No. 18-556

In the Supreme Court of the United States

STATE OF KANSAS,
Petitioner,
v.
CHARLES GLOVER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY BRIEF OF PETITIONER

CHARLES E. BRANSON
District Attorney, Douglas County, Kansas
ANDREW D. BAUCH
Assistant District Attorney

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
TOBY CROUSE
Solicitor General of Kansas
(Counsel of Record)
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General
120 S.W. 10th Ave.
2nd Floor
Topeka, KS 66612
(785) 296-2215
toby.crouse@ag.ks.gov

Counsel for Petitioner State of Kansas

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Kansas Supreme Court's Decision Is Irreconcilable with the Decisions of 16 State Supreme Courts and Federal Circuit Courts. 2

II. The Division Among State Supreme Courts and Federal Circuit Courts Warrants Review in this Case. 6

III. The Decision Below Misapplied the Fourth Amendment to Prohibit Commonsense Investigations. 9

CONCLUSION. 12

TABLE OF AUTHORITIES

CASES

Armfield v. State,
918 N.E.2d 316 (Ind. 2009). 2, 7

Commonwealth v. Deramo,
762 N.E.2d 815 (Mass. 2002) 4

Delaware v. Prouse,
440 U.S. 648 (1979). 5, 9

Illinois v. Wardlow,
528 U.S. 119 (2000). 10

State v. Pike,
551 N.W.2d 919 (Minn. 1996) 3

State v. Richter,
765 A.2d 687 (2000) 8

State v. Showalter,
432 P.3d 697, 2019 WL 166570 (Kan. Ct. App. 2019) 8

State v. Smith,
905 N.W.2d 353 (Wis. 2018). 4

State v. Williams,
No. A17-0655, 2018 WL 1040731 (Minn. Ct. App. Feb. 26, 2018) 3

State v. Vance,
790 N.W.2d 775 (Iowa 2010) 4, 7, 8, 11

Texas v. Brown,
460 U.S. 730 (1983). 11

Traft v. Commonwealth,
539 S.W.3d 647 (Ky. 2018) 5

United States v. Arvizu,
534 U.S. 266 (2002). 7

United States v. Cortez-Galaviz,
495 F.3d 1203 (10th Cir. 2007). 2, 3, 7, 10, 11

United States v. McBrown,
149 F.3d 1176, 1998 WL 413981 (5th Cir. 1998) . 4

United States v. Sokolow,
490 U.S. 1 (1989). 7

Whren v. United States,
517 U.S. 806 (1996). 7

RULES

Sup. Ct. R. 10(b) 5

OTHER AUTHORITIES

David J. DeYoung & Michael A. Gebers, *California Department of Motor Vehicles, An Examination of the Characteristics and Traffic Risks of Drivers Suspended/Revoked for Different Reasons* (2004), *available at* https://pdfs.semanticscholar.org/397f/ffe16d48caf6584b4a47184819c179d27d90.pdf 10

Mothers Against Drunk Driving, https://www.madd.org/blog/stats/50-to-75-percent-of-convicted-drunk-drivers-continue-to-drive-on-a-suspended-license/ 9, 10

National Highway Traffic Safety Administration, Reasons for Driver License Suspension, Recidivism, and Crash Involvement Among Drivers with Suspended/Revoked Licenses 1 (2009), *available at* http://www.nhtsa.dot.gov/ people/injury/TSFLaws/PDFs/ 810719W.pdf. 9, 10

REPLY BRIEF

Certiorari should be granted because even Glover concedes that there is a clear split on the exact question presented. Opp. 11. Twelve state supreme courts and four federal circuit courts have held that it is reasonable for an officer to suspect that the owner of a vehicle is driving the vehicle, absent information to the contrary. In those jurisdictions *no more* evidence is required. The Kansas Supreme Court interpreted the Fourth Amendment differently. It consciously departed from the majority view and held that it is never reasonable for an officer to suspect that the owner of a vehicle is also its driver without *more* evidence that it is the owner driving the vehicle. This Court should grant review to bring uniformity to the important Fourth Amendment question presented.

Although Glover would have the Court believe that this case is an anomaly that will never recur, the dozens of appellate courts that have decided the very question presented say otherwise. Pet. 6-10. And the stipulated factual record is a feature that makes review of this case all the more attractive because it will result in a clear rule of law. This Court should grant review to halt the distortion of this Court's reasonable suspicion precedents the Kansas Supreme Court has wrought.

I. The Kansas Supreme Court's Decision Is Irreconcilable with the Decisions of 16 State Supreme Courts and Federal Circuit Courts.

Glover agrees there is a split among state supreme courts on the question presented. Opp. 11 (conceding that the Kansas Supreme Court's interpretation of the Fourth Amendment conflicts with the rule applied by the supreme courts of three other states). Glover strains mightily to minimize the breadth of this split, but to no avail.

