijuana possessed in any amount is criminal. The court's reliance on these cases ignores the critical fact that it was only a crime to possess more than one ounce of marijuana when Mr. Zullo was seized.

As discussed at length *infra*, Vermont's and sister courts' precedents rejecting *Mimms* prohibit exit orders to investigate civil violations. To justify an exit order to investigate marijuana possession, an officer must articulate some fact supporting reasonable suspicion that *more* than one ounce of marijuana is present or some other criminal activity is afoot. *See Commonwealth v. Cruz*, 945 N.E.2d 899, 902 (Mass. 2011) (no basis to make exit order "without at least some other additional fact beyond the mere odor of burnt marijuana to bolster a reasonable suspicion of *criminal* activity"); *People v. Brukner*, 25 N.Y.S.3d 559, 571 (N.Y. City Ct. 2015), *aff'd*, *appeal dismissed*, 43 N.Y.S.3d 851 (N.Y. Co. Ct. 2016) ("[T]he mere odor of marihuana emanating from a pedestrian, *without more*, does not create reasonable suspicion that a crime has occurred, and consequently does not authorize law enforcement to forcibly stop, frisk, or

[9] And, indeed, Trooper Hatch did not expect he would find more than one ounce of marijuana in the car, if any. Pl's Stmt. of Facts ¶ 30; Def.'s Resp. to Pl.'s Stmt. of Facts ¶ 30.

search."). Because Vermont precedent requires that officers have reasonable suspicion of *crime* to justify exit orders, and no fact suggested that Mr. Zullo possessed more than one ounce of marijuana, the exit order could only be justified if constitutionally permissible for suspected civil violations. As discussed next, it is not.

3. Article 11's Requirement of Reasonableness Demands That Exit Orders Be Limited to Reasonably Suspected Crimes

As described *supra*, the Vermont Supreme Court has explicitly rejected *Mimms*, but has not had the opportunity to apply that rejection specifically to civil violations. However, Article 11's reasonableness criterion, supported by Vermont precedent, court rules, and statutes, clearly limit such intrusions to reasonably suspected crimes.

When interpreting novel Article 11 questions, this Court imports the Fourth Amendment's "reasonableness" criterion, with the warrant requirement representing the standard of reasonableness. *State v. Berard*, 154 Vt. 306, 309 (1990). If the novel situation meets a narrow exception to the warrant requirement, such as with exit orders or *Terry* stops, courts balance the government's interest in the seizure against individuals' Article 11 interests. *E.g.*, *Medina*, 2014 VT 69, ¶¶ 61-62 (striking statute requiring DNA testing of criminal arraignees because innocent persons' privacy interest in blood sample and DNA sequence outweighs state's purported interest in identifying criminal defendants); *United States v. Hensley*, 469 U.S. 221, 228 (1985) (weighing governmental interest in preventing crime and apprehending felons against individual liberty); *Mimms*, 434 U.S. at 117, 123 (Stevens, J., dissenting) (police safety interest does not necessarily outweigh concern for indiscriminate invasion of liberty).

This Court reviews the reasonableness of exit orders by balancing the seriousness of the suspected crime against motorists' liberty interest. *See Caron*, 155 Vt. at 500-01

(citing *United States v. Pelusio,* 725 F.2d 161, 165–66 (2d Cir. 1983)); *State v. Ford*, 2007 VT 107, ¶ 4 (Article 11 reasonableness analysis includes consideration of a "defendant's potential criminal conduct, [and] the inconvenience or discomfort to the defendant"). For instance, in *Caron*, the Court weighed the degree of intrusiveness against the suspected crime's violent nature. 155 Vt. at 500 ("[I]t is useful to look at a number of factors in determining the reasonableness . . . including the time, place, duration, and degree of intrusiveness."). The Court upheld the exit order because apprehending reasonably suspected violent felons and protecting officer safety outweighed the liberty interests at stake. *Id.* at 501.

