No. 23-335

In the Supreme Court of the United States

KANSAS,

Petitioner,

v.

JEREMY A. CLINE,

Respondent.

On petition for a writ of certiorari to the Kansas Court of Appeals

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities ii

Brief in Opposition 1

Statement 3

A. Legal background 3

B. Factual background 5

C. Proceedings below 9

Reasons for Denying the Petition 13

A. This Court lacks jurisdiction 13

B. This case would not warrant further review even if the Court had jurisdiction 15

1. No lower court has adopted a categorical rule against suppression of evidence uncovered as a result of excessive force 15

2. The petition seeks mere error correction and presents facts certain never again to recur 20

3. The decision below is correct 22

Conclusion 25

TABLE OF AUTHORITIES

Cases

Bateman v. *Arizona*,
429 U.S. 1302 (1976) 13

Brito v. *State*,
2016 WL 7377180 (Nev. 2016) 19

Conwell v. *State*,
714 N.E.2d 764 (Ind. Ct. App. 1999) 19, 20

Cox Broadcasting Corp. v. *Cohn*,
420 U.S. 469 (1975) 14, 15

Davis v. *United States*,
564 U.S. 229 (2011) 2, 3, 4, 22, 23

Grier v. *State*,
868 N.E.2d 443 (Ind. 2007) 19

Herring v. *United States*,
555 U.S. 135 (2009) 4, 23

Huber v. *New Jersey Department of Environmental Protection*,
562 U.S. 1302 (2011) 22

Hudson v. *Michigan*,
547 U.S. 586 (2006) 3, 4

Mapp v. *Ohio*,
367 U.S. 643 (1961) 3

Murray v. *United States*,
487 U.S. 533 (1988) 4

Nix v. *Williams*,
467 U.S. 431 (1984) 4

Ohio v. *Robinette*,
519 U.S. 33 (1996) 3

Cases—continued

Republic Natural Gas Co. v. *Oklahoma*,
334 U.S. 62 (1948) 13

Segura v. *United States*,
468 U.S. 796 (1984) 3

Serfass v. *United States*,
420 U.S. 377 (1975) 14

Silverthorne Lumber Co. v. *United States*,
251 U.S. 385 (1920) 3

State v. *Daniel*,
242 P.3d 1186 (Kan. 2010) 4, 5

State v. *Ellis*,
469 P.3d 65 (Kan. 2020) 4, 5

State v. *Henning*,
209 P.3d 711 (Kan. 2009) 4

State v. *Herr*,
828 N.W.2d 896 (Wis. Ct. App. 2013) 19

State v. *Hodson*,
907 P.2d 1155 (Utah 1995) 19, 20

State v. *Hoeck*,
163 P.3d 252 (Kan. 2007) 5

State v. *Neighbors*,
328 P.3d 1081 (Kan. 2014) 4

State v. *Nelson*,
354 So. 2d 540 (La. 1978) 19

State v. *Sundberg*,
611 P.2d 44 (Alaska 1980) 18

Cases—continued

State v. *Tapp*,
353 So. 2d 267 (La. 1977).....19

State v. *Ward*,
2021 WL 4127189 (Idaho Ct. App. 2021) 19

United States v. *Ankeny*,
502 F.3d 829 (9th Cir. 2007) 16

United States v. *Garcia-Hernandez*,
659 F.3d 108 (1st Cir. 2011)..... 17, 18

United States v. *Leon*,
468 U.S. 897 (1984).....4, 24

United States v. *Morales*,
385 F. App'x 165 (3d Cir. 2010) 19

United States v. *Ramirez*,
523 U.S. 65 (1998).....16

United States v. *Watson*,
558 F.3d 702 (7th Cir. 2009)..... 16, 17

Utah v. *Strieff*,
579 U.S. 232 (2016).....4

Wong Sun v. *United States*,
371 U.S. 471 (1963).....3

Other Authorities

28 U.S.C. § 1257(a).....13

S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* (10th ed. 2013) 21

BRIEF IN OPPOSITION

The facts of this case are shocking, and the Kansas intermediate court was manifestly correct to apply the exclusionary rule in these highly unusual circumstances. This case involved a tactical vehicle intervention, or TVI maneuver, used by state trooper Justin Dobler to stop respondent Jeremy Cline's vehicle during a low-speed pursuit over a trivial moving violation. This was Dobler's sixth vehicle pursuit in fifteen months, and he had a long history of official discipline for engaging in inappropriate car chases. The TVI maneuver in this case killed Anita Benz, Cline's girlfriend and front-seat passenger. Dobler was terminated from his job as a state trooper as a result, for "willful endangerment of lives" and "gross carelessness" in the execution of his job duties.

Dobler began his pursuit of Cline's car because of a simple cracked windshield. He chased the vehicle at low speeds through a residential area, in violation of departmental policy. The video evidence is clear that, during the three-minute pursuit, Cline was not driving recklessly or putting any bystanders at risk. He even used his turn signal and slowed at stop signs. A records check showed the vehicle was not stolen.

