No. 258PA23 TWENTY SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA,
Appellant,

v.

ERIC WAYNE WRIGHT,
Defendant-Appellee.

From Mecklenburg County

****

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA IN SUPPORT OF DEFENDANT

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NATURE OF AMICI CURIAE'S INTEREST[1]

The American Civil Liberties Union and the ACLU of North Carolina (together, "ACLU") are non-profit, nonpartisan organizations dedicated to the principles of liberty and equality enshrined in the U.S. Constitution and the nation's civil rights laws. The ACLU has filed numerous amicus briefs in state and federal court addressing civil rights issues and has consistently advocated for the right to be free from unreasonable, coercive, and otherwise excessive law enforcement conduct. The ACLU has an interest in this case as it involves coercive law enforcement conduct that infringes upon North Carolinians' fundamental right to be free from unreasonable searches and seizures.

INTRODUCTION

On a dirt road on a cold winter night, three police officers were trying to get Eric Wright to let them search his backpack. Mr. Wright was scared of the police and refused consent at least five times. But Mr. Wright did not know if he could do so lawfully and the police kept at it, calling Mr. Wright "deceptive," asking him again, and refusing to take no

[1] No person or entity other than amici curiae, their members, or counsel wrote this brief or contributed money for its preparation.

for an answer. Mr. Wright eventually acquiesced to a search of his backpack.

On sparse findings of fact, the trial court held that the search complied with the Fourth Amendment and that the State had carried its burden of proving Mr. Wright's voluntary consent to the search. A unanimous panel of the Court of Appeals reversed, holding that Mr. Wright's consent was not voluntary but the result of coercion. *State v. Wright*, 290 N.C. App. 465, 477–78 (2023).

For three reasons, amici agree with the Court of Appeals.

First, a wealth of scientific studies shows that, in general, people experience inherent pressure to comply with police search requests. *See, e.g.*, Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L.J. 1962 (2019) [hereinafter Sommers & Bohns, *The Voluntariness of Voluntary Consent*]. Courts have long appreciated this reality. As another state supreme court observed nearly fifty years ago, "Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law." *State v. Johnson*, 68 N.J. 349, 354, 346 A.2d 66, 68 (1975); *see also, e.g.*, *State v. Robinette*, 653

N.E.2d 695, 698 (Ohio 1995) (explaining that, when being questioned by the police, "a reasonable person would not feel free to walk away as the officer continues to address him"), *rev'd on other grounds by Ohio v. Robinette*, 519 U.S. 33 (1996).

That pressure may become especially apparent when the person being searched is Black, as Mr. Wright is. "[M]any African-Americans, and undoubtedly other people of color, know that refusing to accede to the authority of the police, and even seemingly polite requests[,] can have deadly consequences." Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 242–43 (2002) [hereinafter Strauss, *Reconstructing Consent*]. Even the trial court in this case acknowledged the pressures faced by Black people interacting with police (R p 67), as have other courts. *See, e.g.*, *Jamison v. McClendon*, 476 F. Supp. 3d 386, 413–16 (S.D. Miss. 2020); *United States v. Dillard*, No. 3:24-CR-50, 2024 WL 3463956, at *10 (E.D. Va. July 17, 2024); *Washington v. State*, 482 Md. 395, 404, 287 A.3d 301, 307 (2022); *Betts v. City of Chicago*, 784 F. Supp. 2d 1020, 1026 n.1 (N.D. Ill. 2011); *United States v. Knights*, 989 F.3d 1281, 1295–98 (11th Cir. 2021) (Rosenbaum, J., concurring).

