No. 16-889

In The Supreme Court of the United States

CHERYL DARLENE SINCLAIR,

Petitioner,

v.

LAUDERDALE COUNTY, TENNESSEE; CLAY ALAN NEWMAN; STEVEN SANDERS, SHERIFF,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, AND LAW PROFESSORS ERWIN CHEMERINSKY, KAREN MCDONALD HENNING, KIT KINPORTS, CHARLES MACLEAN, JANET MOORE, AND BRIAN OWSLEY IN SUPPORT OF THE PETITION FOR CERTIORARI

ADAM LAMPARELLO
Counsel of Record
Associate Professor of Law
INDIANA TECH LAW SCHOOL
1600 E. Washington Blvd.
Fort Wayne, IN 46803
260.422.5561, ext. 3450
axlamparello@IndianaTech.edu

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*

Amici curiae are listed in the Appendix and teach, practice, and write in the areas of, *inter alia*, criminal law and procedure, and constitutional law.[1]

The National Association for Public Defense

The National Association for Public Defense ("NAPD") is a national organization uniting nearly 14,000 public defense practitioners across the fifty states. As public defense experts, NAPD's mission is to ensure strong criminal justice systems, policies and practices ensuring effective indigent defense, system reform that increases fairness for indigent clients, and education and support of public defenders and public defender leaders.

The NAPD plays an important role in advocating for defense counsel and the clients they serve and is uniquely situated to speak to issues of fairness and justice facing indigent criminal defendants. As this case presents important and unresolved questions concerning the Fourth Amendment, NAPD offers its perspective to the Court.

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[1] All parties have consented to the filing of this amicus brief. Counsel of record for both parties received notice at least ten days prior to the due date of *Amici Curiae*'s brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their law school, or their counsel made a monetary contribution to its preparation or submission.

Amici Law Professors

Erwin Chemerinsky is the Dean, Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law at the University of California-Irvine School of Law. Dean Chemerinsky has authored ten books and over 200 law review articles, and was recently recognized by the National Jurist magazine as the most influential person in legal education in the United States.

Karen McDonald Henning is an Associate Professor of Law at the University of Detroit Mercy School of Law, and a former appellate attorney in the Office of the Attorney General for the District of Columbia. Professor Henning has authored a variety of law review articles, including "*Reasonable*" *Police Mistakes: Fourth Amendment Claims and the Good Faith Exception After* Heien, 90 ST. JOHN'S L. REV. 271 (2016).

Kit Kinports is the Polisher Family Distinguished Faculty Scholar and Professor of Law at Penn State University Law School. Professor Kinports has authored numerous articles, including Heien*'s Mistake of Law*, 68 ALA. L. REV. 121 (2016), and *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75 (2014), and is a former clerk to Justice Harry Blackmun.

Charles E. MacLean is the Associate Dean for Faculty and an Associate Professor of Law at Indiana Tech Law School. Professor MacLean has authored dozens of law review articles, including Abidor v. Napolitano: *Suspicionless Cell Phone and Laptop "Strip" Searches*

at the Border Compromise the Fourth and First Amendments, 108 NW. U. L. REV. COLLOQUY 280 (2014) (with Adam Lamparello), and *Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine Is Rudderless in the Digital Age Unless Congress Continually Resets the Privacy Bar*, 24 ALB. L.J. SCI. & TECH. 47 (2014).

Janet Moore is an Associate Professor of Law at the University of Cincinnati College of Law. Professor Moore co-convened the Indigent Defense Research Association, a national organization of practitioners, researchers, and policy makers who use data to improve public defense, and has served as an invited expert for the American Bar Association's Indigent Defense Advisory Group, the Indigent Defense Commissions of Michigan and Texas, and the Steering and Amicus Committees of the National Association for Public Defense. Professor Moore has authored numerous articles, including *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of their Public Defenders*, 33 BEHAV. SCI. & L. 751 (2015) (with Christopher C. Campbell, Wesley Meier, and Michael Gaffney), and *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALBANY L. REV. 1281 (2015) (with Marla Sandys and Raj Jayadev).

Brian Owsley is an Assistant Professor of Law at the University of North Texas College of Law, a former trial attorney for the United States Department of Justice, and a former United States Magistrate Judge for the Southern District of Texas, where he served from 2005-2013. Professor Owsley's scholarly work includes

Supreme Court Jurisprudence of the Personal in City of Los Angeles v. Patel, 114 MICH. LAW REV. FIRST IMPRESSIONS 51 (2015), and *The Fourth Amendment Implications of the Government's Use of Cell Tower Dumps in its Electronic Surveillance*, 16 U. PA. J. CONST. L. ONLINE 1 (2013).