Nonetheless, once the car turned onto a divided-lane road, Dobler used a TVI maneuver to deliberately send the vehicle into a telephone pole, seriously injuring Cline and killing Benz. *Because of a cracked windshield.*

Having stopped the vehicle with this flagrantly unreasonable application of force, Dobler uncovered evidence of certain crimes—principally, according to state prosecutors, evidence of *felony murder for the very death that Dobler himself had caused*.

At the suppression hearing that followed, several of Trooper Dobler's supervisors, including his unit captain, testified for Cline. They explained that Dobler had been warned repeatedly not to initiate vehicle pursuits within city limits for anything other than "violent person felonies," and they uniformly opined that that the chase in this case was grossly unreasonable.

When police misconduct is "deliberate, reckless, or grossly negligent * * * the deterrent value of exclusion is strong and tends to outweigh the resulting costs," warranting suppression. *Davis* v. *United States*, 564 U.S. 229, 238 (2011). As the state trial court remarked at the suppression hearing, this was thus the "very rare" case in which settled Fourth Amendment principles warranted exclusion of evidence as a response to excessive force.

In upholding that conclusion, the intermediate state appellate court expressly recognized the fact-bound nature of suppression rulings like this and kept its analysis tightly focused on the highly unusual circumstances of the case.

Kansas disagrees with the bottom-line result below. In its view, the evidence should not have been suppressed, and Cline should now be serving a decades-long sentence for the death caused by *Dobler's* willful endangerment of lives. But this Court lacks jurisdiction to address that question because the appeal is expressly "interlocutory" (Pet. App. 15) and thus not final under Section 1257(a).

Even if it were otherwise, review would be unwarranted. Rather than framing its petition as the (ill-conceived) error-correction request that it is, Kansas mischaracterizes the decision below as creating a "split of opinion about the application of the exclusionary rule" in excessive-force cases. That is obviously wrong. No court

has held that excessive-force violations cannot ever support suppression, nor would such a rule make sense, as this case makes clear. The disparate outcomes Kansas identifies in its petition are not the result of a disagreement among the lower courts on a common matter of law; they are instead the result of courts applying the same legal standards to disparate facts. In these circumstances, further review would be folly.

STATEMENT

A. Legal background

The exclusionary rule—which prohibits the use of unlawfully seized evidence in criminal trials—is the primary means of enforcing Fourth Amendment violations by federal and state courts in criminal proceedings. See *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule requires the suppression of evidence obtained as a direct result of an unlawful search or seizure, as well as evidence that is derivative of unconstitutional conduct, commonly referred to as "fruit of the poisonous tree." See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920); *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963); *Segura* v. *United States*, 468 U.S. 796, 804 (1984).

The "purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis*, 564 U.S. at 246. Like all Fourth Amendment inquiries, it "eschew[s] bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996). The Court has therefore explained that exclusion is warranted only "where its deterrence benefits outweigh its substantial social costs." *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006).

In weighing the cost of exclusion against its deterrent value, the Court focuses "on the 'flagrancy of the police misconduct' at issue.'" *Davis*, 564 U.S. at 238 (quoting *United States* v. *Leon*, 468 U.S. 897, 911 (1984)). When police misconduct is "'deliberate,' 'reckless,' or 'grossly negligent' * * * , the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Ibid.* (quoting *Herring* v. *United States*, 555 U.S. 135, 144 (2009)).

To have a deterrent effect on law enforcement, there must be a "causal relationship between the unconstitutional act and the discovery of evidence." *Utah* v. *Strieff*, 579 U.S. 232, 238 (2016). In situations where police would have discovered the evidence notwithstanding the unlawful search or seizure, suppression is unwarranted because exclusion would not serve a deterrent purpose. See *Murray* v. *United States*, 487 U.S. 533, 537-541 (1988) (independent source doctrine); *Nix* v. *Williams*, 467 U.S. 431, 444 (1984) (inevitable discovery doctrine). To be sure, "but-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson*, 547 U.S. at 592. That is, where the causal connection is "remote or has been interrupted by some intervening circumstance" then exclusion would not serve the deterrent purpose of the rule. *Utah*, 579 U.S. at 238 (attenuation doctrine).

The Kansas Supreme Court's approach to the Fourth Amendment is fully aligned with this Court's. See, *e.g.*, *State* v. *Henning*, 209 P.3d 711, 718 (Kan. 2009); *State* v. *Neighbors*, 328 P.3d 1081, 1086 (Kan. 2014); *State* v. *Ellis*, 469 P.3d 65, 70-78 (Kan. 2020); *State* v. *Daniel*, 242 P.3d 1186, 1191 (Kan. 2010).