Unhoused people may also have particular reason to fear interacting with law enforcement, based on the disproportionate criminalization of their activities and fear that police officers could take or destroy belongings they rely on for survival. *See, e.g.*, Krista Craven et al., *"I'm No Criminal, I'm Just Homeless": The Greensboro Homeless Union's Efforts to Address the Criminalization of Homelessness*, 50 J. of Cmty. Psych. 1875 (2022) [hereinafter Craven et al., *I'm No Criminal, I'm Just Homeless*]; Megan Welsh & Mounah Abdel-Samad, *"You're an Embarrassment": Un-housed People's Understandings of Policing in Downtown San Diego*, 19 Criminology, Crim. Just., L. & Soc'y 33 (2018) [hereinafter Welsh & Abdel-Samad, *You're an Embarrassment*].

Second, applying these fundamental principles to the case at hand, Mr. Wright's "consent" was not voluntary because it was not "the product of an essentially free and unconstrained choice," *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973), but rather of police coercion. Considering the totality of the circumstances, a reasonable person in Mr. Wright's shoes would not have felt "free to disregard the police and go about his business." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quotation marks and citation omitted).

Third, although the State on appeal urges deference to the trial court and relies mainly on police testimony that they told Mr. Wright he could leave (St. Br. 24–25), the trial court did not make any such findings in its order. (*See* R p 67). Nor did the trial court explain *why* a reasonable person in Mr. Wright's shoes would have felt free to leave. So even if the trial court's findings deserve deference, there is little in the trial court's order to which an appellate court could defer.

For these reasons and as discussed below, the Court of Appeals' unanimous decision should be affirmed.

ARGUMENT

I. When considering whether consent to a search is voluntary, courts must consider the totality of the circumstances, including characteristics of the defendant that may make them more susceptible to coercion.

The Fourth Amendment to the United States Constitution protects North Carolinians from unreasonable searches and seizures. A search of an individual's private property without a warrant is *per se* unreasonable unless the State meets its burden to prove that an exception to the warrant requirement applied. *See State v. Cherry*, 298 N.C. 86, 92 (1979) (citing *Katz v. United States*, 389 U.S. 347 (1967)). One such exception is

"lawful consent to [a] search." *State v. Smith*, 346 N.C. 794, 798 (1997) (citing *Schneckloth*, 412 U.S. 218).

The facial appearance of consent, however, does not make a warrantless search lawful. Instead, the State has the burden of showing that the consent was voluntary—that is, that it was "unequivocal and specific, and freely and intelligently given," rather than being coerced or "given merely to avoid resistance." *State v. Little*, 270 N.C. 234, 239 (1967) (quotation marks omitted) (citing 79 C.J.S. Searches and Seizures § 62). This showing is required to protect fundamental privacy interests and ensure that police officers do not violate those interests and render the Fourth Amendment meaningless by simply asking for consent until they get the answer they want. As the United States Supreme Court has observed, "The purpose of the Fourth Amendment" is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

Whether consent is voluntarily given depends on "the totality of all the surrounding circumstances," including "the characteristics of the

accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226; *see Smith*, 346 N.C. at 798. This assessment must include all circumstances that inform whether a reasonable person in the defendant's shoes would have felt "free to disregard the police and go about his business." *Bostick*, 501 U.S. at 434 (quotation marks and citation omitted). Given persuasive scientific data that people commonly believe that they have no choice but to comply with authorities, the reasonable person assessment must reflect this reality.

Throughout our lives, persons with "authority" "exert an enormous amount of influence over our decisions," from parents to teachers and doctors. Janice Nadler, *No Need To Shout: Bus Sweeps and the Psychology of Coercion*, 2002 Sup. Ct. Rev. 153, 173–74 (2002). "For most people, most of the time, conforming to the wishes of persons with authority makes a great deal of sense." *Id.* at 174. So much so, in fact, that this ingrained instinct to obey can lead us to involuntarily consent to police officers. Research has found that "people will obey authority even when it is not in their own best interest to do so, and that obedience increases when the authority figure has visible trappings of authority, such as a uniform." Strauss, *Reconstructing Consent*, at 236.