Amici respectfully submit that the Court should grant the petition for *certiorari*, reverse the decision of the Sixth Circuit Court of Appeals, and, in so doing, adopt a rule stating that, where a statute is unambiguous, a law enforcement officer's mistake of law is *per se* unreasonable under the Fourth Amendment. Such a rule would clarify the Court's holding in *Heien v. North Carolina*, resolve conflicting decisions among the lower courts, and strike the proper balance between law enforcement's investigatory needs and individual privacy rights.

SUMMARY OF ARGUMENT

"[A]n officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."[2]

In *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014), the Court held that mistakes of law, when based on conflicting and therefore ambiguous statutes, may, in certain circumstances, be reasonable. In so ruling, the Court implicitly suggested that mistakes of

[2] *Heien v. North Carolina*, 135 S. Ct. 530, 539-40 (2014).

law based on *unambiguous* statutes would be unreasonable under the Fourth Amendment. *See id.* at 536 ("the ultimate touchstone of the Fourth Amendment is 'reasonableness' ") (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014)). However, the Court did not explicitly resolve this question. Unfortunately, the Court's silence on this issue has divided the federal courts and created considerable confusion concerning *Heien*'s application to mistakes of law that are predicated on unambiguous statutes.[3]

Accordingly, *amici* respectfully submit that, to clarify the Court's narrow holding in *Heien*, provide guidance to lower courts and law enforcement, and adequately protect individual privacy rights, the Court should answer this question now. In so doing, the Court should adopt a *per se* rule – thus eschewing an *ad hoc*, case-by-case framework – stating that an officer's mistake of law, when based on an unambiguous statute, is unreasonable under the Fourth Amendment.[4]

This approach makes eminent sense, and three reasons counsel in favor of its adoption. *First*, adopting

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[3] As discussed *infra*, the Sixth Circuit's opinion, for example, directly conflicts with decisions from the Fifth and Seventh Circuit Courts of Appeals. *See United States v. Alvarado-Zarza*, 782 F.3d 246, 248 (5th Cir. 2015); *United States v. Stanbridge*, 813 F.3d 1032, 1037-38 (7th Cir. 2016).

[4] For purposes of this brief, *amici* submit that a statute is only ambiguous where "the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view." *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring) (internal citation omitted).

a categorical rule now will provide clarity and guidance to law enforcement officers, who require workable rules to consistently – and fairly – apply the law. *See, e.g.*, *Riley*, 134 S. Ct. at 2491-92 ("if police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis – not in an ad hoc, case-by-case fashion by individual police officers' ") (quoting *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981)).

For example, in *Riley*, the Court underscored the importance of providing workable – and categorical – rules for law enforcement officers and lower courts. There, the Court unanimously adopted a rule stating that warrantless cell phone data searches incident to arrest violated the Fourth Amendment because, *inter alia*, such searches bore no relationship to the original justifications underlying the search incident to arrest doctrine – protecting officer safety and preserving evidence. *See Riley*, 134 S. Ct. at 2485 (observing that there "are no comparable risks [to officer safety and the destruction of evidence] when the search is of digital data") (brackets added). As a result, absent exigent circumstances, law enforcement officers cannot search cell phone data incident to arrest without probable cause and a warrant. *See Riley*, 134 S. Ct. at 2495 ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is . . . simple – get a warrant"). The adoption of a categorical rule that mistaken interpretations of unambiguous laws are *per se* unreasonable will likewise provide clarity and guidance to law enforcement officers and

avoid an untenable, case-by-case approach that often results in a muddled and uncertain jurisprudence.

In addition, a categorical rule will avoid the unintended and undesirable consequence of undermining this Court's jurisprudence in other contexts. For example, if a law enforcement officer arrested a motorist for the crime of driving while intoxicated and, based on the advice of a supervisor or district attorney, conducted a warrantless search of the arrestee's cellular telephone in violation of *Riley*'s unambiguous rule, the officer could claim that the search, in reliance on that advice, was reasonable. That result is precisely what may – and likely would – occur in a variety of contexts if the Court fails to adopt the *per se* rule *amici* propose.

Put simply, this case presents the Court with a golden opportunity to clarify *Heien* and the mistake of law doctrine a mere two years after *Heien* was decided, and thus to avoid the unanticipated – and unforeseeable – problems that may arise in the absence of a clear, workable, and fair standard.