Consistent with this Court's teachings, the Kansas Supreme Court holds that the "exclusionary rule operates

to protect Fourth Amendment rights through deterrence, and it is not the defendant's personal constitutional right." *Daniel*, 242 P.3d at 1190. And it has therefore directed Kansas courts—as this Court has—to determine "whether evidence should be excluded as a sanction for a Fourth Amendment violation * * * by weighing the costs and benefits of preventing the prosecution's use of the illegally obtained evidence." *Id.* at 1190-1191. Likewise, it has directed Kansas courts to consider the flagrancy of the police misconduct at issue. See *State* v. *Hoeck*, 163 P.3d 252, 265 (Kan. 2007). And Kansas appropriately requires a close causal relationship between the unlawful police conduct and the discovery of the evidence sought to be suppressed before applying the exclusionary rule. See *Ellis*, 469 P.3d at 73-74.

B. Factual background

This case concerns Trooper Dobler's forcible stop of Cline's vehicle, killing Anita Benz—his then-girlfriend and front-seat passenger.

The Kansas Highway Patrol was engaged at the time in Operation Frontier Justice, a multi-agency task force aimed at reducing crime in Topeka. Pet. App. 5. Law enforcement officers who participated in the program were instructed to avoid vehicle pursuits. *Ibid.* In the rare event that an officer felt he had to initiate pursuit, the operation plan provided that "any pursuits that do occur should be constantly reevaluated and may be discontinued at any time" and that "paramount consideration and prioritizing will be given to the safety of the public and the risk of pursuing individuals." *Ibid.* (cleaned up).

Dobler was a member of the task force. He had been told repeatedly "not to pursue in the City of Topeka unless * * * chasing a violent felon." Pet. App. 11. This

rule had been relayed to him in whole-troop meetings, in private conversations with his supervising captain, and in numerous emails. *Ibid.*; see also Resp. C.A. Br. 5, 9, 25.

Dobler had demonstrated an unusual need of these reminders. At the time he joined the Kansas Highway Patrol in 2017, he was already facing disciplinary action by his former employer for violating vehicle pursuit policies. Resp. C.A. Br. 8. After he joined the Kansas Highway Patrol, Dobler continued to "receive[] written warnings for violating [its] pursuit policy." Pet. App. 10. On one occasion, he was disciplined for turning off his lights and siren during an active pursuit. Resp. C.A. Br. 8, 31. On another, he had to be reprimanded for hitting an innocent vehicle during a pursuit. *Id.* at 9.

These serial warnings did not take, nor did the clear terms of departmental policy.

While on patrol in Topeka one afternoon, Dobler noticed a white sedan with a cracked windshield. Pet. App. 5. According to Dobler, he believed the windshield obstructed the driver's view and presented a safety issue and moving violation. *Ibid*. The car also possibly matched the description of one recently reported stolen, and the driver (Cline) and its passenger (Benz) looked "nervous" when they passed his cruiser. *Id.* at 5-6. Dobler would later admit that he had "no suspicion" that the occupants "were felons, nor that they were engaged in any felonious activity, except for the possible car theft." *Id.* at 6.

Based solely on the broken windshield, Dobler turned on his emergency lights, made a U-turn, and began to follow the car. Pet. App. 6. Dobler observed the car's license plate and reported it to dispatch. *Ibid.* When the car did not stop in response to his lights, Dobler turned on

his siren and informed dispatch that he would initiate a vehicle pursuit, despite being in city limits. *Ibid.*

Cline continued to drive away from Dobler at low speeds. Pet. App. 6. Although he did not make complete stops at stop signs, he continued to use turn signals and brakes. *Ibid.* While Dobler would later report that he was concerned for his and pedestrians' safety, the dashcam footage showed that the streets were "almost empty," and Dobler later admitted that there was not a single pedestrian at that point in the pursuit. *Ibid.* Dobler also learned from dispatch that the car was not stolen. Nevertheless, he continued his pursuit. *Ibid.*

Dobler followed the car into a trailer court. Pet. App. 7. Cline continued to use brakes and turn signals as he passed through the trailer court, at speeds only "20-30 miles per hour." *Id.* Although Dobler would later report that there were children in the road, the wide-angle video showed no children. Resp. C.A. Br. 33. And even supposing that Dobler's version of facts had been true, his captain later testified that the presence of children in the trailer court would warrant Dobler *stopping* his pursuit, not the other way around. Pet. App. 11. Nonetheless, Dobler continued to pursue Cline as he drove through the trailer court and back onto a two-lane street. *Id.* at 7.

Once on the open road, Dobler decided to perform a tactical vehicle intervention, or TVI. Pet. App. 7. A TVI maneuver is intended to make a fleeing vehicle do a "controlled spin * * * with the intention of disabling [the] vehicle." *Ibid.* Dobler readily admitted that it is a "dangerous tactic." *Id.* at 24.