Additionally, people consistently underestimate the pressure an individual feels to consent to a request from an authoritative figure, especially one who represents the overwhelming power of the government. For example, in one recent study, researchers assigned participants to two groups, asking the first whether a hypothetical reasonable person would agree to unlock their smartphone for a search, and the second whether the participants themselves would hand over their smartphones for a search. Sommers & Bohns, *The Voluntariness of Voluntary Consent*, at 1962. Although only 14% of participants in the first group believed a reasonable person would agree to such an intrusion, in fact 97% of participants in the second group acceded to the request, which was specifically "designed to be unnerving and intrusive." *Id.* at 1985, 2010.[2]

Beyond this baseline tendency to obey authority, the inherent power differential between police officers and citizens significantly increases the pressure to consent, even when police are seemingly polite.

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[2] *See also* Roseanna Sommers & Vanessa K. Bohns, *Consent Searches and Underestimation of Compliance: Robustness to Type of Search, Consequences of Search, and Demographic Sample*, 21 J. Empirical Legal Stud. 4 (2024).

See Strauss, *Reconstructing Consent* at 236, 241–43. "[W]hen the police use request language, [people] hear this as a command and similarly assume this is backed by force." Janice Nadler & J. D. Trout, *The Language of Consent in Police Encounters*, *in* The Oxford Handbook of Language and Law 326, 332 (Lawrence M. Solan & Peter M. Tiersma, eds., 2012). "[A]uthority figures need not use highly face-threatening language—part of that burden is carried by the badge and gun." *Id.*[3] And "[p]eople in positions of authority can control the message conveyed by linguistic expressions in a number of" other ways, too. *Id.* An officer's "[p]osture, mode of dress, physical proximity, location, identity, and the authority of the speaker all contribute to" the meaning—and perceived meaning—of the officer's words. *Id.*

Many people do not understand that they can refuse to consent to a police search, and research shows that those who do are often "skeptical that an officer would actually take no for an answer." Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 Geo. Wash. L. Rev. 281, 301 (2016) (citation omitted). This

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[3] *See also* Leonard Bickman, *The Social Power of a Uniform*, 4 J. Applied Soc. Psych. 47 (1974) (finding that people tend to be more obedient to authority figures dressed in uniforms than in street clothes).

skepticism stems, in part, from widespread distrust in police and a belief that failure to cooperate with officers could lead to harm. Nearly half of Americans believe that most police officers think they are above the law (49%) and that police are generally not held accountable for misconduct (46%).[4] And one in five Americans (21%) personally know someone who has been "physically mistreated or abused by the police."[5] Importantly, more than half of Americans (57%) believe that police use of force is caused by citizens' failure to cooperate with police during a stop—i.e., refusal to agree to police requests.[6]

Reinforcing this general distrust are "recent developments in video recording technology and social media," which "have created immediate and pervasive social awareness of new incidents of police violence." Note,

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[4] Emily Ekins, Cato Inst., Policing in America: Understanding Public Attitudes Toward the Police 4 (2017), https://www.cato.org/sites/cato.org/files/survey-reports/pdf/policing-in-america-august-1-2017.pdf [hereinafter Ekins, Policing in America].

[5] *Id.* at 30.

[6] Assoc. Press-NORC Ctr. for Pub. Affs. Rch., Law Enforcement and Violence Survey 8 (2015), https://apnorc.org/wp-content/uploads/2020/02/Issue-Brief_PoliceFinal.pdf [hereinafter AP-NORC, Law Enforcement and Violence Survey].

Beau C. Tremitiere, *The Fallacy of a Colorblind Consent Search Doctrine*, 112 Nw. U. L. Rev. 527, 527 (2017) [hereinafter Tremitiere, *The Fallacy*].[7] In fact, polls from just last year show that confidence in police and police training is lower than ever before; almost two-thirds of Americans believe that the police are not properly trained to use force.[8]

When a defendant is a member of a vulnerable community, courts have recognized that the reasonable person assessment must be applied in a manner that does not exclude the documented and predictable expectations of individuals in the same community. This is especially true when considering Black Americans. To avoid an equal protection problem, the totality of the circumstances analysis for Black defendants should not exclude experiences that exist primarily for Black people. In other words, the acute fear and distrust of police among Black Americans