Since *Caron* and *Sprague*, this Court has consistently held that "an exit order is only justified when the objective facts and circumstances would support reasonable suspicion that the safety of the officer, or of others, was at risk or that a crime has been committed." *State v. Tetreault*, 2017 VT 119, ¶ 22 (internal quotation marks omitted). And, while this Court has not previously reviewed whether civil violations justify exit orders, *Cunningham* already acknowledged that civil violations cannot justify prolonged detentions. In *Cunningham*, a driver lawfully detained for failing to produce proof of identification and insurance also had past drug convictions, refused to answer questions about his presence in Vergennes, and was an alleged cocaine dealer. 2008 VT 43, ¶¶ 2-4. Officers prolonged his detention for the civil violations to conduct a drug investigation. *Id.* ¶ 5. The Court suppressed the investigation's fruits because the facts did not betray an indication of occurring crime, without which the detention could go no longer than the time necessary to ticket the driver. *Id.* ¶ 19; s*ee also id.* ¶ 40 (Skoglund, J., concurring). Since Article 11 does not permit prolonging detentions for civil violations,

and exit orders necessarily prolong detentions, *Cunningham* suggests exit orders for civil violations also violate Article 11.

The two states similarly rejecting *Mimms* and opting for a *Terry* exit-order standard, Massachusetts and Hawaii, have also found that an individual's liberty interests in being free from exit orders outweighs the governmental interests in investigating civil violations. For example, in a Massachusetts case nearly identical to this one, officers detected the "faint odor of burnt marijuana" coming from a standing vehicle and ordered the occupants to exit. *Cruz*, 945 N.E.2d at 903. The Massachusetts Supreme Judicial Court found it axiomatic that an exit order, to be reasonable in the first place, required reasonable suspicion of a *crime*. *Id*. at 908 ("We note at the outset of our analysis that the lesser standard of reasonable suspicion is tied, by its very definition, to the suspicion of *criminal,* as opposed to merely infractionary, conduct."). After reviewing Massachusetts constitutional precedent, statutory construction, the marijuana decriminalization ballot initiative, and the distinction between a "crime" and a "violation," the court decided that exit orders upon the scent of burnt marijuana were not justified without "some other additional fact to bolster a reasonable suspicion of actual *criminal* activity"—i.e., possession of a criminal amount of marijuana. *Id*. at 910.

Hawaii's Supreme Court has also rejected *Mimms*, holding that the Hawaii constitution requires officers to have "at least a reasonable basis of specific articulable facts to believe a *crime* has been committed" before making exit orders. *State v. Kim*, 68 Haw. 286, 290 (1985) (emphasis added). In *State v. Vallesteros*, 84 Haw. 295, 302 (1997), the Hawaii court reaffirmed *Kim*, deciding that an officer must reasonably suspect a *criminal* offense, traffic-related or not, to justify an arrest because it would be unreasonable to permit arrests for violations that did not permit exit orders.

Similarly, the Washington Supreme Court, which has rejected *Mimms* with regard to vehicle passengers, invalidated *Terry* stops based on non-traffic civil infractions.[10] *State v. Duncan*, 146 Wash. 2d 166, 181-82 (2002). In *Duncan*, an officer stopped and frisked the defendant, claiming he had an open alcohol container in public—a civil infraction. *Id.* at 169. Interpreting *Terry* and its progeny, the Washington court determined non-traffic seizures were only justified upon reasonable suspicion of *criminal* violations because there is no overriding justification to detain a person for civil infractions beyond the time it takes to issue the ticket. *Id.* at 181-82.

The *Duncan* court's rationale, sounding in the reasonableness analysis of *Terry*, is worth further analysis. The court first reviewed the U.S. Supreme Court's decision in *Hensley*, where the Court expanded its interpretation of *Terry* to allow street seizures on reasonable suspicion that the seized individual committed an unsolved past felony. *Id.* at 176 (citing 469 U.S. at 228). The Supreme Court determined that the state interest in preventing serious crimes and bringing felons to justice overcame individuals' interests in being free from temporary investigatory detention. *Id.* According to *Duncan*, *Hensley*'s emphasis on crimes and felons "suggests that the interest in preventing civil infractions may not be accorded the same weight" as the interest in preventing crimes and apprehending felons. *Id.* (citing 469 U.S. at 228).