Dobler chose to do a TVI maneuver because, he would later claim, there was a car approaching from the other direction, and Cline might collide with it. Pet. App. 7. And

the state defended Dobler's decision to initiate the maneuver as reasonable by arguing that Cline posed an imminent threat to pedestrians and other cars. Pet. C.A. Br. 21. But the dashcam footage and photographs in evidence prove that "the approaching car" had "already pulled off to the side of the road." Pet. App. 7. The state would eventually admit this fact, acknowledging in its petition for review to the Kansas Supreme Court that neither pedestrians nor other vehicles faced "immediate risk." *Id.* at 48.

Dobler also admitted that many obstructions on the side of the road made it a "less than ideal" location for a tactical vehicle intervention. Pet. App. 7-8, 10. Dobler's captain testified that it was a particularly "poor" location for a TVI due to the "telephone poles, mailboxes, driveways, and parked cars" along the road. Resp. C.A. Br. 27. And, despite Kansas Highway Patrol generally urging troopers to seek authorization before performing a TVI maneuver, Dobler did not bother. Pet. App. 11.

Undeterred by clear departmental policy and many past warnings, Dobler deliberately struck the back bumper of Cline's car. Pet. App. 8. Given his unusually extensive experience performing these dangerous maneuvers, Dobler testified that he was "100 percent" certain where Cline's car would end up. Resp. C.A. Br. 35. Cline's car went "spinning off the road and slamm[ed] into a telephone pole on its passenger side" (Pet. App. 8), exactly as Dobler intended.

The pursuit lasted a mere 3 minutes and 35 seconds. Pet. App. 8. Officers removed Cline through the driver's side window and handcuffed him. *Ibid.* Cline and Benz were promptly transported to the hospital. *Ibid.* Officers

eventually found a knife, a bag of methamphetamine, and drug paraphernalia in Cline's possession. *Ibid.*

Benz died of her injuries.

Dobler's captain and all seven members of the Kansas Highway Patrol Executive Command agreed that the pursuit of Cline was more dangerous to the public than the danger of letting Cline get away. Resp. C.A. Br. 17. Kansas Highway Patrol Major Sauer testified that the entire Executive Command—including the Superintendent, the Assistant Superintendent, and five majors in the Patrol—unanimously agreed that Dobler should be fired. *Id.* at 20. Highway Patrol Captain Joseph Witham testified that Dobler's "entire pursuit should have been avoided [and] should not have occurred" because he "was chasing, ultimately, a windshield violation," which was not reasonable. Pet. App. 11.

Despite violating Kansas Highway Patrol policies and direct orders from his superiors—and those superiors testifying against his actions—Dobler remained defiant in court, proudly calling himself "the best of the best." Resp. C.A. Br. 11. The Kansas Highway Patrol disagreed and fired him shortly after he killed Benz. Pet. App. 12.

C. Proceedings below

1. The state charged Cline with felony murder for Benz's death, fleeing or attempting to elude, possession of drug paraphernalia, interference with a law enforcement officer, and several traffic violations. Pet. App. 8-9. Cline moved to dismiss the felony murder charge and suppress the evidence obtained after the TVI maneuver. Cline argued that Dobler had used excessive force to effect the seizure in violation of the Fourth Amendment, without which Benz would still be alive. *Id.* at 9.

After a hearing, the trial court granted Cline's motion to suppress. Pet. App. 32-36. First, the trial court found that Dobler used excessive force in seizing Cline's vehicle. *Id.* at 33-34. Viewing the totality of circumstances for objective reasonableness, the court concluded that "this indeed was excessive force." *Id.* at 33. After "watch[ing] the videos" and "hear[ing] all the testimony presented," the judge explained, "[b]y no means am I seeing this as anything but a Fourth Amendment violation." *Ibid.*

The court described the flagrancy of Dobler's excessive force. It emphasized that the officer used "deadly force" over a "traffic infraction," "which resulted in the fatality of the passenger" and his "release from Kansas Highway Patrol." Pet. App. 33-34. It explained the causal connection between the violation and the evidence discovery: "the unreasonableness in the seizure[] result[ed] in the death of the passenger." *Id.* at 36. And the court recognized the deterrence value of suppression, finding that the "reasonable course would have been to decline pursuit" and that "vehicle pursuit[s]" like this one should be "prevent[ed]." *Id.* at 33-34.

In granting suppression, the district court repeatedly emphasized the unusual facts of the case: "this is a very rare case, very rare case, that this court is indeed granting the Motion to Suppress." Pet. App. 32 ("I must point out that this is a very rare case, very rare case"); 34 ("I have to note this is very rare for this Court to make such a ruling. But I think the parties can agree this is a rare case"); 36 ("And like I said, this is a rare decision on my part to do so.").

The practical effect of the suppression order was that the state could proceed with charges against Cline only

for fleeing and attempting to elude, and the traffic violations. All the evidence related to the felony murder and drug-related charges was suppressed. Pet. App. 15, 34. Although the charges for the various traffic-related offenses will ultimately proceed, the state noticed an interlocutory appeal. *Id.* at 15.