Second, and relatedly, by clarifying the scope of *Heien*, a *per se* rule will promote consistency and predictability among the lower courts and facilitate an objective evaluation of an officer's conduct. Specifically, such a rule will enable lower courts, when determining whether an officer's mistake of law is objectively reasonable, to focus on whether the statutory text is ambiguous, not on whether the officer's subjective intentions rendered a search or seizure reasonable under the Fourth Amendment – an approach that the *Heien*

Court expressly rejected. *See Heien*, 135 S. Ct. at 539 (noting that the Court does "not examine the subjective understanding of the particular officer involved"). At this juncture, however, the level of confusion – as evidenced by conflicting opinions in the lower courts – and the resulting risk that courts will consider an officer's subjective intentions in the reasonableness analysis, is significant.

Third, a *per se* rule would strike the appropriate balance between the investigatory needs of law enforcement and the privacy rights of individuals, thus promoting fairness and accountability in the law's administration. Indeed, a *per se* rule would operate to prohibit law enforcement officers from evading responsibility for unreasonable investigatory conduct, which is surely present when a mistake of law is based on an unambiguous statute. After all, law enforcement already benefits from numerous exceptions to the warrant requirement, uses enhanced technological devices to investigate criminal activity, and may stop individuals even when the stated reason for the stop is pretextual; is it too much to ask that officers understand and correctly apply unambiguous laws? The answer should be no.

At the very least, if law enforcement officers "are in doubt about what the law requires," this Court's jurisprudence should give "them an incentive to err on the side of constitutional behavior." *United States v. Johnson*, 457 U.S. 537, 561 (1982). For these reasons, as well as those set forth *infra*, *amici* respectfully submit that the petition for *certiorari* should be granted

and the decision of the Sixth Circuit Court of Appeals reversed.

ARGUMENT

I. Mistakes of Law Predicated on Unambiguous Statutes Are *Per Se* Unreasonable.

As stated *supra*, the *Heien* Court did not explicitly address the issue of whether an officer's mistake concerning an unambiguous law can ever be reasonable. Yet, its reasoning implicitly suggests that such mistakes would be *ipso facto* unreasonable. Moreover, such a result would provide the necessary guidance to both the lower courts and law enforcement. Thus, this Court should make clear that law enforcement officials are required under the Fourth Amendment to adhere to unambiguous statutes.

A. In *Heien v. North Carolina*, the Court's Ruling Was Predicated on the Ambiguity of the Underlying Statutes.

In *Heien*, the Court implicitly recognized that statutory ambiguity is a necessary predicate for a finding that an officer's mistake of law was reasonable. The Court's holding and reasoning were based largely, if not entirely, on that fact. Both the North Carolina Court of Appeals and North Carolina Supreme Court found that the conflicting statutes created an ambiguity such that the officer's mistaken interpretation of those statutes as requiring two functioning brake

lights was reasonable. *See Heien*, 135 S. Ct. at 540. Writing for the majority, Chief Justice Roberts stated as follows:

> Although the North Carolina statute at issue refers to "*a* stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." . . . The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," . . . indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.

Id. (internal citations omitted).

The North Carolina Court of Appeals also concluded that "the 'rear lamps' discussed in subsection (d) do not include brake lights, but, given the 'other,' it would at least have been reasonable to think they did," and the "stop lamp" provision had "never been previously construed by North Carolina's appellate courts." *Id.* As such, it was "objectively reasonable for an officer . . . to think that Heien's faulty right brake light was a violation of North Carolina law." *Id.* The Supreme Court's reasoning likewise demonstrates that the driving force underlying *Heien* – and the holding that the officer's conduct was reasonable – was the ambiguity created by the conflicting statutes.

Where a statute is unambiguous, however, *Heien* provides no support for the conclusion that an officer's conduct can ever be reasonable. And here, the statute at issue – which defines the crime of escape as the "unauthorized departure from custody or failure to return to custody following a temporary leave for a specific purpose or limited period, *but does not include a violation of conditions of probation or parole*" – is anything but ambiguous. Tenn. Code Ann. § 39-16-601(3) (1989) (emphasis added).

In addition to the majority's reasoning, Justice Kagan's concurring opinion in *Heien* advocated for precisely the rule that *amici* propose, and that the Solicitor General endorsed:

> A court tasked with deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. *If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not.* As the Solicitor General made the point at oral argument, the statute must pose a "really difficult" or "very hard question of statutory interpretation." And indeed, both North Carolina and the Solicitor General agreed that such cases will be "exceedingly rare."