Next, the *Duncan* court noted that Washington's constitution provides greater protections against warrantless search and seizure than the Fourth Amendment. *Id.* at 177. And, Washington common law prohibited warrantless arrests for misdemeanors committed outside an officer's presence, even where probable cause exists. The rule

[10] Many courts, including the Vermont Supreme Court, have analogized *Terry* stops to exit orders. *E.g.*, *Caron,* 155 Vt. at 500-01; *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 114 (Mass. 1999).

illustrated the higher burden imposed on officers investigating lesser crimes. *Id*. Thus, Washington's high court decided that reasonableness, to represent a meaningful barrier to unjustified seizures, needed to limit further intrusions for lesser violations because longstanding national jurisprudence shows that "society will tolerate a higher level of intrusion for a greater risk and higher crime than it would a lesser crime." *Id*. Therefore, in light of the statutorily designated low importance of civil infractions, Washington's Constitution permits only the most minimal intrusion.

The court also noted that Washington's statutes limited detentions for non-traffic civil infractions more than traffic infractions. *Id*. at 174-75. Under Washington law, officers can only detain a suspected non-traffic civil violator to check identification and issue tickets. *Id*. On the other hand, motorists stopped for traffic infractions can be detained for a longer period to check identification, warrants, license status, proof of insurance, and vehicle registration. *Id*. Again, everywhere the court looked, it saw no reasonable basis to permit *Terry* stops for civil infractions. *Id*. The reasoning that persuaded the *Cruz*, *Kim*, and *Duncan* courts to limit further seizures to reasonably suspected *crimes* applies equally in Vermont.

4. Vermont's Article 11 Precedent, Court Rules, and Statutes Support Prohibiting Exit Orders to Investigate Non-traffic Civil Infractions

Vermont's Article 11 precedent, criminal procedure, and statutes support aligning with those courts that, after rejecting *Mimms*, have declined to allow *Terry*/*Caron* seizures for suspected non-traffic civil violations. Vermont courts have consistently ruled against prolonged detentions and exit orders where there was no evidence of safety concerns or "indication that defendant was engaged in any *criminal* offense requiring further investigation." *Sprague*, 2003 VT 20, ¶ 22 (emphasis added). In

Caron, *Sprague*, *Cunningham*, and others, the Court has repeatedly echoed the requirement of *criminal* wrongdoing to justify exit orders. *See infra* Part 2.A.3. The Court has also found that seizures for civil violations can only last long enough to identify the person and issue tickets. *See Cunningham*, 2008 VT 43; *see also Rodriguez v. United States*, 135 S. Ct. 1609, 1611-12 (2015) (in traffic stop context, authority for the seizure ends "when tasks tied to the traffic infraction are—or reasonably should have been—completed"). Like the high courts of Massachusetts, Hawaii, and Washington, Vermont's Supreme Court maintains a meaningful distinction between civil infractions and crimes. *See Cunningham*, 2008 VT 43, ¶ 3 (distinguishing between offenses that are "civil in nature" and criminal when reviewing a prolonged detention under Article 11)*; State v. Flagg*, 160 Vt. 141, 145 n.1 (1993) (describing the decriminalization of driving with a suspended license, changing it from a misdemeanor to a civil violation, as a "reclassification" requiring new procedures, in a new forum, with a lesser burden of proof); *State v. de Macedo Soares*, 2011 VT 56, ¶¶ 6-7 ("Being a civil defendant is 'fundamentally different' from being a criminal defendant.").

Furthermore, like the common-law rule in *Duncan*, Vermont Rule of Criminal Procedure 3(c) is written to generally prohibit warrantless arrests for misdemeanors occurring outside an officer's presence. V.R.Cr.P. 3(c); *see State v. Forcier*, 643 A.2d 1200, 1204 (Vt. 1994) (under V.R.Cr.P. 3(c), citation is the norm and arrest the exception). As described in *Duncan*, the U.S. Supreme Court's balancing criteria discussed in *Terry* and *Hensley* favor this inverse intrusiveness scheme. *Duncan*, 146 Wash. 2d at 177-78. Because Vermont's rules use this scheme for non-witnessed misdemeanors, Article 11 should provide similarly reasonable protection for lesser civil violations, permitting only minimal, necessary intrusions.

Vermont statutes also support prohibiting exit orders for suspected civil violations. Like the detention statutes reviewed in *Duncan*, Vermont law only permits civil violation detentions until the detained is "properly identified." 4 V.S.A. § 1111. And, while the Court permits traffic stop detentions to be somewhat longer to check registration and proof of insurance, the justifications for prolonging those stops—"ensuring that vehicles on the road are operated safely and responsibly," *Rodriguez*, 135 S. Ct. at 1615—do not apply to non-traffic civil violations.