2. The Kansas Court of Appeals affirmed in an interlocutory appeal. Pet. App. 2-31. The court first addressed the State's central argument on appeal, holding that Dobler indeed used excessive force in violation of the Fourth Amendment (Pet. App. 15-24), which the State does not challenge before this Court (Pet. 7 n.2). The court observed that Dobler had no reason to believe Cline was a dangerous felon; he knew there was a passenger in the front seat of Cline's car; he knew there were other officers nearby to help; he knew he was performing the TVI in a risky area; and he had been told explicitly not to initiate pursuits like the one that took place. Pet. App. 23.

As for a government interest, the court rebuffed the state's contention that an approaching car on the road caused Dobler to execute the TVI. Pet. App. 20. The dashcam and photographic evidence, the court explained, squarely contradicted Dobler's story. *Ibid.* "If the reason for Dobler to execute the TVI was to protect the driver of the car that had pulled off to the side of the road," the court said, "this reason does not appear to outweigh the danger involved in performing the maneuver." *Ibid.*

And the court took to task Dobler's "striking[]" lack of concern for Benz's safety, as she "was a member of the public that Dobler should have been trying to protect," given that there was no evidence that she was linked to Cline's decision to flee. Pet. App. 20.

The court of appeals then turned to the State's argument that the exclusionary rule should not apply. Pet App. 24-31. It held that "[t]he facts and circumstances of this case demonstrate that the exclusion of evidence because of Dobler's conduct falls within the purpose of the exclusionary rule"—deterrence. *Id.* at 28.

The court remarked that Dobler's actions were not "isolated" but rather "part of a pattern of intentional conduct." Pet. App. 28-29. And it noted that previous directives and reprimands from multiple employers had not succeeded in deterring Dobler's uses of excessive force in vehicle pursuits. *Ibid.* Suppressing evidence in cases like this, the court reasoned, "removes the incentive for officers such as Dobler to disregard policies and perform dangerous maneuvers simply to bring a hastier end to an ill-advised pursuit." *Id.* at 29.

Finally, the court found "most importantly" that there is "a direct causal connection between Dobler's use of excessive force and the evidence Cline seeks to suppress." Pet. App. 29. Namely, "Dobler's use of the TVI maneuver caused the car crash and directly led to Benz's death." *Ibid.*

Notably, the state did not argue that the exclusionary rule cannot ever apply in excessive force cases. See Resp. C.A. Br. 32-37. But for completeness, the court of appeals referenced a federal case, which the State had "not cited," that "suggested" exclusion may be inappropriate when a defendant alleges that officers used excessive force during a stop. Pet. App. 28. But the court concluded that settled exclusionary-rule principles—requiring a direct causal connection—settled the matter where, on "[t]he facts and circumstances of this case," a "direct

causal connection" was present. *Id.* at 28-29. The court therefore affirmed suppression.

The State petitioned the Kansas Supreme Court for further review, which was denied. Pet. App. 1.

REASONS FOR DENYING THE PETITION

Review should be denied foremost because the appeal below was interlocutory, and this Court accordingly lacks jurisdiction under Section 1257(a).

Even aside from that jurisdictional defect, this case involves application of settled law to unique facts unworthy of further review. Given the fact-bound nature of cases like this, the state's effort to manufacture a circuit split falls flat. At bottom, Kansas's petition is merely a request for error correction of an intermediate state appellate court decision. Even if the outcome below were questionable—it is not—the facts here are unlikely ever to recur against, and review would be unwarranted. Regardless, the Kansas Court of Appeals faithfully applied this Court's settled exclusionary-rule holdings and reached the right result. Review should be denied.

A. This Court lacks jurisdiction

The Court should deny review first and foremost because it lacks jurisdiction.

1. For the judgment of a state court to be reviewable under Section 1257(a), it must be "final." Generally, a state-court judgment is final only when "nothing more than a ministerial act remains to be done" on remand. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948); see *Bateman* v. *Arizona*, 429 U.S. 1302, 1306 (1976) (applying general rule).

The judgment here is not final, and the appeal here is expressly "interlocutory." Pet. App. 15. The Court thus

straightforwardly lacks jurisdiction to entertain the petition under Section 1257(a).

None of the exceptions to finality recognized by this Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), applies. Certain evidence has been suppressed by the trial court, effectively foreclosing the state's prosecution of *some* of the charges against Cline, including felony murder. See Pet. App. 15. But the charges for other offenses that turn on pre-TVI events (the fleeing and attempting-to-elude charges and traffic violations) have not been dismissed, are not foreclosed by the suppression of evidence, and thus remain live in the case. *Ibid.* There are therefore "further proceedings" that are not ministerial and have yet to occur in the state courts, and "the outcome of [those] further proceedings" is uncertain. *Cox Broadcasting*, 420 U.S. at 479.

Nor is this a circumstance "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting*, 420 U.S. at 480. To begin, the Kansas Supreme Court denied review, so it has not decided the case at all. Besides that, the parties could reach a plea agreement on remand, ending the case altogether.

