No. 23-335

In the
Supreme Court of the United States

STATE OF KANSAS,
Petitioner,

v.

JEREMY A. CLINE,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In spite of the facts that (1) this Court's precedents establish its jurisdiction over this case, (2) the lower courts have expressly acknowledged a split of opinion, and (3) the question presented is purely a question of law, Respondent Cline strenuously—and futilely—argues that this Court does not have jurisdiction, that there is no split among the lower courts, and that this case is entirely factbound. And while Cline is wrong on all counts, what must first be recognized is what is left entirely unaddressed in Cline's brief in opposition, and what makes the question presented here so important: the judge-made exclusionary rule comes with significant costs to society that must be balanced against its utility, costs which in this case not only resulted in Cline walking away from all responsibility for his criminal acts (including felony murder), but also encourage the perverse incentive, recognized by this Court in *Scott v. Harris*, 550 U.S. 372, 385-86 (2007), for criminals to seek "impunity by recklessness." These costs are too great for expansion of the exclusionary rule to cases of excessive force where other available remedies exist.

As this Court has noted, the significant societal costs imposed by the exclusionary rule demand that it be used only as a last resort, and only where its deterrent purpose would be most effective. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). It "does not apply when the costs of exclusion outweigh its deterrent benefits." *Lange v. California*, 141 S. Ct. 2011, 2027 (2021) (Thomas, J., concurring). Moreover, this Court's precedents "make clear that the exclusionary

rule does not apply when it would encourage bad conduct by criminal defendants." *Id.*

Where there are other available remedies that could provide the necessary deterrence, while avoiding the significant costs of the exclusionary rule, the rule should not apply. This case presents the Court with the opportunity to reign in the expansion of the exclusionary rule and set important parameters on its application.

1. This Court has jurisdiction.

Cline's jurisdictional argument is meritless. Although it is true this case originates from an interlocutory appeal of a suppression order, that is no impediment to this Court's jurisdiction. After all, this Court has considered and ruled on many cases arising from interlocutory appeals in the past. For example, *United States v. Leon*, 468 U.S. 897 (1984), was similarly a case arising from the government's interlocutory appeal of a suppression order. *Michigan v. DeFillippo*, 443 U.S. 31 (1979), involved an interlocutory appeal of a suppression decision by a criminal defendant. Indeed, this Court has commonly reviewed appeals from suppression orders in essentially the same procedural posture as this case. *E.g. Kansas v. Glover*, 140 S. Ct. 1183 (2020); *Missouri v. McNeely*, 569 U.S. 141 (2013); *Florida v. Jardines*, 569 U.S. 1 (2013); *Hudson v. Michigan*, 547 U.S. 586 (2006). Clearly, the fact that this appeal arises from an interlocutory appeal of a suppression order is no obstacle to this Court's jurisdiction.

Moreover, contrary to Cline's assertion, the district court's order suppressing *all* evidence

discovered after his seizure is effectively a final order ending prosecution of Cline. Cline's argument that the State may still prosecute him for fleeing and eluding police and for traffic infractions is misplaced, as the district court made it clear that it was suppressing all evidence discovered after the tactical vehicle intervention, *including Cline's identity*. *See* Pet. App. 35-36. Prior to seizing Cline, law enforcement had no idea who was driving the car. Thus, the State cannot bring charges against Cline because, under the court's suppression order, it has no way to prove that he was driving the car. This is plainly demonstrated by the colloquy between the district court judge and the prosecutor immediately after the court issued its suppression ruling:

> MR. MANLY [PROSECUTOR]: Yes. And I need to make sure I understand the Court's ruling clearly.
>
> Are you suppressing -- I think you said you're suppressing everything after the point of contact with the car?
>
> THE COURT: Correct.
>
> MR. MANLY: So officers observations of items inside the car, the interview, medical examiner testimony, all that?
>
> THE COURT: Right. And that's why at the motion hearing I asked about "does this exclude for the eluding?" It does not.
>
> MR. MANLY: It does not. *I don't know that I have evidence without -- I don't*

> *know that I have evidence to prove who the driver was, but.*
>
> THE COURT: *Well, the officer testified who the driver was because they did the -- oh, I see what you're saying.*

Pet. App. 35-36 (emphasis added). Realizing that without any evidence to establish Cline's identity, a prosecution against Cline on any charge could not proceed, the State then pursued its interlocutory appeal.

