No. 18-556

IN THE
Supreme Court of the United States

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

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF
PROFESSOR ANDREW MANUEL CRESPO
AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Does a police officer have reasonable suspicion to believe that a vehicle is being driven by its registered owner, as opposed to some other authorized driver, when the sole fact known to the officer is that the registered owner is not lawfully allowed to drive any vehicle at all?

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INTEREST OF AMICUS CURIAE*

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SUMMARY OF ARGUMENT

Sheriff's Deputy Mark Mehrer pulled over the respondent's truck based on a single fact: It was registered to an unlicensed driver. Unlike many Fourth Amendment cases, the reasonableness of such a stop turns on a straightforward, empirical question: How often is that one known fact actually associated with illegal behavior?

The State of Kansas has ready access to data that would answer that question, and could have presented such data during a routine suppression hearing below. It opted instead, however, to draft a stipulation devoid of empirical support for the central factual claim it advances—a stipulation that constitutes the entire record in the case. To cure that misstep, the State now asks this Court to fill in its stipulation's missing facts, and to do so in the most unusual way: Rather than examine the inherently *local* empirics of the *factual* question at issue, the State wants the Court to answer that question with a *nationwide* rule of *law*.

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* No counsel for a party authored any part of this brief. Harvard University provides financial support for faculty research that helped defray printing and filing costs, but it is not a signatory; the views here are of *amicus curiae* alone. No other entity funded this brief, and both parties have consented to its filing.

That is not how the Fourth Amendment works.

1. The Fourth Amendment inquiry, at its core, is about facts. In many cases, those facts depict a "multi-faceted" "mosaic" that judges must assess by applying their own commonsense intuitions to the totality of the circumstances. *Ornelas v. United States*, 517 U.S. 690, 698 (1996). This case, however, turns on "one fact and one fact alone." Br. in Opp. 14. And that makes an important difference. For when the government relies "on a single factor to justify stopping [a] car," the only rational, commonsense way to evaluate the constitutionality of that stop is to consider the underlying statistical inference upon which the government's assertion rises and falls. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

That statistical inference cannot be intuited. It requires data. And just as importantly, those data will often vary from one set of circumstances to another. In this case, for example, two key data points likely influence the answer to the question presented: the average number of people authorized to drive a typical car, and the average rate at which suspended drivers stop driving. Those data points, however, vary substantially from one location to another, given the widely divergent driving needs and practices of people in urban, suburban, and rural settings. There is thus no way to answer the inherently factual question presented here with a single, nationwide rule of law. Rather, the only commonsense way to answer that question is to consider the underlying facts about how drivers actually behave in the relevant settings.

2. Fortunately, these are knowable facts. Indeed, the data required to answer the question presented could easily have been collected and presented by the

State during the proceedings below. Unfortunately, however, the State did not put *any* of that data into the record, opting instead to draft a stipulation that conspicuously omits any of the key factual information needed to assess its core assertion.

As a matter of black letter law, that makes this an easy case. "If the party who has the burden of producing evidence does not meet that burden, the consequence is an adverse ruling on the matter at issue." 6 Wayne R. LaFave, Search & Seizure §11.2(b), at 49 (5th ed. 2012). Here, the burden of proof lies with the State. The State's failure to include any pertinent facts in its stipulation thus ends the inquiry, just as the court below held. *See* 422 P.3d 64, 72, Pet. App. 18 ("In plain terms, it does not matter if the evidentiary gap is an inch or a mile; if the State has the burden to fill it, it must do so *with evidence*.")*.*

3. The central irony of this case is that, while the State made a fatal mistake by failing to include any pertinent facts in its stipulation, it very well could have won the case had it simply proceeded in the ordinary fashion and presented evidence to support its claim during a routine suppression hearing. Notably, such evidence could have easily been collected and presented here—via the very same laptop that the arresting officer used to run the respondent's license plate. With the click of a button, that dashboard computer could have been used to gather and report all of the information needed to determine whether this stop was, in fact, supported by reasonable suspicion.

Even without that easily obtainable data, however, the State could still have prevailed below had it simply presented other readily available and routinely produced evidence to support its claim. The State, for

example, could have produced studies describing the relevant driving statistics—as it and its *amici* now belatedly (and impermissibly) attempt to do for the first time in their briefing to this Court. Alternatively, the State could have called Officer Mehrer to the stand and asked him how many times vehicles that he has personally pulled over were being driven by their unlicensed registered owners—the key statistic of interest.

The State's failure to elicit such testimony or any other relevant evidence in support of its claim is the determinative point. Facts matter, most especially in judicial proceedings. For that reason alone, the State's failure to produce any relevant facts during the proceedings below resolves this case. That unusual litigation error, however, need not—and ought not—doom *other* stops that proceed under similar circumstances. Rather, if such stops are supported by an adequate factual foundation, grounded in readily available data, they should pass constitutional muster.