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[7] *See also* Madeline Novich & Alyssa Zduniak, *Violence Trending: How Socially Transmitted Content of Police Misconduct Impacts Reactions toward Police Among American Youth*, *in* The Emerald International Handbook of Technology-Facilitated Violence and Abuse 271 (2021); Emily Washburn, *America Less Confident In Police Than Ever Before: A Look At The Numbers*, Forbes (Feb. 3, 2023), https://www.forbes.com/sites/emilywashburn/2023/02/03/america-less-confident-in-police-than-ever-before-a-look-at-the-numbers/ [hereinafter Washburn, *America Less Confident*].

[8] Washburn, *America Less Confident*.

are relevant to a court's determination of consent. *See, e.g.*, *State v. Bartlett*, 260 N.C. App. 579, 584 (2018) (stating that "race may be a relevant factor in considering whether" consent was voluntary); *Jamison*, 476 F. Supp. 3d at 414–16 (analysis of consent under the Fourth Amendment "cannot be separated from" the context of race and police brutality in the United States; "Black people in this country are acutely aware of the danger traffic stops pose to Black lives"); *Knights*, 989 F.3d at 1288 (noting that "race can be relevant" when determining whether a defendant consented to a search or seizure under the Fourth Amendment).

Black Americans are disproportionately the victims of police brutality and violence. Black people in the United States are 2.9 times more likely to be killed by police than white people.[9] Black Americans are also "twice as likely as white Americans to know someone physically abused by police." Ekins, Policing in America, at 3.

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[9] *See* Mapping Police Violence, https://mappingpoliceviolence.org/ (last visited Oct. 31, 2024); *see also* Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 Proc. Nat'l Acad. Sci. 16793, 16794 (2019).

Awareness of these racial disparities in police violence can be traumatic for communities of color, particularly Black Americans, and it creates a "pervasive belief for many persons of color that police/citizen encounters are potentially life threatening." Tremitiere, *The Fallacy*, at 552 (quotation marks and citation omitted). This in turn "affects how people of color interact with law enforcement"—"[d]eeply sown distrust increases one's perceived likelihood that law enforcement would react disproportionately or violently if one refused to comply with police requests or instructions, even if that refusal were respectful and lawful." *Id.* More than three-quarters of Black Americans believe that police are too quick to use lethal force (81%) and that they are more likely to use lethal force against a Black person (85%). AP-NORC, Law Enforcement and Violence Survey, at 3. Nearly three quarters of Black Americans believe that police violence against civilians is an extremely or very serious problem, compared to less than 20% of white people. *Id.* at 1. And Black Americans are also five times as likely to personally expect worse treatment from police officers as compared to white people. Ekins, Policing in America, at 4.

These racial disparities—and people's perceptions of them—create increased pressure for Black people to consent to police searches rather than risk becoming a victim of police brutality, especially when police appear unwilling to take no for an answer. *See* Strauss, *Reconstructing Consent*, at 242–43; Tremitiere, *The Fallacy*, at 555; Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 949, 1017 (2002). This pressure is particularly concerning when considered alongside research that demonstrates that police officers are significantly more likely to search or to request consent to search from Black people—particularly Black men—than white people who are stopped by officers. *See* Anthony G. Vito & George E. Higgins, *Understanding the Role of Race, Gender and Age in Request to Consent Search Drivers*, 19 J. of Ethnicity in Crim. Just. 223 (2021); Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736 (2020). One 2017 study, for example, analyzed data from hundreds of police agencies and found that Black drivers stopped by police were two and a half times as likely to be searched as white drivers stopped by the police. *See* Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes*, 9 Duke F. for L. & Soc.

Change 21, 41 (2017). Of the states studied, North Carolina had some of the highest racial disparity rates. *See id.* at 46.