Nevertheless, even if that was not the case, this Court still has jurisdiction to review the federal question presented because, just as in *Kansas v. Marsh*, 548 U.S. 163 (2006), there is no way for the State to seek further review of the federal issue. In *Marsh*, the Court noted that 28 U.S.C. § 1257 authorizes this Court to review a state court decision "even though the state court proceedings are not yet complete, 'where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had.'" 548 U.S. at 168 (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975)). Just as in *Marsh*, if Cline goes to trial here on some charges (assuming for the sake of argument that a trial could be had) and is acquitted, "double jeopardy and state law will preclude the State from appealing," while if he is convicted, the State will have no further opportunity to seek review of the suppression order. *Id.* Thus, under *Marsh* and the precedent behind it, this Court has jurisdiction to consider the question presented.

Further, the fact that the decision at issue comes from an intermediate court of appeals rather than the state's highest court is not jurisdictionally relevant. The State sought discretionary review by the Kansas Supreme Court and raised the federal question. Pet. App. 51-53. The Kansas Supreme Court denied review, allowing the lower court's decision on the federal issue to stand. This Court has regularly reviewed federal questions arising from intermediate state courts of appeal. *E.g., Counterman v. Colorado*, 143 S. Ct. 2106 (2023); *Lange v. California*, 141 S. Ct. 2011 (2021); *Hudson v. Michigan*, 547 U.S. 586 (2006); *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

Finally, the exclusionary rule issue was both presented to and addressed by the lower court. Kansas argued in its brief to the Kansas Court of Appeals that the exclusionary rule did not apply and cited state caselaw that suggested it was inappropriate because a civil action is a sufficient deterrent to the use of excessive police force.[1] The State then raised the issue again in its Petition for Review to the Kansas Supreme Court. Pet. App. 51-53. And the Kansas Court of Appeals addressed the issue, acknowledging the State's argument that the exclusionary rule was an inappropriate remedy, and noting the split of federal authority regarding "whether the exclusionary rule is the appropriate remedy in cases involving the unreasonable and

[1] This was raised in the State's Court of Appeals' Brief, p. 35. The State's brief in the lower court was not included in the Appendix to the Petition for Certiorari, but it can be found on Westlaw at 2022 WL 14586174.

excessive use of force by law enforcement officers, or if such a violation should instead be addressed in a civil action under 42 U.S.C. § 1983." Pet. App. 24-30. While the court ultimately rejected the State's argument, it was nevertheless addressed. Where a federal claim "was either addressed by, or properly presented to, the state court that rendered the decision [under review]," this Court has jurisdiction. *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

2. There is a split of authority among lower courts.

Contrary to Cline's argument, there is a split of authority in the lower courts regarding the question presented. Indeed, the Kansas Court of Appeals expressly acknowledged such a split and considered it in the decision below:

> [W]e observe that federal courts have come down on either side of whether the exclusionary rule is the appropriate remedy in cases involving the unreasonable and excessive use of force by law enforcement officers, or if such a violation should be addressed in a civil action under 42 U.S.C. § 1983.

Pet. App. 28. The fact that lower courts perceive a split of authority is strong evidence that there is, in fact, a split of authority.

Moreover, in *United States v. Watson*, 558 F.3d 702, 705 (7th Cir. 2009), the Seventh Circuit explicitly stated it was disagreeing with the Ninth Circuit's language in *United States v. Ankeny*, 502 F.3d 829, 836 (9th Cir. 2007), "that the use of excessive force in

the course of a search can require suppression of the evidence seized." The *Watson* court said *Ankeny's* language "flies in the face of [*United States v.*] *Ramirez*, [526 U.S. 65 (1998)]." Rather, the Seventh Circuit took the view that a civil action is "a remedy better calibrated to the actual harm done the defendant than the exclusionary rule would be." *Id.*

Even Cline admits there is a difference of opinion among the circuits, although he discounts it as insignificant, chalking it up to different facts. Brief in Opposition, p. 17. But regardless of Cline's hairsplitting, there is a split of authority, even if only in degree. The lower courts certainly believe there is a split of authority, and this perception will undoubtedly impact future lower court decisions, just as it did in this case, if left unresolved.

And what is definitely certain is that the question presented here is an important question of federal law that this Court has never directly addressed.

3. This case presents purely a question of law.

This case plainly presents a pure question of law and is not, as Cline asserts, an overly factbound case simply seeking error correction.

In his brief in opposition, Cline spends several pages discussing innumerous facts that are not at all relevant to the question presented.[2] At the same time,

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[2] For example, Cline's mischaracterization of the pursuit being solely about a broken windshield is irrelevant because interpretation of the Fourth Amendment—and thus whether the exclusionary rule should apply—does not hinge on whether the

he ignores the fact that other remedies to deter excessive force both exist *and were utilized in this case* (the trooper was fired from his job, Pet. App. 29, and the Benz family successfully pursued a civil suit against the government[3]).