The Kansas Supreme Court's decision conflicts with the holdings of at least 16 other state supreme courts and federal circuit courts. Pet. 6-9. While Glover argues that additional facts were present in some of those cases, the decisions did not rely on those additional facts. Instead, the holdings are categorical: "an officer has reasonable suspicion to initiate a *Terry* stop when (1) the officer knows that the registered owner of a vehicle has a suspended license and (2) the officer is unaware of any evidence or circumstances which indicate that the owner is not the driver of the vehicle." *Armfield v. State*, 918 N.E.2d 316, 321 (Ind. 2009).

For example, the Tenth Circuit—whose decisions are binding on federal prosecutions in Kansas—previously rejected the rationale for the Kansas Supreme Court's decision. *See United States v. Cortez-Galaviz*, 495 F.3d 1203, 1207-08 (10th Cir. 2007) (Gorsuch, J.) (holding that it is reasonable for an officer to suspect that the owner of a vehicle is driving it). In *Cortez-Galaviz*, the Tenth Circuit upheld a stop even though the registration and insurance check provided

less information about the likelihood of criminal activity than the license plate check in this case. There, the check indicated that the owner's insurance was "not found," which was "one of at least three possible responses to an officer's computer search, the others being messages indicating that the vehicle either definitely is or definitely is not insured." *Id.* at 1204. Yet the Tenth Circuit had no trouble finding that the officer had reasonable suspicion despite this ambiguity, and did not rely on any other suspicious behavior that may have been present. *Id.* at 1206. Yet here, the officer had information that the owner definitely did not have a valid driver's license. App. 60-61. And the Kansas Supreme Court said that was insufficient for reasonable suspicion.

In *State v. Pike*, 551 N.W.2d 919 (Minn. 1996), the Minnesota Supreme Court expressly declined to consider disputed testimony regarding potentially suspicious behavior. *Id.* at 922. Instead, the court's decision rested only on the trooper's undisputed testimony that he "was aware that the owner of the vehicle in question had a revoked license." *Id.* Thus, the court held that "[w]hen an officer observes a vehicle being driven, it is rational for him or her to infer that the owner of the vehicle is the current operator," as long as the officer "remains unaware of any facts which would render unreasonable the assumption that the owner is driving the vehicle." *Id.*; *see also, e.g.*, *State v. Williams*, No. A17-0655, 2018 WL 1040731, at *3 (Minn. Ct. App. Feb. 26, 2018), review denied (May 15, 2018) ("*Pike* does not require police to make an effort to acquire information about a vehicle's owner before inferring that the vehicle's owner is its operator.").

The other decisions the Kansas Supreme Court split with are similarly unequivocal. For example:

- *State v. Vance*, 790 N.W.2d 775, 781 (Iowa 2010): "We hold an officer has reasonable suspicion to initiate an investigatory stop of a vehicle to investigate whether the driver has a valid driver's license when the officer knows the registered owner of the vehicle has a suspended license, and the officer is unaware of any evidence or circumstances indicating the registered owner is not the driver of the vehicle."
- *State v. Smith*, 905 N.W.2d 353, 359 (Wis. 2018): "[R]easonable suspicion exists to stop a vehicle if an officer has knowledge the owner of the vehicle has an invalid license."
- *Commonwealth v. Deramo*, 762 N.E.2d 815, 818 (Mass. 2002): "[T]he police may, in the absence of any contrary evidence, reasonably conclude that a vehicle is likely being driven by its registered owner."

Besides, none of the suspicious circumstances absent from this case—driving unusually slowly or being oddly parked or stopped—provide any additional support for the inference that the owner of the vehicle is also the driver.

Nor does it matter that in a few cases the officer knew the owner had an outstanding warrant rather than a suspended license. The courts in those cases also flatly held that it is reasonable for an officer to believe that the owner of a vehicle is driving it, absent information to the contrary. *See, e.g.*, *United States v.*

McBrown, 149 F.3d 1176, 1998 WL 413981, at *10 (5th Cir. 1998) (unpublished) (holding that a license plate check that showed warrants for the owner's arrest provided reasonable suspicion to stop the vehicle because the officer "did not know that McBrown was not the owner of the vehicle"); *Traft v. Commonwealth*, 539 S.W.3d 647, 651 (Ky. 2018) ("[W]e hold that the fact that the owner of the vehicle was subject to seizure for violation of law creates an articulable and reasonable suspicion for an officer to initiate a traffic stop.").