Moreover, the plain language of Vermont's decriminalization statute supports prohibiting exit orders for the civil violation at issue. *See* 18 V.S.A. § 4230a. The statute, using the exact language of § 1111, only authorizes detentions for 4230a violations until the detained is "properly identified." *See* 18 V.S.A. § 4230a(e). The inclusion of this specific authority, and the exclusion of other permission to detain individuals, suggests legislative intent to limit seizure authority. *See In re D.C.*, 2016 VT 72, ¶ 31 (in interpreting statutes, Vermont courts follow *expressio unius est exclusion alterius* ("the express mention of one thing excludes all others.")).

The decriminalization statute's plain language and general thrust further characterize the low value of the governmental interest in further investigating 4230a violations. The statute repeatedly references the violations' civil nature. *E.g.*, 18 V.S.A. § 4230a(a) ("A person . . . who knowingly and unlawfully possesses one ounce or less of marijuana . . . commits a *civil* violation and shall be assessed a *civil* penalty." (emphasis added)); *see also id.* § 4230a(d); *id.* § 4230a(b)(1) (violators "shall not be penalized or sanctioned in any manner by the State or any of its political subdivisions or denied any right or privilege under State law"). It specifically distinguishes the violation from a criminal offense. *Id.* § 4230a(b)(2) ("A violation of this section shall not result in the

creation of a criminal history record of any kind."). Act 76 affirmatively reclassified low-level marijuana possession, placing violations under Judicial Bureau jurisdiction. 2013 Vt. Acts & Resolves 656-7 (codified at 4 V.S.A. § 1102(24)). As did the voters in *Cruz*, "[b]y mandating that possession of such a small quantity of marijuana become a civil violation, not a crime, the [legislature] intended to treat offenders who possess one ounce or less of marijuana differently from perpetrators of drug crimes." 945 N.E.2d at 909–10.

Vermont precedent, rules, and statutory plain language view civil violations to be of lesser public value and consequently justify only minimal, necessary intrusions. Violators, although finable for the infractions, are constitutionally protected from all but the most minimal liberty intrusion necessary to ensure tickets are properly administered. Article 11's strict prohibition on unjustified seizures must be maintained unless objectively reasonable suspicion based on articulable facts evidences an actual crime.

B. The Seizure of Mr. Zullo's Vehicle Without Probable Cause of a Crime Violated Article 11

If it is unreasonable to issue exit orders to investigate reasonably suspected civil violations, it is necessarily unreasonable to seize a car to investigate civil violations. Article 11 requires a vehicle's seizure to be supported by probable cause. *State v. Platt*, 154 Vt. 179, 188 (1990). Probable cause to seize a vehicle pursuant to applying for a warrant requires "objective facts and circumstances from which a person of reasonable caution would conclude that a *crime* has been committed and that evidence of that *crime* will be found in the place to be searched." *State v. Ballou*, 148 Vt. 427, 433-34 (1987) (emphasis added). The seizure must be "reasonable and proper" in the

circumstances. *Platt*, 154 Vt. at 188. And, it must be the least intrusive manner available to effectuate the purpose of the seizure. *See id.* at 188.

In this case, as further discussed *infra*, there was no probable cause of present criminal activity. Assuming an objective officer could form probable cause that Mr. Zullo was committing a civil violation, the State had no interest to justify prolonging the stop to form it. Probable cause is always unnecessary to effectuate the governmental interest in ticketing civil violators because they can be ticketed as long as the initial stop/seizure is based upon reasonable suspicion. *State v. Howard*, 2016 VT 49, ¶ 5. A civil violation complaint only requires completing a ticket form. V.R.C.P. 80.6 (c). Since the purpose of a traffic or non-traffic civil violation stop is to provide the ticket, there is no need to further investigate the violation.[11] Seizing Mr. Zullo's vehicle to search for evidence of a civil violation was neither "reasonable and proper" nor necessary to effectuate the seizure's purpose. It was plainly unconstitutional.

Even if the Court decides that objectively reasonable suspicion of criminal activity existed, the vehicle seizure was not justified by probable cause of an occurring crime. Probable cause is the most stringent justification required for intrusions into Article 11-protected interests. *E.g.*, *State v. Pitts*, 2009 VT 51, ¶ 7. While a finding of probable cause does not require absolute certainty, it does demand that "a person of reasonable caution would conclude that a crime has been committed and that evidence of the crime will be found in the place to be searched." *State v. Melchior*, 172 Vt. 248, 251 (2001) (quoting *State v. Defranceaux*, 170 Vt. 561, 562 (1999) (internal quotations omitted)).