ARGUMENT

I. The Answer to the Question Presented Cannot Be Intuited. It Requires Facts.

At its core, the Fourth Amendment poses a straightforward substantive question. Are "the facts and circumstances" known to an officer when he initiates a search or a seizure "sufficient in themselves to warrant" that intrusion? *Safford Unified School Dist. #1 v. Redding,* 557 U.S. 364, 370 (2009) (internal quotation marks omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (quoting *Carroll v. United States,* 267 U.S. 132, 162 (1925))). As the word

"facts" in that sentence makes clear, this inquiry is an empirical one. *See* Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 Stan. L. Rev. 987, 999 (2014) (describing the Fourth Amendment as "designed to ensure that the state can establish sufficiently the *empirical fact* of legal guilt" before it curtails a person's liberty); *cf.* Br. for United States as *Amicus Curiae* 5 (arguing against a holding that "would not be empirically justified"). Courts assessing the constitutionality of a search or seizure must therefore resolve two basic questions in every case: How likely is it that a crime is being committed? And is that likelihood strong enough to justify a search or a seizure? *See Ornelas v. United States,* 517 U.S. 690, 696 (1996). This case is about the first of these two questions—the starting point for the Fourth Amendment analysis.[1]

In many cases, judges answer that question by applying their "practical, common-sense judgment" to the "totality of the circumstances" at hand. *Illinois v. Gates*, 462 U.S. 213, 241, 244 (1983). Indeed, judges

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[1] The relationship between these questions, like other issues discussed in this brief, is elaborated in Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 Yale L.J. (forthcoming 2020), bit.ly/PCPluralism. For present purposes, it is enough to note that the question of how to measure the State's proof is distinct from (and precedes) the question of how much proof is enough, which is not squarely presented here. *See* 422 P.3d 64, 72, Pet. App. 19 (opinion below) ("[T]he State did not present any . . . evidence here, so the question of what evidence is necessary is not before us."). The State's claim that the respondent seeks to "transform[] the rule of reasonable suspicion into something akin to (or greater than) probable cause" thus lacks merit, as requiring a factual claim to be supported by proof says nothing at all about how much proof will suffice. Pet. Br. 7.

often have no choice but to rely on their commonsense intuitions, because "in many instances the factual 'mosaic' analyzed for a reasonable suspicion determination" will be so rich and case-specific that it eludes a more fixed and "neat set of legal rules." *United States v. Arvizu,* 534 U.S. 266, 274–75 (2002) (internal quotation marks omitted) (quoting *Ornelas,* 517 U.S. at 695–96 (quoting *Gates,* 462 U.S. at 232)); *see also* Br. of Okla. et al. as *Amici Curiae* 5; Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 Yale L.J. (forthcoming 2020) (manuscript at 25–36), bit.ly/PCPluralism.

Sometimes, however, the very nature of the inquiry at issue resists such an appeal to judicial intuition, precisely because there is no "totality" of the circumstances to consider but rather only one circumstance—one fact—driving the analysis. In that subset of cases, the only commonsense way to evaluate the claim is to consider the basic statistical inference that the claim entails. Crucially, however, those statistics will often vary across scenarios or from one place to another, as they do here. As a result, the core factual question at the heart of this case simply cannot be answered by a nationwide rule of law.

A. Any "Commonsense" Assessment of the Merits of this Case Must Look to Statistically Grounded Empirical Realities.

As the State rightly observes, this case "cleanly presents [a] Fourth Amendment question unobscured by a mosaic of variables." Cert. Reply Br. 6. And as the seventeen States appearing as *amici curiae* note, the case's simplicity is significant, because it means that the constitutionality of the stop challenged here rises and falls on "the probabilities associated with a simple,

but frequently recurring set of facts." Br. of Okla. et al. as *Amici Curiae* 5. Those probabilities, however, cannot reliably be intuited by common sense. They require "empirical and statistical data." *Id.* at 2; *see* Crespo, *Probable Cause Pluralism*, at 12–28.

To appreciate this essential point, consider first a basic example. Imagine that a police officer chases a fleeing robber into a hotel with twenty-five rooms but loses sight of the suspect before seeing which room he enters. *Cf. United States v. Winsor*, 816 F.2d 1394, 1398 (9th Cir. 1987). In such a case, the lawfulness of the officer's decision to burst into any one of those rooms will turn entirely on the "odds favoring discovery of the suspect in [that] room." *Id.* And because those odds turn on just one fact (the number of rooms) there is only one "commonsense" way to describe them: The likelihood that the robber is in one of those twenty-five rooms is one in twenty-five, or four percent. *Cf. Kentucky v. King*, 563 U.S. 452, 465 (2011) (noting that if an officer loses a suspect in a hallway with only two doors, there will be "a 50% chance that the fleeing suspect ha[s] entered the apartment on the left rather than the apartment on the right").

As this example shows, while it may often be wise "to avoid framing the question of probable cause [or reasonable suspicion] in terms of precise statistics," there will be "some cases" for which "such a framework must be" applied. Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. Cal. L. Rev. 777, 794 (2004).[2] The case at hand is

[2] The Fourth Amendment's standard of proof varies between probable cause and reasonable suspicion, depending on the

precisely such a case. To see why, consider now two more examples that more closely track the facts here.