People experiencing homelessness are also particularly vulnerable to coercion during law enforcement interactions. The criminalization of homelessness is well-documented,[10] and it leads to a unique fear of police encounters for those living without housing. *See generally* Welsh & Abdel-Samad, *You're an Embarrassment*. "People experiencing homelessness are up to 11 times more likely to be arrested than those who are housed,"[11] and they are disproportionately likely to be assaulted

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[10] *See, e.g.*, Allard K. Lowenstein International Human Rights Clinic, Yale Law School, *"Forced Into Breaking the Law": The Criminalization of Homelessness in Connecticut* (2016); Madeline Bailey, Erica Crew, & Madz Reeve, Vera Institute of Justice, *No Access to Justice: Breaking the Cycle of Homelessness and Jail* (2020), https://vera-institute.files.svdcdn.com/production/downloads/publications/no-access-to-justice.pdf; Nat'l L. Ctr. on Homelessness & Poverty, *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [hereinafter, *Housing Not Handcuffs*].

[11] *Housing Not Handcuffs,* at 50.

by police.[12] Often, these arrests and assaults are in response to the unhoused person doing what they must to survive: sleeping outside with a blanket, for example, or laying on a sidewalk because they have nowhere else to go. In Greensboro, North Carolina, unhoused people are commonly cited or arrested for "loitering" or "soliciting." Craven et al., *I'm No Criminal, I'm Just Homeless*, at 1881. The ubiquitous nature of laws criminalizing behavior that unhoused people cannot avoid can increase an unhoused person's perception that they must comply with police officers' demands or face enforcement.[13] And because unhoused people frequently carry most of their possessions—including those most

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[12] *See* Tanya L. Zakrison, Paul A. Hamel, & Stephen W. Hwang, *Homeless People's Trust and Interactions with Police and Paramedics*, 81 J. of Urb. Health 596 (2004).

[13] *See* Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 Am. Socio. Rev. 769, 792 (2019) (describing punitive and widespread process of policing unhoused individuals through move-along orders, citations, and threats of arrest and pervasive property confiscation and destruction that almost "always involved either a police presence, the threat of police being called, or leveraging anti-homeless ordinances to provide legal cover for property confiscation") [hereinafter Herring, *Complaint-Oriented Policing*]; Craven et al., *I'm No Criminal, I'm Just Homeless*, at 1881–84 (discussing the criminalization of homelessness in Greensboro and unhoused people's general distrust of police and perception that police are likely to use excessive force against unhoused people).

private and important—with them, they can feel particularly coerced to submit to police demands to search property in order to avoid loss or damage to their belongings that could result if law enforcement ultimately uses force to conduct a non-consensual search.[14]

This reality means that unhoused people are acutely aware of the police, and they often develop particular methods, schedules, and tactics to avoid or quickly terminate encounters with police officers. *See, e.g.*, Forrest Stuart, *Becoming "Copwise": Policing, Culture, and the Collateral Consequences of Street-Level Criminalization*, 50 L. & Soc'y R. 279 (2016); Welsh & Abdel-Samad, *You're an Embarrassment*, at 34, 41–42. Unhoused people's perceptions of police and the risks they pose are relevant to a totality of the circumstances analysis focused on the

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[14] *See* Herring, *Complaint-Oriented Policing*, at 792. This concern is not hypothetical; unhoused people commonly have their personal property—which they rely on to survive—confiscated and/or destroyed by law enforcement, which has devastating effects. *See, e.g.*, Nat'l Law Ctr. on Homelessness & Poverty, Violations of the Human Rights of Persons Experiencing Homelessness in the United States, at 1, 3 (2017), https://homelesslaw.org/wp-content/uploads/2018/10/sr-ep-2017.pdf; U.S. Dep't of Justice Civ. Rights Div., Investigation of the City of Phoenix and the Phoenix Police Department, at 49–54 (2024), https://www.justice.gov/crt/media/1355866/dl?inline (finding that city officials and police officers regularly seized and destroyed the property of unhoused people in violation of the U.S. Constitution).

voluntariness of consent. *See, e.g.*, *Cmty. for Creative Non-Violence v. Unknown Agents of U.S. Marshals Serv.*, 797 F. Supp. 7, 16 (D.D.C. 1992) (discussing the "realities of homelessness" that caused unhoused people to feel particular pressure to consent to police requests); *see also Schneckloth*, 412 U.S. at 226 (explaining that the totality of circumstances analysis includes consideration of "the characteristics of the accused" and the "psychological impact" of the interaction "on the accused").