[11] In the Judicial Bureau, criminal procedural safeguards are not constitutionally required. *de Macedo Soares*, 2011 VT 56, ¶¶ 6-7. The proceedings "are intended to be expedited and summary," operate under limited Vermont Rules of Civil Procedure, and do not apply the Rules of Evidence do not apply. *Id.* ¶ 9; V.R.C.P. 80.6(n).

And, this Court has long agreed that, while motorists may have a somewhat diminished expectation of privacy, "this is not to say . . . that they carry no expectation of privacy." *Bauder*, 924 A.2d at 48.

When Hatch seized Mr. Zullo's car, he supposedly detected the faint odor of burnt marijuana and saw a car air freshener and bottle of eye drops in the front seating area, but no indication that Mr. Zullo possessed or smoked marijuana that day. Ruling on Mot. for Summ. J. 2. After an hour of pressuring Mr. Zullo to consent to a vehicle search, and discovering no additional facts tending to show that Mr. Zullo possessed more than one ounce of marijuana,[12] Trooper Hatch seized the vehicle and towed it to the Rutland Barracks. *Id.* at 2-3.

Without additional facts supporting a reasonable belief that more than one ounce of marijuana was present, the seizure lacked probable cause. Paradoxically, on the same facts that the superior court found justified the exit order, it found probable cause,[13] again citing inapposite cases that were factually distinguishable, based on Fourth Amendment jurisprudence, or had no relevance after decriminalization. Ruling on Mot. for Summ. J. 19-20. Nothing in those cases negates the longstanding Vermont precedent evincing a protective constitutional posture that prohibits seizing vehicles to investigate civil violations.

[12] As the lower court noted, "Trooper Hatch uncovered no further indicia of possession after he ordered Zullo to exit the vehicle." Ruling on Mot. for Summ. J. 18.

[13] The court did recognize jurisdictions where the scent of marijuana alone is insufficient to support probable cause and that the Vermont Supreme Court has never ruled on the question. *Id.* at 20.

C. If the Prior Seizure Violated Article 11, the Search Also Violated Article 11

The lower court dismissed Mr. Zullo's claim that the vehicle search was invalid, deciding that V.R.Cr.P. 41 permits warrants to search for "contraband," Order on Def.'s Mot. to Dismiss 5-6, without considering Mr. Zullo's argument that it is unreasonable to issue warrants for suspected civil violations. Pl.'s Opp. to Mot. to Dismiss 21-25. Particularly on a wintry afternoon, on a state highway eight miles from home, Mr. Zullo's interests outweighed the governmental interest in locating evidence of civil infractions.

The search was also wholly unnecessary. Because § 4230a violations are under Judicial Bureau jurisdiction, Trooper Hatch's post-stop actions were unnecessary to effectuate the law's goal: to ticket for violations. In this circumstance, Trooper Hatch prolonged the seizure and invaded important privacy interests without purpose—the exact arbitrariness that Article 11 forbids. *Sprague*, 2003 VT 20, ¶ 17. Because a vehicle search to investigate a civil violation, especially one of such meager value, was unnecessary, any such search is unreasonable, pursuant to a warrant or not, violating Article 11.

Even if a warrant could issue for a civil violation, the search cannot stand if the preceding seizures were invalid. Without the unlawful exit order, the vehicle could not have been seized or searched. Any information gleaned after the exit order should therefore be excised from the warrant application. *State v. Morris,* 165 Vt. 111, 128–29 (1996) (where portion of evidence in affidavit must be expunged, court must determine whether remaining information in affidavit establishes probable cause to support warrant). As argued *supra*, since the information available before the exit order did not

provide reasonable suspicion of a crime, let alone probable cause, any search would be unreasonable.

CONCLUSION

For all of these reasons, this Court should reverse the decisions below as to Counts 1-4, and grant summary judgment to Gregory Zullo as to Counts 1-4.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 8809 words, excluding the statement of issues, table of contents, table of authorities, signature blocks, and this certificate as permitted by Vt. R. App. 32(a)(7)(C). I have relied upon the word processor used to produce this brief, Microsoft Word 2010, to calculate the word count.

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