First, imagine that instead of conducting a license-plate check, Officer Mehrer had pulled the respondent over for driving a 1995 Chevy pickup truck—on the theory that this type of truck is often driven by people with suspended licenses. Note that this theory might well be true. It is, after all, entirely possible that the factors that contribute to drivers' licenses being suspended—including an inability to pay government-imposed debts—correlate strongly with driving a twenty-five-year-old vehicle that is well suited to manual labor. *Cf.* Nat'l Ctr. for State Courts, Trends in State Courts: Fines, Fees, and Bail Practices 20 (2017) (noting that "[m]illions of individuals across the United States" have had their licenses suspended due to their inability "to pay fines, fees, and surcharges assessed in traffic or criminal cases"). But of course, the assertion might also not be true at all. Driving a 1995 Chevy pickup truck—or a red pickup truck, or a minivan, or any other type of vehicle—might not signal anything at all about whether that vehicle is being driven by someone with a suspended license, or may have only a very weak correlation to such a conclusion.[3]

Here, though, is the key point: The relationship between the single observed fact (1995 Chevy pickup) and the asserted inferential conclusion (driving

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intrusion at issue. But the basic nature of the inquiry is the same across cases. *See Ornelas*, 517 U.S. at 696; *Safford,* 557 U.S. at 370; Br. of Okla. et al. as *Amici Curiae* 2 ("Neither standard requires an officer's certainty, but both deal with probabilities."); Crespo, *Probable Cause Pluralism*, at 56–67.

[3] The State does not argue that the model of respondent's truck is relevant here. *See* Pet. Br. 2.

without a license) is *knowable*. All that is required to pin that inference down is some sufficiently reliable information about the underlying statistics: How often *are* 1995 Chevy pickup trucks driven by people with suspended licenses? That is a question to which there is an answer. Not some intuited, "feels right" answer, but an actual, real answer, grounded in concrete data that could be presented to a judge reviewing the claim. *Cf. infra* Part III (discussing data availability). Absent such data, however, there is no reliable commonsense way to divine the answer. One needs to know the facts.

Notably, this Court has appreciated this point before, in a case largely indistinguishable from the pickup truck example just described. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court considered the constitutionality of a traffic stop conducted near the southern border in which "the officers relied on a *single factor* to justify stopping [the] car: the apparent Mexican ancestry of the occupants." *Id.* at 885–86 (emphasis added). In the Government's view, that single fact reliably indicated that the occupants of the car "may be aliens [subject to] questioning about their citizenship and immigration status." *Id.* at 883. But the Court rejected that contention—because the underlying statistics did not support it. Rather, as the Court noted, census data showed that of the millions of people "of Mexican origin" living in border states at that time, the percentage who were "registered as aliens from Mexico" ranged from 8.5% to 20.4%. *Id.* at 886 n.12.

Drawing on this publicly available data, the Court went on to issue a holding grounded directly in statistical reasoning: The "single factor" cited by the Government in support of the stop, "standing alone,"

was insufficient, because while "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry," only "a relatively small proportion of them are aliens." *Id.* at 885–87. "The likelihood that any given person of Mexican ancestry is an alien" thus did "not justify stopping all Mexican-Americans to ask if they are aliens." *Id.* at 886–87.[4]

This same logic applies to, and clarifies, the central question in this case: What *is* the "likelihood" that the "single factor" cited by the State (a vehicle's being registered to an unlicensed driver) corresponds to the alleged illegal activity (that vehicle's being *driven* by the unlicensed owner)? *Id.* at 885–86. And once again, the answer to that question should, and logically must, turn on the "proportion" of vehicles observed to be registered to unlicensed owners that *are in fact* driven by those owners when pulled over. *Id.* at 886.

There is just one problem. The State has offered no information about this essential proportion. And unfortunately, no amount of commonsense reflection will yield the missing data.

To appreciate this determinative point, consider one final example. Imagine a state in which teenagers cannot legally drive at night. *Cf.* Kan. Stat. Ann. § 8-2,101(c)(2)(A) (2018). And imagine further that, one

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[4] This Court's administrative-search and special-needs cases also emphasize the importance of using "empirical data[,] . . . [s]tated as a percentage," to demonstrate the "effectiveness" of a given type of search. *Michigan Dep't of State Police v. Sitz,* 496 U.S. 444, 454–55 (1990); *see also* Crespo, *Probable Cause Pluralism*, at 18–19. Statistical inferences that draw on race, as in *Brignoni-Ponce*, raise separate issues not implicated here. *Cf. id.* at 15–16 (discussing racial profiling).

night, an officer sees a car go by with a bumper sticker that reads "Go Jaguars! 2019 High School Football Champs!" Does this bumper sticker provide reasonable suspicion to stop the car?

To some, the commonsense answer to that question will be yes. The bumper sticker, after all, indicates that the driver of the car might be a high school teenager out after curfew. To others, however, the commonsense answer will clearly be no. The driver, after all, could easily be the *parent* of a high school teenager. Indeed, if there is one thing we know about teenagers in this state it is that they are *not allowed* to drive at night.