This is neither a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case" if it is allowed to proceed to a final judgment in the trial court. *Cox Broadcasting*, 420 U.S. at 481. On remand, the felony-murder and related charges will have to be dismissed before jeopardy attaches. See *Serfass* v. *United States*, 420 U.S. 377, 388 (1975). Later review of the suppression question is therefore not

logically foreclosed if the court recharges Cline with the crimes that depend on the suppressed evidence.

Finally, this is not a case "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds," foreclosing further litigation of the federal issue by preclusion. *Cox Broadcasting*, 420 U.S. at 482-483. On remand, the sole issue left to be decided are the moving-violation and fleeing charges that depend on the state's pre-TVI evidence.

Because the case is expressly "interlocutory" (Pet. App. 15) and there is an entire trial to be held on remand, the judgment of the state court remains non-final, and the Court lacks jurisdiction to proceed under Section 1257(a). That alone is reason to deny the petition.

B. This case would not warrant further review even if the Court had jurisdiction

Even if the decision below were final, the case still would not be worthy of the Court's attention. There is no split, and the facts here are exceedingly unusual. Kansas in fact asks for case-specific error correction, which is plainly unwarranted in these circumstances.

1. No lower court has adopted a categorical rule against suppression of evidence uncovered as a result of excessive force

Kansas has not identified a single case in conflict with the decision below. To our knowledge, no court has adopted the categorical rule that the state urges before this Court—that use of excessive force in violation of the Fourth Amendment can never warrant suppression. Any differences in outcomes among the cases cited in the

petition are attributable to differences in facts, not differences in the courts' approaches to the legal framework.

a. The petition asserts (at 9-10) that a split of authority has emerged based on *dictum* from *United States* v. *Ramirez*, 523 U.S. 65 (1998). Not so.

In *Ramirez*, the Court considered the Fourth Amendment standards for "no knock" home entries that result in property damage. In the course of considering such claims, the Court observed that excessive force may constitute an independent Fourth Amendment violation "even though the entry itself is lawful and the fruits of the search are not subject to suppression." *Ramirez*, 523 U.S. at 71. On the facts presented, the Court held that "there was no Fourth Amendment violation" and determined that it therefore "need not decide whether, for example, there was sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence." *Id.* at 74 n.3. The premise of that *dictum* is that suppression *would* be warranted if the requisite "causal relationship" exists.

Following *Ramirez*, the lower courts have coalesced around the necessity of a causal link before an excessive-force violation calls for suppression. In *United States* v. *Ankeny*, 502 F.3d 829 (9th Cir. 2007), the Ninth Circuit said so expressly. *Id.* at 837. After finding the excessive-force claim to be a "close question," the Ninth Circuit held suppression inappropriate because "[t]he alleged Fourth Amendment violation and the discovery of the evidence lack[ed] the causal nexus that is required to invoke the exclusionary rule." *Id.* at 836-837.

Kansas contends (Pet. 10) that *Ankeny* is in conflict with the Seventh Circuit's decision in *United States* v. *Watson*, 558 F.3d 702 (7th Cir. 2009). But that is

mistaken. Although *Watson* expressed some uncertainty about *Ankeny* (*id.* at 705), the outcome in *Watson* rested entirely on what *Ramirez* previewed and *Ankeny* held: that the lack of a causal connection between an excessive use of force and the discovery of evidence bars suppression. Lack of causation was also the holding in *Watson*: "The police didn't obtain the evidence by pointing their guns at the defendant, but by obtaining the consent of the driver." *Ibid.* The absence of a "causal connection between the manner in which the police approached the defendant in this case and the search of the car that disclosed the weapons used in evidence" rendered suppression inappropriate. *Id.* at 704.

Watson's purported rejection of *Ankeny* therefore was not a disagreement in substance, but one concerning facts. Doctrinally, the outcomes in the two cases are consistent with each other—when there is no causal connection between an excessive use of force and discovery of evidence (as typically will be true), the exclusionary rule does not apply.

The petition also asserts a conflict with the First Circuit's decision in *United States* v. *Garcia-Hernandez*, 659 F.3d 108 (1st Cir. 2011), but the court there merely held that the particular facts—similar to *Ankeny*'s facts—did not justify suppression. *Id.* at 112-113. In effect, *Garcia-Hernandez* held that a defendant could not repackage a knock-and-announce violation as an excessive-force violation to obtain suppression. *Id.* at 114. And in denying suppression, the court emphasized the central role of "but-for causation" and found it absent. *Id.* at 112-113. Regardless of whether the officers had "knocked, announced, and politely entered" or did so with "armored vehicle[s], a large complement of officers,

noise-flash accompaniment, and a formidable show of force," "the incriminating evidence would have been found when they conducted the search" pursuant to the warrant. *Ibid.*

If anything, *Garcia-Hernandez* reflects the agreement among lower courts. The First Circuit cited both *Ankeny* and *Watson* without distinguishing between them—apparently recognizing their compatible reasoning and outcomes. 659 F.3d at 113-114. These cases all converge on the central role of causality in application of the exclusionary rule. The only daylight between the Seventh and Ninth Circuits is that the Seventh Circuit appeared to assume as a matter of fact (not law) that excessive force could *never* be a but-for cause of evidence discovery. The instant case proves that assumption wrong, as a matter of fact. And no case citing *Watson* or *Garcia-Hernandez* has refused to suppress evidence when the requisite causal nexus between the use of force and the evidence discovery was present.