Glover's argument that these additional facts matter also is inconsistent with the Kansas Supreme Court's rationale. The Kansas Supreme Court explained that it declined to follow all the other courts to have addressed the question presented because it disagreed with the legal reasoning of the other courts as to the requirements of the Fourth Amendment. It did not reject those holdings because it believed this case was factually distinguishable. App. 17. Glover's attempt to chip away at the clear split not only requires ignoring the actual holdings of the decisions the Kansas Supreme Court split with, it also requires an unduly narrow view of the decision below.

At bottom, there is an intolerable split on an important question of Fourth Amendment law that this Court should resolve. Sup. Ct. R. 10(b); *see also Delaware v. Prouse*, 440 U.S. 648 (1979) (granting certiorari to resolve a conflict in the holdings of state supreme courts and federal circuit courts on an important Fourth Amendment question, even though the lower court decisions involved materially different

facts). The Fourth Amendment's protections should not vary from place to place. Glover concedes that the Kansas Supreme Court's decision will result in stops violating the Fourth Amendment in Kansas courts but not in others. Only this Court can resolve that conflict.

II. The Division Among State Supreme Courts and Federal Circuit Courts Warrants Review in this Case.

Whether it is reasonable for an officer to suspect that the owner of a vehicle is the one driving the vehicle is a question that affects countless decisions by law enforcement officers every day. That this case so cleanly presents this important Fourth Amendment question unobscured by a mosaic of variables is a strength of the petition, not a weakness. It also highlights the conflict created by the decision below, which will have real-world consequences. It will result in the Fourth Amendment requiring different outcomes in similar cases depending where the case is brought. And the consequences of declining review would be particularly acute in Kansas where two different Fourth Amendment rules apply depending on whether the State or federal government brings charges.

1. The importance of resolving the conflict the decision below has created is undeniable. If Glover had been stopped and charged in any of the 16 jurisdictions with conflicting precedent, the stop would not have violated the Fourth Amendment. And if the stop had revealed crimes charged by federal prosecutors in Kansas, the stop would have been lawful and the evidence admissible. Granting review in this case, which so cleanly presents a question of Fourth

Amendment law, would greatly advance this Court's interest in "unify[ing] precedent" and providing "law enforcement officers the tools to reach the correct decision beforehand." *United States v. Arvizu*, 534 U.S. 266, 275 (2002).

2. Glover's suggestion that this case has little practical significance borders on the dangerous and the absurd. First he argues that law enforcement officers will almost always be able to obtain additional information about a driver sufficient to establish reasonable suspicion under the Kansas Supreme Court's heightened requirement. Opp. 15. The only difference is that—in Kansas—they will be required to do so. Yet numerous other courts have previously rejected the Kansas approach as both unsafe and unreasonable. *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1208 (10th Cir. 2007); *Armfield v. State*, 918 N.E.2d 316, 322 (Ind. 2009); *State v. Vance*, 790 N.W.2d 775, 781 (Iowa 2010). And this Court has rejected altogether the notion that the reasonableness of an officer's decision to stop a suspect turns on the availability of less intrusive investigatory techniques. *United States v. Sokolow*, 490 U.S. 1, 11 (1989).

Next Glover argues that if an officer is not able to identify the driver, the officer can always use a minor traffic violation as a pretext to stop the vehicle and investigate the possible driver's license violation. Opp. 15. The Fourth Amendment certainly allows stops for minor infractions even when the officer's intent is to investigate a more serious crime. *See Whren v. United States*, 517 U.S. 806, 812-13 (1996). But it would be passing strange to adopt a Fourth Amendment rule

that would *require* the use of pretextual seizures to investigate the vast majority of unlicensed drivers who can easily avoid detection, even where an officer has information that reasonably suggests more serious infractions are afoot. It also ignores the fact that between the time an officer runs a plate and has to decide whether to stop a vehicle, the driver often has not openly broken the law and has every incentive not to do so if the driver lacks a valid license. *See, e.g.*, *Vance*, 790 N.W.2d at 778; *State v. Richter*, 765 A.2d 687, 688 (2000).

3. Glover offers no support for his assertion that the number of cases affected by the decision below is "vanishingly small." Opp. 17. Indeed, the Kansas Court of Appeals has already relied on *Glover* to reverse at least one other criminal conviction where a vehicle was stopped based on information that its registered owner had a suspended license. *State v. Showalter*, 432 P.3d 697, 2019 WL 166570, at *1 (Kan. Ct. App. 2019). And the decision below puts Kansas law enforcement officers in a particularly impossible situation. Not only will they be required to guess what "more information" is required to establish reasonable suspicion, they will need to weigh the risks involved in obtaining it, and will need clairvoyance to see into the future whether any charges that might result will be brought in federal or state court. The question presented is an important one that warrants this Court's review.