But of course, this hypothetical almost perfectly tracks the question presented. For here, too, a single item attached to the bumper of a car indicates that the car is associated with a group of people (say, a family) that includes one person who cannot legally drive, and others who can. And the same dueling intuitions described above perfectly capture the split of authority among the lower courts: Some judges, including those who decided this case, will intuit one answer. *See* Pet. App. 38–39 (trial court opinion) ("I think . . . for a lot of families that if there are multiple family members . . . somebody other than the registered owner often is driving that vehicle."); 422 P.3d 64, 69, Pet. App. 11 (opinion below) ("[C]ommon experience in Kansas . . . suggests families may have several drivers sharing vehicles . . . ."); *see also* Oral Arg. at 28:57, *State v. Glover*, 422 P.3d 64 (Kan. 2018) (No. 116,446) (Johnson, J.), https://youtu.be/LQLIeh2cEtw [hereinafter Oral Arg.] ("I would prefer to assume someone was going to follow the [suspended-license] law than to assume someone is breaking the law."). Other judges, however, will intuit the opposite answer. *See, e.g.*, *People v. Barnes*, 505

N.E.2d 427, 428 (Ill. App. Ct. 1987) ("While other people may drive an owner's vehicle, it is clear that the owner will do the vast amount of driving.").

If one is being truly honest, however, a judge who knows nothing more than that a car is registered to an unlicensed owner can offer only one commonsense response to the question presented, and that is the one given by Justice Stegall during the oral argument below. "I'm looking for something solid to stand on," he said, "and I just don't know where to go . . . . I don't know how often cars on the road are being driven by their owners." Oral Arg. at 27:21. "How would [one] know" that, after all, "without having some further evidentiary foundation [showing], for example, statistically speaking, how often *are* vehicles on the road being driven by [their] registered owner?" *Id.* at 25:56 (emphasis added).

Of course, as Justice Stegall went on to observe, one "could guess" the answer to that question. *Id.* But as he further noted, such a guess would be little better than "a hunch," *id.*, which "this Court has consistently refused to sanction" as a valid basis for a stop. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *see also* Oral Arg. at 22:07 (Luckert, J.) ("[A]ll we have here . . . [is] a hunch that the owner is the person who is in that car. We don't have any more than that."). Rather, to the extent that the Fourth Amendment tolerates guesses, it insists that they be educated ones, grounded in factual reality: "[T]he police officer must be able to point to specific and articulable *facts* which, taken together with rational inferences *from those facts*, reasonably warrant th[e] intrusion." *Terry,* 392 U.S. at 21 (emphases added).

For all these reasons, the seventeen states that appear here as *amici curiae* have it precisely right.

"While not always possible, [some] police practices can be evaluated against statistical correlations drawn from sound empirical data . . . ." Br. of Okla. et al. as *Amici Curiae* 2. "This case is amenable to [such] empirical and statistical" analysis, *id.*, and should therefore be evaluated based on "data" that describe the "patterns of operation of certain kinds of lawbreakers," namely, people with suspended licenses. *United States v. Cortez*, 449 U.S. 411, 418 (1981).

B. The Empirics of this Case Cannot Be Intuited, in Part Because They Vary Across Locations. This Case Thus Cannot Be Resolved by a Nationwide Rule of Law.

Once one accepts that this case turns on an empirical question, two salient and uncontested points come into focus. First, some of the potential answers to that question would clearly be sufficient to validate the challenged stop—while others just as clearly would not. Once again, the *amici* States have it right. *See* Br. of Okla. et al. as *Amici Curiae* 5 (observing that if the key probability "is exceedingly low" the stop would be unconstitutional, but that if it "approaches anywhere near 50%—though certainly it need not be that high—the conclusion that [the stop was] reasonable will be hard to escape").[5] The

[5] As noted *supra* n.1, the precise threshold for reasonable suspicion need not be specified here. *But cf. Navarette v. California*, 572 U.S. 393, 410 (2014) (Scalia, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.) (describing reasonable suspicion as a "proportion" of "1 in 10 or at least 1 in 20"); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 Vand. L. Rev. 1293, 1328 (1982) (finding that judges, when surveyed, generally peg reasonable suspicion at 20% or 30%).

essential question is thus where within that range the true answer lies.

Second, as the court below held, and as the State now acknowledges, the probability that a given vehicle is being driven by its unlicensed owner is likely to depend in part on two underlying pieces of information: the average number of "drivers for every registered automobile," and the extent to which "suspended drivers continue to drive." Pet. Br. 13–14; *see also* 422 P.3d at 69–70, Pet. App. 11–12 (opinion below) (focusing on these same two factors). Indeed, in some circumstances, data concerning either one of these factors could answer the question. For example, if data were to show that the typical car has twenty-five associated drivers, even the State would apparently concede that the stop at issue here would be unconstitutional. *See* Pet. Br. 13–14. Similarly, if data were to show that license suspensions are maximally effective, such that one hundred percent of suspended drivers cease driving, the fact that a vehicle is registered to an unlicensed owner would definitively *exclude* that person from the universe of potential drivers—precisely the opposite inference from the one the State seeks to draw.