The two identities just discussed often overlap: Black Americans make up almost 40% of the unhoused population, even though they are only about 13% of the U.S. population and 21% of the U.S. population living in poverty.[15] In North Carolina, the disparities are even more

[15] Dep't of Hous. & Urb. Dev., The 2023 Annual Homelessness Assessment Report (AHAR) to Congress: Part 1: Point-In-Time Estimates of Homelessness 2 (2023), https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf.

striking: Black people account for around 21% of the overall population[16] but more than half (52%) of the unhoused population.[17]

Amici do not mean to suggest that Black or unhoused people can never consent to police encounters. But when considering the "totality of the circumstances," the realities of relations between police and vulnerable communities to which a particular defendant belongs must be taken into account when asking whether a reasonable person, in the defendant's shoes, would feel free to leave or refuse consent.

II. The State failed to prove that Mr. Wright voluntarily consented to a search of his bag.

To prevail here, the State had to prove that a reasonable person in Mr. Wright's position "would feel free to disregard the police and go about his business." *Bostick*, 501 U.S. at 434 (quotation marks omitted); *accord*

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[16] *See North Carolina Population by Race & Ethnicity*, Neilsberg (Jul. 15, 2024), https://www.neilsberg.com/insights/north-carolina-population-by-race/; *QuickFacts: North Carolina*, U.S. Census Bur., https://www.census.gov/quickfacts/fact/table/NC/PST045223 (last visited Oct. 21, 2024).

[17] Dep't of Hous. & Urb. Dev., Off. of Pol'y Dev. & Rsch., 2023 Annual Homeless Assessment Report: Part 1 – PIT Estimates of Homelessness in the U.S., https://www.huduser.gov/portal/datasets/ahar/2023-ahar-part-1-pit-estimates-of-homelessness-in-the-us.html (linking to 2007–2023 point-in-time estimates by state) (last visited Oct. 21, 2024).

State v. Icard, 363 N.C. 303, 310–11 (2009). In other words, the State had to show that Mr. Wright had an "essentially free and unconstrained choice," and that his will was not "overborne" by police conduct. *United States v. Watson,* 423 U.S. 411, 424 (1976) (quoting *Schneckloth*, 412 U.S. at 225).

This inquiry requires the Court to apply "the most careful scrutiny" to the totality of the circumstances. *Schneckloth*, 412 U.S. at 229. There is no exhaustive list of relevant factors, and no single factor is dispositive. While an officer's subjective intent is irrelevant, *Fernandez v. California,* 571 U.S. 292, 302 (2014), "the possibly vulnerable subjective state of the person who consents" is relevant in the totality of the circumstances analysis, *Schneckloth,* 412 U.S. at 229. This Court has also recognized that the "subjective response" of an individual to police tactics in the moment is relevant in determining what a reasonable person in the defendant's shoes would expect in a search of his person or belongings. *See State v. Stone,* 362 N.C. 50, 55 (2007).

In addition, this Court, the U.S. Supreme Court, and others have considered a defendant's "knowledge of the right to refuse consent,"[18] whether a defendant "consented immediately or police made repeated requests for consent,"[19] the time of day or night,[20] whether police officers were armed or in a uniform,[21] a defendant's race,[22] and "widely shared

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[18] *United States v. Drayton*, 536 U.S. 194, 206–07 (2002) (quoting *Schneckloth*, 412 U.S at 227).