The petition next characterizes (at 12) the Alaska court's decision in *State* v. *Sundberg*, 611 P.2d 44 (Alaska 1980), as "concluding that application of the exclusionary rule is inappropriate sanction for police use of excessive force." Pet. 12. But *Sundberg* only confirms the highly fact-dependent nature of the exclusionary rule. It addressed (again, as factual matters) the deterrence value of suppression given the particular facts of the case, the relevant history of the challenged misconduct by officers in the region, and the flagrancy of the violation. 611 P.2d at 51-52. And it expressly left open the possibility that suppression could be warranted in excessive force cases involving different facts. *Id.* at 52.

Like the other cases just discussed, *State* v. *Herr*, 828 N.W.2d 896 (Wis. Ct. App. 2013), an intermediate state court case, invoked *Watson* and refused to suppress evidence because there was "no causal relationship between the alleged use of unreasonable force and the evidence sought to be suppressed." *Id.* at 898-899.

Beyond those, the petition cites a handful of unpublished cases that (like the decision in this case) do not set the law for their jurisdictions and thus cannot support a meaningful division of authority. See *United States* v. *Morales*, 385 F. App'x 165 (3d Cir. 2010); *Brito* v. *State,* 2016 WL 7377180 (Nev. 2016); *State* v. *Ward*, 2021 WL 4127189 (Idaho Ct. App. 2021). In the end, Kansas has not identified any court in which the outcome here would have been different.

b. Courts that have suppressed evidence recovered following excessive force, in contrast, emphasize the *presence* of the requisite causal connection. *State* v. *Tapp*, 353 So. 2d 267 (La. 1977), *Conwell* v. *State*, 714 N.E.2d 764 (Ind. Ct. App. 1999), and several other state decisions applied the exclusionary rule to evidence an officer obtained by choking the defendant. See also *State* v. *Hodson*, 907 P.2d 1155 (Utah 1995); *Grier* v. *State*, 868 N.E.2d 443 (Ind. 2007); *State* v. *Nelson*, 354 So. 2d 540 (La. 1978). In those cases, officers obtained evidence as a direct result of applying excessive force to the throat. *E.g.*, *Tapp*, 353 So. 2d at 268 (suppressing a packet of drugs obtained via a "prolonged and brutal struggle to cause Tapp to disgorge" the evidence).

These cases emphasize the flagrancy and extreme danger of the force involved with choking. See *Tapp*, 353 So. 2d at 269 (holding that the extraction was "a grievous, dangerous, painful and unjustifiable assault

upon a human being in an effort to get physical evidence from inside his body"); *Conwell*, 714 N.E.2d at 768 (holding that "[t]he application of force to a person's throat is a dangerous and sensitive activity * * * likely to result in violent resistance by the arrestee" (quoting *Hodson*, 907 P.2d at 1158)).

In sum, the decision below would not have come out any differently in any other jurisdiction. No courts are taking a categorical approach to the question presented, and each instead focuses on whether the evidence at issue was obtained as a direct result of a flagrant use of excessive force. If not, no suppression; if so, evidence suppressed. Here, the TVI that killed Anita Benz presents the rare confluence of flagrancy and causation for which any court would have found suppression warranted. Every court cited in the petition would say just that.

2. The petition seeks mere error correction and presents facts certain never again to recur

a. The question presented here is unworthy of the Court's attention because the facts at issue in this case are very unlikely ever to recur again. The court repeatedly observed that this case is "a very rare" one. Pet. App. 32, 34. The court felt compelled "to note [that] this is very rare for this Court to make such a ruling," and that even "the parties can agree this is a rare case where the officer used quite excessive force." *Ibid.*

And it is a rare case, indeed. Dobler used deadly force to apprehend a fleeing suspect solely on account of a broken windshield. He pursued Cline despite having no suspicion of a dangerous or violent crime and despite learning early in the chase that the car was not stolen. And, ultimately, Dobler chose to initiate a TVI after just three minutes of low-speed pursuit in an obviously

dangerous location, given the telephone poles and ditches along the road. Pet. App. 7-8. Add to that Dobler's extremely troubling background of recalcitrant and dangerous behavior initiating car chases, and these facts are nothing short of anomalous.

b. Even if the question were important (it is not), this would be a singularly poor vehicle for addressing it. To begin with, and although the State now frames its petition around a categorical excessive-force exception to the exclusionary rule, it never made that argument to the Kansas Court of Appeals, which noted it only in passing. There is therefore a threshold question whether Kansas has adequately preserved the newfound arguments it makes in its petition.