The State seems to recognize that the answer to the question presented turns on actual data about these factors, as it now cites figures with respect to each one in its brief. *See* Pet. Br. 13, 14 & n.2 (suggesting that "there are two to three drivers for every registered automobile in Kansas" and that somewhere between 30% and 75% percent of people with suspended licenses continue to drive). Unfortunately, these figures come far too late, and well past the point when their integrity could have

been tested. *See infra* Part II. But even if the State had come forward with adequate data at the appropriate time, that data could not support the nationwide rule of law that it and its *amici* now seek—because the underlying facts vary significantly from place to place.

Consider first the number of drivers per car. According to the State's own cited statistics, *see* Pet. Br. 13, this ratio varies substantially even within the ten states described in the cited source, which reports that there are roughly 40% more drivers per automobile in North Dakota than in Minnesota. *See The 10 States with the Most Suspended/Revoked Licenses*, Insurify (June 4, 2018), https://insurify.com/insights/the-10-states-with-the-most-suspended-revoked-licenses/ (reporting 2.24 and 1.61 drivers per car in these two states). That variability only increases once the rest of the country is considered, with the number of drivers per automobile varying by as much as 195% across states. *See* Fed. Highway Admin., *Highway Statistics* 2017, tbls. DL-1C & MV-1 (2018), https://www.fhwa.dot.gov/policyinformation/statistics/2017/.[6] By the State's own logic, "the likelihood that

[6] The State cites an insurance website that pulls data from the Federal Highway Administration, which separately reports the ratio per state of licensed drivers to *all* motor vehicles, including buses, trucks, and motorcycles—all of which the State's source excludes. The State's source, however, curiously *includes* publicly owned vehicles (such as police cruisers) in its denominator, notwithstanding their irrelevance to the question presented; it also conflates 2015 data for the number of drivers with 2016 data for the number of vehicles. *Compare The 10 States with the Most Suspended/Revoked Licenses*, Insurify (June 4, 2018), *with* Fed. Highway Admin., *Highway Statistics* 2015, tbl. DL-1C (2017), https://www.fhwa.dot.gov/policyinformation/statistics/2015/, *and* Fed. Highway Admin., *Highway*

the registered owner of a vehicle" is driving that vehicle could thus nearly *double* from one state to the next. Pet. Br. 13. And crucially, this geographic variation is likely to grow dramatically in coming years, as people increasingly rent their personal cars "to strangers" in the "peer-to-peer car sharing" economy. *See* Jonathan J. Cooper, *Apps Enable Auto Owners to Rent Out Their Vehicles*, Chi. Trib., May. 5, 2019, at 2-4.[7]

As for the deterrent impact of suspending someone's driver's license, here too the underlying empirics vary considerably. The State and its *amici* are quick to observe that various studies—once again, cited for the first time in briefing to this Court—show that many people with suspended licenses continue to drive. *See* Pet. Br. 14; Br. for United States as *Amicus Curiae* 14; Br. of Okla. et al. as *Amici Curiae* 15. But the real question is not whether suspended drivers continue to drive *at all*, but rather *how much* (or how

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Statistics 2016, tbl. MV-1 (2017), https://www.fhwa.dot.gov/policyinformation/statistics/2016/. Because the State introduced these figures for the first time in its briefs to this Court, these and other potential defects in its data have never been tested. *Cf.* Resp. Br. 23; *infra* Part II.

[7] *See* Oral Arg. at 22:53 (Luckert, J.) ("[I]n today's age a person . . . could very easily be using one of the services where you rent [your car] to other people . . . ."). The "burgeoning" car-sharing economy already boasts "10 million members and nearly 400,000 listed vehicles." Maureen Farrell, *IAC Buys $250 Million Stake in Car-Sharing App*, Wall St. J., July 17, 2019, at B5. It varies geographically, however, due in part to differences in state law. *See id.* (noting absence of car sharing in New York, where "rentals can't be insured"); *cf.* Oral Arg. at 27:59 (Johnson, J.) (noting that under prior Kansas tort law, it "was absolutely wrong" to assume the registered owner of a car was the typical driver, because liability rules created "reasons [to title it to someone] different than the regular user").

little) they keep driving after losing their licenses. After all, if data showed that suspended drivers get behind the wheel for only a few minutes a year, the odds that such an individual—as opposed to his spouse or one of his teenagers—would be driving a vehicle registered in his name at the precise moment that it is observed by the police would be "exceedingly low." *Id.* at 5; *see* Resp. Br. 21.

And in fact, research shows that while "most people continue to drive after their licenses have been suspended," those "drivers are *not* driving as before." H. Laurence Ross & Phillip Gonzales, *Effects of License Revocation on Drunk-Driving Offenders*, 20 Accident Analysis & Prevention 379, 383 (1988) (emphasis added). Rather, "the majority" of people with suspended licenses report "that they drove '*much less*.'" *Id.* at 383 (emphasis added).