[19] *United States v. Strache*, 202 F.3d 980, 985 (7th Cir. 2000); *see also* Wayne R. LaFave, 4 *Search & Seizure* § 8.2(b) (6th ed. 2024) (stating that repeated questioning is coercive "when, notwithstanding repeated unequivocal refusals to give consent, the police persist in a manner conveying that they would not take no for an answer" (quotation marks and citation omitted)).

[20] *See, e.g.*, *Icard*, 363 N.C. at 310 (the fact that a police encounter occurred "late at night" contributed to coercive effect).

[21] *Id.*

[22] *Mendenhall,* 446 U.S. at 558 (acknowledging relevance of facts that a Black woman "may have felt unusually threatened by the officers, who were white males"); *Knights*, 989 F.3d at 1288 (noting that a defendant's "race can be relevant" when analyzing the voluntariness of consent under the Fourth Amendment); *Jamison*, 476 F. Supp. 3d at 414–16 (explaining that the consent analysis must account for race, because "Black people in this country are acutely aware of the danger traffic stops pose to Black lives"; finding consent involuntary when Black defendant did not feel "free to say no to an armed" officer and felt he had "no alternative to compliance").

social expectations."[23] Moreover, police needn't threaten violence or otherwise act aggressively to be coercive. Far more subtle tactics may suffice. *See, e.g.*, *Icard*, 363 N.C. at 310 (consent was coerced through police officers' subtle "show of authority," even though police did not yell, act deceptively, brandish weapons, or otherwise threaten the defendant).

Here, these factors would not suggest to an ordinary person that he could "disregard the police and go about his business." *Bostick,* 501 U.S. at 434. The incident occurred on a cold winter night in an empty area. (R p 104). Multiple uniformed officers continued to press Mr. Wright for consent even though he had refused at least five times. (R p 34). Mr. Wright had reason to be afraid during this encounter and in fact said that he was scared of the police. (R p 34). The police called Mr. Wright "deceptive" and said they couldn't take him "off the list" without a search. (*See* St. Br. 6). They also stood on either side of him, so that Mr. Wright was between two officers. (*See* Def. Br. 8). When Mr. Wright asked if he could refuse consent, an officer answered ambiguously: "I'm asking you." (*See* St. Br. 5; R p 33). Mr. Wright refused consent again. (*See* St. Br. 6).

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[23] *Stone*, 362 N.C. at 55 (quoting *Georgia v. Randolph,* 547 U.S. 103, 111 (2006)).

And at this time, the evidentiary record demonstrates that the officers still had Mr. Wright's identification, *Wright*, 290 N.C. App. at 472–73,[24] so Mr. Wright could not simply walk away and terminate the encounter.[25]

Despite his repeated refusals, an officer then said to Mr. Wright: "let's do this, can you open your bag for me so I can look inside it?" (*See* St. Br. 6). This language, after Mr. Wright had already refused consent multiple times, strongly suggested to Mr. Wright that the police were going to search his bag one way or another, so Mr. Wright had no choice but to consent. His previous attempts to refuse consent were ignored, and

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[24] Amici recognize that whether Mr. Wright had access to his identification documents when asked for consent to search is contested in this Court. However, the Court of Appeals' conclusion as to the unavailability of those documents is well-founded, and in any event, other relevant factors still require affirmance of the Court of Appeals' holding as to coercion.

[25] *See* Aidan Taft Grano, *Casual or Coercive? Retention of Identification in Police-Citizen Encounters*, 113 Colum. L. Rev. 1283, 1303–04 (2013) (noting that "[i]n general, even if [courts] avoid treating it as dispositive, retention of identification is often a key factor in undermining the voluntariness of consent" to search and collecting cases); *see also, e.g.*, *United States v. Jordan*, 958 F.2d 1085, 1087 (D.C. Cir. 1992) ("[O]nce the identification is handed over to police and they have had a reasonable opportunity to review it, if the identification is not returned . . . [it is] difficult to imagine that any reasonable person would feel free to leave without it." (second alteration in original) (quotation marks and citation omitted)).

a reasonable person in his situation would have felt that police were going to continue asking until he said yes. At this point, Mr. Wright acquiesced.