Heien, 135 S. Ct. at 541 (Kagan, J., concurring) (emphasis added) (internal citations omitted). As Justice Kagan noted, "Justice Story's opinion in *The Friendship*,

9 F. Cas. 825, 826 (No. 5,125) (C.C.D. Mass. 1812), suggests the appropriate standard for deciding when a legal error can support a seizure: when an officer takes a reasonable view of a 'vexata questio' on which different judges 'h[o]ld opposite opinions.'" *Id.* (internal citations omitted). Put simply, "the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better." *Utah v. Strieff*, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting). Rather, "the test is [only] satisfied when the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view." *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring) (brackets added).

Furthermore, *dicta* in the *Heien* majority opinion intimates that mistakes of law based on unambiguous statutes are unreasonable. For example, if, as the majority suggested, an "officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce" (*Heien*, 135 S. Ct. at 539-40), it is difficult to conceive of any situation, where, as here, an officer's mistaken understanding of an unambiguous statute would be anything but sloppy.

Moreover, the majority in *Heien* was careful to state that "our decision does not discourage officers from learning the law." *Id.* at 539. Yet, it is difficult to conceive of any situation where officers would be encouraged to learn the law if mistaken applications of unambiguous statutes could survive the reasonableness inquiry, if even on a case-by-case basis.

Additionally, if, as the *Heien* Court suggested, the "Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes – whether of fact or of law – must be *objectively* reasonable," *Id.* (majority opinion) (emphasis added), it would be difficult to identify any situation where an officer's mistake of an unambiguous law could satisfy this standard – at least without inquiring into the officer's subjective intentions or motivations. Such an approach is plainly inconsistent with Chief Justice Roberts's admonition in *Heien* that the Court "not examine the subjective understanding of the particular officer involved." *Id.*

Perhaps most importantly, if an officer's conduct can be reasonable even where the underlying statute is unambiguous, it is difficult to conceive of *any* circumstances in which an officer's mistake of law could be considered *unreasonable*. And that is the point. The Court should not permit officers' unreasonable mistakes of law grounded on unambiguous statutes to be deemed reasonable under the Fourth Amendment, either by denying *certiorari*, thereby allowing the Sixth Circuit's erroneous decision and the Circuit split to stand, or by holding to the contrary, when in *Heien* the Court properly intimated that such mistakes would be *ipso facto* unreasonable.

B. A Categorical Rule Will Provide Appropriate Guidance to and a Workable Standard for Law Enforcement and Lower Courts.

In *Riley*, the Court emphasized the importance of providing clear and workable rules to guide law enforcement officers. Specifically, the Court held that warrantless searches of cell phone data incident to arrest were categorically prohibited by the Fourth Amendment because, *inter alia*, they did not implicate officer safety or evidence preservation. *Riley*, 134 S. Ct. at 2485-86 ("digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape," and "once law enforcement officers have secured [but not searched] a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone"). Writing for the majority, Chief Justice Roberts emphasized that, "if police are to have workable rules, the balancing of the competing interests . . . '*must in large part be done on a categorical basis – not in an ad hoc, case-by-case fashion by individual police officers*.'" *Id*. at 2491-92 (quoting *Summers*, 452 U.S. at 705 n.19) (emphasis added).

That statement applies with particular force here. To begin with, the Court's silence on whether mistakes of law can be reasonable where the underlying statute is unambiguous leaves lower courts unguided regarding the proper scope of *Heien* and the mistake of law doctrine. As one commentator notes, "[b]eyond the

clues that can be gleaned from the [*Heien*] Court's disposition of th[e] specific statutory interpretation issue [before it], the majority provided little content to its definition of a reasonable mistake of law." Kit Kinports, Heien*'s Mistake of Law*, 68 ALA. L. REV. 121, 157 (2016).