Crucially, geographic variability looms large in this context as well. For as research shows, "[t]he principal explanation" for driving on a suspended license is "the need to get to work," which is considerably easier to do without a car in dense urban settings or in places with robust public transit. *Id.* at 383 (reporting that the proportion of drivers deterred by license suspension increased from 58% to 95% for people who work within ten miles of their homes); *see id.* at 384 (discussing the salience of public transit). Suspended drivers are thus less likely to drive in cities with strong alternative modes of transportation. *See id.* (indicating that residents of "Western cities" may be more likely to drive with a suspended license than people in cities with better public transit); Br. of Okla. et al. as *Amici Curiae* 15–16 (noting that "[d]rivers in the American heartland . . . are the most likely" to drive

on suspended licenses) (quoting *Danger on the Roads? States with the Most Repeat Driving Offenses*, Insurify (Feb. 27, 2019), https://insurify.com/insights/states-with-most-repeat-driving-offenses/)).

In sum, as Justice Stegall noted below, the reasonableness of the State's inference is likely to "change depending on whether [a] stop happened in New York City or in Gove County, Kansas." Oral Arg. at 30:01. For precisely that reason, the Kansas Supreme Court wisely eschewed "a bright-line rule" that would operate in "a uniform [way] across our wide, diverse" society. *Id.* This Court has been similarly wise in its own precedents. *See United States v. Arvizu*, 534 U.S. 266, 276 (2002) ("[A] driver's [behavior] . . . might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in . . . a remote portion of rural southeastern Arizona[.]"); *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (noting that "reasonable suspicion" could mean one thing "alongside a transcontinental highway at the height of the summer" but something quite different "in December in Milwaukee"). That wisdom should prevail here. Nationwide rules are useful—essential, even—when resolving uniform questions of law. But they have no place in answering highly variable questions of fact.[8]

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[8] Given this fact-laden variability, appellate courts owe "deference" to the "trial judge" who "view[ed] the facts of a particular case in light of the distinctive features . . . of the community" where a stop occurred. *Ornelas*, 517 U.S. at 699–700; *cf.* Pet. App. 38–39 (trial court opinion) (finding that vehicles registered to one family member are "often" driven solely by others).

II. When the Party Bearing the Burden of Proof—here, the State—Presents Zero Evidence to Support an Inherently Factual Claim, that Party Cannot Prevail.

In the end, this should not be a hard case. The question presented is inescapably empirical. Its answer cannot be divined by common sense but rather requires some facts describing the "proportion" of vehicles observed to be registered to unlicensed owners that are actually driven by those unlicensed individuals. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975). The State, however, did not introduce any such facts into the record, opting instead to draft a stipulation of facts wholly devoid of this essential information. That unusual litigation decision requires affirmance of the judgment below.

Few legal principles are better established than the idea that the party with the burden of production has the "obligation to come forward with evidence to support its claim." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994); *see* 6 Wayne R. LaFave, Search & Seizure § 11.2(b), at 49 (5th ed. 2012) ("If the party who has the burden of producing evidence does not meet that burden, the consequence is an adverse ruling on the matter at issue.").

Here, the State concedes that it bears this burden. *See* Pet. Br. 17–19 (insisting that the State is not trying to "shift the burden to the defendant"). And rightly so, given the widely accepted rule that "if the police acted without a warrant the burden of proof is on the prosecution." 6 LaFave, Search & Seizure §11.2(b), at 50; *see United States v. Jeffers,* 342 U.S. 48, 51 (1951) (holding that "the burden is on those

seeking [an] exemption" to the warrant requirement to show that a warrantless search or seizure is justified); *see also Beck v. Ohio*, 379 U.S. 89, 97 (1964); *State v. Morlock*, 218 P.3d 801, 806 (Kan. 2009).

Indeed, the State not only concedes that it bears the burden of production—it attempts to *satisfy* that burden in its briefing to this Court, where for the very first time it offers data supporting its asserted factual inference. *See* Pet. Br. 13–15. But of course this belated effort to slide the key facts of the case into the record is not permissible. This is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Nowhere is that admonition more important than when a party attempts to litigate the central factual question of a case for the first time on appeal. As this Court has long held, requiring the parties to present their factual claims "in the trial forum" is "essential" to ensuring that both sides "have the opportunity to offer all the evidence they believe relevant to the issues [that] the trial tribunal is alone competent to decide," and that neither is "surprised on appeal by [a] final decision" that turns on "issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). "Supreme Court briefs," in other words, "are an inappropriate place to develop the key facts in a case." *Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting); *see also Beck*, 379 U.S. at 93 ("[A] recital in an appellate opinion is hardly the equivalent of findings made by the trier of the facts."); *cf.* Tr. of Oral Arg. at 43, *City of Hays v. Vogt*, 138 S. Ct. 1683 (2018) (No. 16-1495) (Roberts, C.J.) (urging the Court

to "discount" information if "it's not something that's in the record").[9]