But while Cline wants to make this case about facts, it is not. Kansas is not arguing that the lower court erred because the particular facts of this case do not justify the exclusionary rule. Rather, Kansas's argument is that the exclusionary rule should not apply to excessive force claims generally, regardless of the facts. Whether the exclusionary rule should apply, with all of its concomitant costs to society, when other remedies are available, is plainly a question of law, and an important one that this Court should resolve.

4. This case squarely presents an important constitutional question.

This case presents an important question warranting this Court's consideration because the exclusionary rule impacts every jurisdiction in the United States. Applying the rule when law

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offense that precipitated the seizure was a felony or misdemeanor. *Lange*, 141 S. Ct. at 2029 (Roberts, C.J., concurring) (citing *Stanton v. Sims*, 571 U.S. 3, 9 (2013)). Likewise, his consistent refrain that the trooper violated department policies is irrelevant to determining whether the exclusionary rule should apply. Violations of department policies do not equate to constitutional violations. *Whren v. United States*, 517 U.S. 806, 815 (1996).

[3] The family of Anita Benz (Cline's deceased passenger) sued the Kansas Highway Patrol in the United States District Court for the District of Kansas, Case No. 23-CV-02098. The suit was settled on September 26, 2023.

enforcement use excessive force in effecting an otherwise lawful seizure represents an expansion of the rule that affects not only vehicle pursuits, but any situation where law enforcement officers are required to use force to seize a criminal offender, or, as in this case, stop criminal conduct in its tracks.

And more significantly, each application of the exclusionary rule comes with significant societal costs, which can include, as it did here, criminal offenders evading responsibility for their criminal acts. Given the costs, any extension or expansion of the exclusionary rule's reach should be carefully scrutinized. The rule should be narrowly tailored to apply only when no other remedy exists, and its reach should not be allowed to grow and expand when its purpose can be achieved by other means. And other remedies do exist. A suit for damages under 42 U.S.C. § 1983, or state law, is an available and effective remedy. *See Hudson*, 547 U.S. at 598 (observing "civil liability is an effective deterrent" to police misconduct). Further, police disciplinary action is another deterrent remedy. *Id.* at 599 ("[I]t is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect."). Both remedies were utilized in this case, in addition to the exclusionary rule.

Beyond the obvious costs of undermining the truth-seeking function and potentially allowing guilty offenders to escape punishment, the Kansas Court of Appeals' application of the exclusionary rule does exactly what this Court warned of in *Scott*: it creates a "perverse incentive" for offenders to seek "impunity by recklessness," 550 U.S. at 385-86, not only by

fleeing from police, but in other situations by physically resisting arrest, provoking police to use force in the knowledge that it may result in any evidence discovered being suppressed. As Justice Thomas said in *Lange*, "criminal defendants cannot use the exclusionary rule as 'a shield against' their own bad conduct." 141 S. Ct. at 2027 (Thomas, J., concurring) (citing *Walder v. United States*, 347 U.S. 62 (1954)). And "[a] criminal defendant should 'not … be put in a better position than [he] would have been if no illegality had transpired.'" *Id.* (Thomas, J., concurring) (citing *Nix v. Williams*, 467 U.S. 431, 443-44 (1984)). But that is exactly what the Kansas Court of Appeals' application of the exclusionary rule here has done. As a result of the suppression ruling, Cline is now in a far better position because of his own illegal conduct—fleeing the police—that ultimately resulted in the death of his girlfriend, for which he cannot be held accountable.

The decision below also undermines the "'paramount' government interest in public safety." *Lange*, 141 S. Ct. at 2031 (Roberts, C.J., concurring) (citing *Scott*, 550 U.S. at 383). Excluding the evidence in this case both encourages offenders to flee police, and also discourages police from taking necessary action to halt such pursuits, placing the public in greater danger. "A fleeing suspect 'intentionally place[s] himself and the public in danger … [and] [v]ehicular pursuits, in particular, are often catastrophic." *Id.* (Roberts, C.J., concurring). This is yet another cost to society that outweighs the benefits of the exclusionary rule here.

In sum, given the societal costs associated with the exclusionary rule, and specifically the costs imposed in this case, along with the existence of other, adequate remedies, the question presented here is one of significant importance, and is one in which the lower courts are, in fact, divided.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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