Beyond that, the intermediate appellate court's decision below was self-consciously limited to the "facts and circumstances of this case" and their unique relation to "the purpose of the exclusionary rule." Pet. App. 28. In seeking further review of that conclusion, the state is, in truth, asking the Court to correct what it believes to be a one-off legal error, nothing more. There is not seriously a conflict of authority here, and the facts are plainly unusual. But the Court's aim is "to determine questions of importance" (which is to say questions the recur frequently and affect many), and "the correctness or erroneousness of the decision below is not" of itself "the central focus of the Court's exercise of its certiorari jurisdiction." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* 278 (10th ed. 2013).

That shortcoming is especially notable because the decision below is of an intermediate state appellate court, not a state high court. Indeed, the Kansas Supreme Court

has never been presented with an opportunity (other than this one) to consider Kansas's newfound categorical rule against exclusion in excessive-force cases. Likely of the view that this case is a poor fit to that question, and that the intermediate court correctly applied well-established doctrine to the unique facts presented, it denied review.

This Court should do the same. In fact, it regularly denies review where the state's highest court has not yet resolved an issue for the state. See, e.g., *Huber* v. *New Jersey Department of Environmental Protection*, 562 U.S. 1302, 1302 (2011) (Alito, J., joined by Roberts, C.J., and Scalia and Thomas J.J., statement respecting denial of certiorari) ("[B]ecause this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate"). The same outcome is warranted in this case.

3. The decision below is correct

The decision below faithfully applied settled exclusionary rule doctrine to the unique facts of this case to correctly conclude that suppression was warranted. The state acknowledges that exclusion is appropriate when the "deterrent benefits of suppression outweigh the substantial social costs incurred." Pet. 9. That is precisely the test the court of appeals applied, and it correctly found that settled test satisfied by the "very rare" facts of this case. Pet. App. 13, 32.

In *Davis*, this Court recognized that "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." 564 U.S. at 238 (quoting *Herring*, 555 U.S. at 144). Here, Dobler's conduct was surely reckless, at a minimum. Dobler performed a TVI—which he

acknowledged under oath is a dangerous maneuver—in a location he admitted was "less than ideal," with knowledge that there was an innocent passenger in the car, without any indication that Cline was a dangerous felon, without any pedestrians or nearby vehicles in harm's way, and all after only a three-minute pursuit at low speeds prompted by a cracked windshield. Pet. App. 5-8. As the trial court observed and the appeals court echoed, Dobler's flagrant misconduct presents the "very rare case" where the "drastic remedy" of exclusion is appropriate. *Id.* at 13-14, 29.

The lower courts also considered and rightly rejected Kansas's arguments that the causal chain between the seizure and the evidence was such that suppression would not serve to deter. Dobler's use of the TVI was the direct and immediate cause of the crash that led to Benz's death. Pet. App. 29-30. Evidence related to the felony murder charge would not have *existed* (let along been discovered) absent Dobler's gross disregard for human life. *Ibid.* And the lower court found that Kansas did not meet its burden to show that Cline necessarily "would have been arrested and searched leading to the discovery of the drug evidence" absent the TVI. *Id.* at 30. That makes sense, given that departmental policy called for Dobler to terminate the pursuit under the circumstances.

The lower state courts appropriately concluded that exclusion here would deter flagrant law enforcement violations moving forward. In reaching its decision, the appellate court noted that "officers from all agencies frequently deal with vehicle pursuits in which they may need to apprehend fleeing suspects." Pet. App. 29. Suppression here removes the incentive for officers in similar situations to use "dangerous maneuvers simply to bring a

hastier end to an ill-advised pursuit." *Ibid.* Moreover, exclusion encourages law enforcement agencies to better screen, train, and supervise officers like Dobler who have histories of constitutionally questionable behavior.

Suppression here will also have a specific deterrent effect on Dobler, who continues to serve as a law enforcement officer. In *Leon*, this Court stated that for the exclusionary rule to have "any deterrent effect * * * it must alter the behavior of *individual law enforcement officers* or the policies of their departments." 468 U.S. at 918 (emphasis added). Dobler's reckless actions in this case were part of an established pattern of misconduct. He had a history of engaging in unlawful pursuits and executing dangerous TVIs. Pet. App. 28-29. He had already received numerous reprimands for his misconduct before the events of this case. *Ibid.* Suppression here may be the only tool left to discourage Dobler from engaging in further Fourth Amendment violations.

In sum, the exclusionary rule played its deterrent purposes in this case. The lower court thus correctly applied this Court's exclusionary-rule precedents and rightly concluded that this is the rare case in which suppression is necessary to discourage future constitutional enforcement violations.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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