Notably, in this case, the State's newly proffered evidence not only arrives too late, but is potentially unreliable as well. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 392 (1997) (Breyer, J., dissenting) ("The prohibition on facts found outside the record is designed to ensure the reliability of the evidence before the Court."). For one thing, the State's primary source is an insurance company website that uses the wrong denominator when describing the ratio of drivers to cars, and that curiously mixes driver data from one year with vehicle data from another—defects that the State does not mention in its brief and of which it may be unaware. *See supra* n.6. The State's calculations interpreting its data, moreover, are equally curious: In the span of two pages, it offers three different answers to the core empirical question at issue, suggesting at first that "the likelihood" that a suspended owner "is driving his or her vehicle is no less than 33%," Pet. Br. 13, before then suggesting that, actually, it might be as low as 25%, or perhaps less than 10%.[10] One wonders how such claims would

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[9] Facts offered for the first time by appellate *amici* are equally, if not more, problematic. *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014); *cf. infra* n.18.

[10] *Compare* Pet. Br. 14 (suggesting that "there could be three drivers for every registered vehicle"), *with id.* at 15 (suggesting that only 75% of *suspended* drivers continue to drive at all), *and id.* at n.2 (suggesting that as few as 30% of suspended drivers continue driving). Assuming the number of drivers per car is independent of the rate at which suspended drivers cease driving, the State's initial 33% figure should be multiplied by either its 75% or its 30% figure, yielding a final figure of either 24.75% or 9.9%. *But see supra* Part I.B (noting that the analysis should not focus solely on people who stop driving altogether).

have fared under adversarial testing at the trial level, where the respondent could have been aided by cross-examination, "expert witnesses[,] and the procedural protections of discovery." *Sykes*, 564 U.S. at 31 (Scalia, J., dissenting); *cf. Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("We have no idea what evidence [the respondent] would, or could, offer . . . but this is only because [he] has had no [such] opportunity . . . .").

In sum, "it was incumbent upon the prosecution to" present the trial court with sufficient "information" to support "the constitutional validity" of the stop at issue. *Beck*, 379 U.S. at 97; *id.* at 93 (holding that the prosecution cannot prevail when its "record is meager"). Rather than satisfy that burden, however, the State opted to draft a stipulation of facts that contains no information whatsoever regarding the "*likelihood* that the registered owner of a vehicle in Kansas is driving his or her vehicle." Pet. Br. 13 (emphasis added).[11] Because the record is silent on that essential question, the State, as the party bearing the burden of production, cannot prevail. The decision below accurately reflects this straightforward proposition, and should thus be affirmed.[12]

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[11] *See* Oral Arg. at 7:28 & 25:18 (confirming that counsel for the State drafted the key portions of the stipulation).

[12] See 422 P.3d at 71–72, Pet. App. 18–19:

> When a court draws inferences in favor of the State [notwithstanding] a lack of evidence in the record, it impermissibly relieves the State of its burden. . . . In plain terms, it does not matter if the evidentiary gap is an inch or a mile; if the State has the burden to fill it, it must do so *with evidence*. . . . [T]he State, by presenting some more evidence, may meet its burden. But the State did not present any such evidence here . . . .

III. The State Could Have Won This Case Had It Simply Presented Readily Obtainable Evidence Specific to the Location Where the Stop Occurred.

The irony of this case is that the State could have easily won, had it simply presented some evidence supporting its central factual claim during a routine suppression hearing. *Cf. State v. Gray*, 360 P.3d 472, 480 (Kan. Ct. App. 2015) ("Kansas judges make [factual findings] at suppression hearings on a routine basis in courtrooms across the state."). Such evidence was readily available. Indeed, the best possible data for resolving this case could have been collected and reported with the click of a button—via the same dashboard computer that Officer Mehrer used to run the respondent's license plate. Even absent such digital data, however, the State could have prevailed had it presented other, more conventional evidence describing the key statistic at issue, including potentially testimony from Officer Mehrer himself.

The State's failure to present any such evidence requires a narrowly tailored affirmance. *See supra* Part II. But that curious and idiosyncratic litigation misstep ought not doom *other* stops, conducted under similar circumstances, if they are supported by sufficient facts.

A. The Dashboard Computers and Electronic Citations Regularly Employed in Traffic Enforcement Can Provide All the Data Needed to Answer the Question Presented.

To determine the key "proportion" at the heart of this case, *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975), all one needs to do is count how many times vehicles reportedly registered to unlicensed

drivers are actually driven by those individuals when such vehicles are stopped in the relevant geographic area. Armed with that "hit rate," one can "compute the likelihood that any particular [stop] will result . . . in the discovery of particular kinds of evidence," including an unlicensed driver sitting behind the wheel. Sharad Goel, Maya Perelman, Ravi Shroff & David Alan Sklansky, *Combatting Police Discrimination in the Age of Big Data*, 20 New Crim. L. Rev. 181, 187 (2017). "[S]tatistics in the field," in other words, yield "the key number" for the analysis. Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry,* 17 Lewis & Clark L. Rev. 789, 819 (2013); *see* Crespo, *Probable Cause Pluralism*, at 12–28.[13]