III. The Decision Below Misapplied the Fourth Amendment to Prohibit Commonsense Investigations.

Finally, no state supreme court or federal circuit court has been persuaded by Glover's policy-based concerns about the majority rule. In any event, those concerns—which will be addressed if certiorari is granted—are no reason to deny the petition. Stopping a vehicle based on information about the owner of the vehicle is not a random, suspicionless search, as the Kansas Supreme Court and Glover suggest. Both data and commonsense (as recognized by 16 other jurisdictions) demonstrates that it is reasonable to suspect that an owner of a vehicle is driving it, even if the owner's license has been suspended or revoked.

1. This case does not involve a random, suspicionless seizure like the indiscriminate license and registration checks in *Delaware v. Prouse*, 440 U.S. 648 (1979). Far from it. Here, the officer had a reason to be suspicious that criminal activity was afoot because the registered owner of the truck he stopped did not have a valid driver's license.

2. It is well documented that "many suspended/revoked drivers continue to drive after their suspension." National Highway Traffic Safety Administration, Reasons for Driver License Suspension, Recidivism, and Crash Involvement Among Drivers with Suspended/Revoked Licenses 1 (2009), *available at* http://www.nhtsa.dot.gov/people/injury/TSFLaws/PDFs/ 810719W.pdf (NHTSA Report). As many as 50-75% continue driving despite having their license suspended or revoked. Mothers Against Drunk Driving,

https://www.madd.org/blog/stats/50-to-75-percent-of-convicted-drunk-drivers-continue-to-drive-on-a-suspended-license/; David J. DeYoung & Michael A. Gebers, *California Department of Motor Vehicles, An Examination of the Characteristics and Traffic Risks of Drivers Suspended / Revoked for Different Reasons*, p. 1 (2004), *available at* https://pdfs.semanticscholar.org/397f/ffe16d48caf6584b4a47184819c179d27d90.pdf (Traffic Risk of Suspended/Revoked Drivers). Roughly 28% of drivers with a suspended license are convicted of a subsequent driving-related violation within the period of their suspension. *See* NHTSA Report, *supra*, at 19. And they continue to be dangerous; they cause more accidents than licensed drivers, regardless of the reason for the suspension. Traffic Risk of Suspended/Revoked Drivers, *supra*, at 11; Pet. 17-18; States' Amicus Br. 5, 12-14.

Even if there were two licensed drivers for every registered vehicle, Opp. 19 n.6, or if on average an owner were one of three drivers in a family, *see* States' Amicus Br. 13, the likelihood a vehicle is being driven by its owner would be no less than 33%, and probably much higher than that because "common sense and ordinary experience suggest that a vehicle's owner is . . . very often the driver of his or her own car." *Cortez-Galaviz*, 495 F.3d at 1207; *see also* Pet. 7-10; States' Amicus Br. 14-15. That probability is more than sufficient to provide reasonable suspicion, which is satisfied by "considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *see also* Pet. 13-14; States' Amicus Br. 16-17.

3. Glover's claim that the rule in place in 16 other jurisdictions encourages law enforcement officers to conduct indiscriminate seizures of a substantial portion of the lawfully driving public is not credible. Opp. 20-21. First, stopping a vehicle based on information about the owner of the vehicle is not indiscriminate. *Cortez-Galaviz*, 495 F.3d at 1206 (recognizing that a license plate check gave the officer "reason . . . to pluck this needle from the haystack of cars on the road for investigation of a possible insurance violation"). Second, it defies the data and common sense to suggest that a substantial portion of the lawfully driving public is driving vehicles owned by someone who is not authorized to drive or is wanted for breaking the law. Third, the "innocent driver of a borrowed car" has nothing to fear. Opp. 22. After all, they are innocent. And after a brief stop where the officer confirms that the driver is not the owner, the driver will be on their way. *See, e.g.*, *State v. Vance*, 790 N.W.2d 775, 778, 782 (Iowa 2010). Such stops will be no more intrusive than a driver's license checkpoint, which this Court has approved. *See Texas v. Brown*, 460 U.S. 730, 739 (1983).

4. The hypothesized specter of future use of automated license plate reader technology is a red herring. It has no effect on the Fourth Amendment question presented here, which is limited to whether reasonable suspicion exists. Every day law enforcement officers across the country run license plates through computer databases to gather information about whether vehicles are being driven lawfully. Whether the technology used to run the plate is a dashboard computer in a patrol car or an automated license plate

reader, the act of running the plate and deciding in real time whether to make a stop does not implicate the parade of high-tech horribles Glover attempts to conjure.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
TOBY CROUSE
Solicitor General of Kansas
(Counsel of Record)
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
toby.crouse@ag.ks.gov

CHARLES E. BRANSON
District Attorney,
Douglas County, Kansas
ANDREW D. BAUCH
Assistant District Attorney

Counsel for Petitioner
State of Kansas