In fact, the Court's silence on this issue has already created a conflict among the federal courts of appeals. The Sixth Circuit's opinion, for example, directly conflicts with decisions from the Fifth and Seventh Circuit Courts of Appeals, which appropriately have refused to extend *Heien* to mistakes interpreting unambiguous statutes. *See, e.g.*, *United States v. Alvarado-Zarza*, 782 F.3d 246, 248 (5th Cir. 2015); *United States v. Stanbridge*, 813 F.3d 1032, 1037-38 (7th Cir. 2016); *but see Mason v. Commonwealth*, 786 S.E.2d 148 (Va. 2016) (finding reasonable suspicion despite an officer's mistaken interpretation of an unambiguous statute). *Amici* respectfully submit that the time to provide clearer direction is now. The Court's silence on this issue, largely because it was not expressly before the Court in *Heien*, risks precisely the type of *ad hoc*, case-by-case jurisprudence that *Riley* explicitly rejected, creating further conflicts in the lower courts and confusion among law enforcement.

In addition, adopting a *per se* rule will enable lower courts to focus the reasonableness inquiry on whether the underlying statute was ambiguous, not on whether the officer's subjective motivations or understandings rendered the stop reasonable – an inquiry

that the *Heien* majority eschewed and that would prevent lower courts from developing the clear and workable rules necessary for ensuring a fair and consistent administration of the law. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("'[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'") (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)). Finally, such a rule would carefully circumscribe the situations in which mistakes of law can be considered reasonable [i.e., only where the underlying statute is ambiguous], encourage a serious, not sloppy, "study of the laws [officers are] duty-bound to enforce," and provide law enforcement with an "incentive to err on the side of constitutional behavior." *Heien*, 135 S. Ct. at 539-40; *Johnson*, 457 U.S. at 561 (brackets added).

II. A *Per Se* Rule Will Strike the Appropriate Balance Between the Investigatory Needs of Law Enforcement and Individual Privacy Rights.

Resolving the question raised by the petition – and adopting a rule that mistakes of unambiguous laws are *per se* unreasonable – would strike the proper balance between the investigatory needs of law enforcement and the privacy rights of individuals. On the other hand, if the Court embraced the proposition that mistaken interpretations of unambiguous laws could be considered objectively reasonable under the Fourth

Amendment, it would be difficult to identify any situation where an officer's mistake of law would be deemed unreasonable. As a result, the threat to privacy rights would be unreasonably high and the incentive for officers to know the laws they are obligated to enforce would be unreasonably low. And if the Court simply refuses to address this question and lets the Sixth Circuit's decision stand, the result would be the same. Contrary to *Heien*, a law enforcement officer would gain a "Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." *Heien*, 135 S. Ct. at 539-40.

Adopting the *per se* rule advocated by *amici* would not undermine the law enforcement interests underlying the Court's ruling in *Heien*. *Heien* recognized that "[t]o be reasonable is not to be perfect," and that law enforcement officials "deserve a margin of error" when forced to "make a quick decision" where "the application of a statute is unclear." *Id*. at 536, 539. But asking police to be familiar with unambiguous statutes is a far cry from demanding perfection on their part and allowing them no room for error. Rather, it is merely asking them to act as "reasonably well trained officer[s]" who "have a reasonable knowledge of what the law prohibits." *United States v. Leon*, 468 U.S. 897, 922 n.23, 919 n.20 (1984).

At bottom, if the Court does not limit *Heien* and hold that mistakes of law based on unambiguous statutes are never reasonable, the privacy protections underlying the Fourth Amendment will be threatened. Simply stated, the scope of *Heien* and the mistake of

law doctrine should be commensurate with officers' obligation to know the unambiguous law they are responsible for enforcing – and that citizens are required to obey.

CONCLUSION

For the foregoing reasons, and those set forth by Petitioner, the petition for *certiorari* should be granted, and the decision by the Sixth Circuit Court of Appeals reversed.

Respectfully submitted,

ADAM LAMPARELLO
Counsel of Record
Associate Professor of Law
INDIANA TECH LAW SCHOOL
1600 E. Washington Blvd.
Fort Wayne, IN 46803
260.422.5561, ext. 3450
axlamparello@IndianaTech.edu

APPENDIX

List of *Amici Curiae*

The National Association for Public Defense

Erwin Chemerinsky
Dean, Distinguished Professor of Law, and
Raymond Pryke Professor of First Amendment Law
University of California – Irvine School of Law

Karen McDonald Henning
Associate Professor of Law
University of Detroit Mercy School of Law

Kit Kinports
Polisher Family Distinguished Faculty Scholar
and Professor of Law
Penn State University Law School

Charles MacLean
Associate Dean for Faculty and
Associate Professor of Law
Indiana Tech Law School

Janet Moore
Associate Professor of Law
University of Cincinnati College of Law

Brian Owsley
Assistant Professor of Law
University of North Texas College of Law