On appeal, the State points to testimony from officers that they told Mr. Wright he could leave. The State also urges deference to the trial court. (St. Br. 8, 11, 17, 19, 24). But the trial court did not make any findings as to what the police told Mr. Wright before searching his bag. (R pp 66–67). Without such findings, there is nothing for this Court to defer to.

The trial court's conclusion of law that "Defendant was always free to leave" before being arrested also cannot justify the search. (R p 67). That conclusion, regardless of whether it is true, does not explain why a reasonable person, in Mr. Wright's shoes, should have *understood* his legal freedom to leave and felt that he could do so. Nor did the trial court address most of the other facts discussed above that weighed against the State, the party with the burden of demonstrating that Mr. Wright's consent was "the product of an essentially free and unconstrained choice," *Schneckloth*, 412 U.S. at 225, and that a reasonable person in Mr. Wright's shoes would have felt "free to disregard the police and go about

his business." *Bostick*, 501 U.S. at 434 (quotation marks and citation omitted).

What's more, the trial court acknowledged studies showing that many Black people "do not feel they have the freedom to deny consent," but it dismissed race and Mr. Wright's fear as "not a deciding factor." (R p 67). While no single factor is dispositive, the trial court appeared to treat these facts as *irrelevant*, giving them no weight or analysis at all. That was clear error under binding precedent. *See Schneckloth*, 412 U.S. at 226 (totality of the circumstances includes the "possibly vulnerable subjective state of the person" who is being questioned); *Mendenhall,* 446 U.S. at 558 (totality of the circumstances includes acknowledgment of the fact that a Black woman "may have felt unusually threatened by the officers, who were white males").

The trial court also emphasized that the "officers did not raise their voice or brandish a firearm." (R p 105). Even so, they continued to press Mr. Wright for his consent despite five refusals and called him "deceptive." This would not suggest to a reasonable person that they had any choice in consenting to a search, and the State does not assert otherwise. (*See* St. Br. 20–25). And, as for the trial court's attention to

whether officers had guns drawn, subtle acts far short of threatening deadly force may obviously be coercive. *See, e.g.*, *Icard*, 363 N.C. at 310 (holding that consent was coerced where police had holstered weapons but made no threat of violence).

In sum, this record shows three police officers tried to wear down a vulnerable man to the point that any "choice" he had in the search was surely "overborne" by police coercion. *Watson,* 423 U.S. at 424. The State failed to prove otherwise.

CONCLUSION

The Court of Appeals' decision should be affirmed.

Respectfully submitted this 4th day of November, 2024.

/s/Daniel K. Siegel
Daniel K. Siegel
N.C. State Bar. No. 46397
ACLU OF NORTH CAROLINA
LEGAL FOUNDATION
P.O. Box 28004
Raleigh, NC 27611
(919) 592-4630
dsiegel@acluofnc.org

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Bridget Lavender
N.Y. State Bar No. 1175453*
American Civil Liberties Union
125 Broad St., 18th Floor
New York, NY 10004
blavender@aclu.org

**Pro hac vice admission pending*

Michele Delgado
N.C. State Bar No. 50661
ACLU OF NORTH CAROLINA
LEGAL FOUNDATION
P.O. Box 28004
Raleigh, NC 27611
mdelgado@acluofnc.org

CERTIFICATE OF SERVICE

I certify that on November 4, 2024, this brief was served on all counsel of record via email to the following:

Katy Dickinson-Schultz,
Assistant Appellate Defender
Katy.W.Dickinson-Schultz@nccourts.org

Attorney for Defendant

Caden Hayes
North Carolina Department of Justice
cwhayes@ncdoj.gov

Attorney for the State

/s/ Daniel K. Siegel
Daniel K. Siegel

Counsel for amici curiae