Sometimes, the data necessary to determine this hit rate will be hard to come by. *Cf. Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000). But not so here. On the contrary, "[t]echnology has made it easier and easier to record, collect, and analyze data on *Terry* stops, and more and more police departments are doing so." Goel et al., *supra,* at 186; *see* Crespo, *Probable Cause Pluralism*, at 20–22. Nowhere is that data collection more prevalent than with respect to automotive information, which officers across the country routinely access from "'mobile data terminals' in their squad cars," Br. of Nat'l Fraternal Order of

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[13] The National District Attorneys Association thus rightly focuses on whether "[t]he ratio of unlicensed drivers to law-abiding drivers [among those who are] stopped" is sufficiently "productive." Br. of Nat'l Dist. Att'ys Assoc. as *Amicus Curiae* 11. Its assertion that "[s]tops like the one performed here . . . are *dramatically more* productive" than other stops, however, suffers from a familiar defect: It is a factual claim, wholly untethered to factual support. *Id.* (emphasis added) (citing no sources).

Police as *Amicus Curiae* 14, just as Officer Mehrer did here, *see* Oral. Arg. at 19:14; Pet. App. 83.

Those "mobile data terminals" are the key to answering the question presented. Indeed, most police departments—including, apparently, the Douglas County Sheriff's Office—*already have* data covering thousands of prior traffic stops stored within their files, in the form of electronically issued traffic citations.[14] Those tickets record the license plate numbers of every ticketed vehicle, *see, e.g.*, Pet. App. 45, the precise input that Officer Mehrer used to determine whether the respondent's vehicle was registered to an unlicensed driver. And each electronic ticket also records the driver's license number of the person who was *actually* driving the ticketed car. *See id.* The pool of electronic traffic tickets thus contains—for every previously conducted stop—the two pieces of information needed to determine how frequently vehicles registered to unlicensed drivers were in fact being driven by those individuals when stopped. And with a straightforward algorithm, a computer could comb through all those thousands of tickets—and calculate the hit rate of interest.[15]

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[14] "[S]omewhere between 25 and 50 million traffic tickets are issued each year." *Traffic Tickets Are Big Business,* Nat'l Motorists Ass'n (Oct. 12, 2007), https://perma.cc/4TQQ-C93Q. And "about 60 percent of law enforcement agencies" use "some form of eCitation" system that can "aggregate ticket data . . . for future analysis." eCitationCoalition, *Guidelines for Evaluating and Implementing eCitation Systems* 2 (2016), https://perma.cc/48QJ-UAVU; *cf. Court Payments*, Douglas Cty., Kansas, https://perma.cc/3QNH-3CDK (last visited Aug. 26, 2019) (describing electronic ticketing system).

[15] *Cf.* Sharad Goel et al., *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop-and-Frisk Policy*, 10 Annals of Applied Stat. 365 (2016) (using similar method for street stops).

Indeed, dashboard computers could go one step further. For imagine a slightly different version of this case, in which after Officer Mehrer learned from his computer that license plate 295ATJ is registered to unlicensed driver Charles Glover, Jr., the computer then flashed a question on its screen to await the officer when he returned to the cruiser: "*Was that Charles Glover, Jr.? Yes/No.*" With the click of a button, Officer Mehrer (and all the other officers in his area conducting similar stops) would have begun to assemble a pool of "data that is both system-wide and stop-level deep," the "gold standard" for testing the State's asserted inference. W. David Ball, *The Plausible and the Possible: A Bayesian Approach to the Analysis of Reasonable Suspicion*, 55 Am. Crim. L. Rev. 511, 530 (2018).

Programming dashboard computers to issue such prompts (or finding an app for that) is trivially simple. *Cf.* SceneDoc, eCitations, https://perma.cc/U26Z-D8Z8 (last visited Aug. 26, 2019). And with just a few dozen Yes/No clicks, the same dashboard computer used to run the respondent's license plate could quickly—and automatically—begin to calculate the precise hit rate at issue.[16] Armed with that hit rate, the laptop could

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[16] If one takes as a hypothesis the State's claim that the true rate at which an unlicensed driver "is driving his or her vehicle is no less than 33%," Pet. Br. 13, it would take only 20 Yes/No clicks to determine whether the actual likelihood that a car is being driven by its unlicensed driver exceeds 10%, and only 73 Yes/No clicks to determine whether that actual likelihood exceeds 20%. *Cf. supra* n.5 (discussing potential thresholds for "reasonable suspicion"). These figures are based on a one-tailed statistical test where alpha = 0.05 and power = 0.8. *See generally* Neil A. Weiss, Introductory Statistics 396–454 (7th ed. 2005).

then indicate to the officer whether there is, in fact, a sufficient "likelihood" that a vehicle registered to an unlicensed driver is being driven by that individual, Pet. Br. 13, and thus whether there is reasonable suspicion for a stop.[17]

In sum, the State is sitting on a trove of data, in the form of the electronic traffic citations it has already issued and the "gold standard" hit rate data it could easily collect. If the burden of production means anything at all, *see supra* Part II, surely it means that a party with such easy access to the most relevant information at issue must, in fact, produce it.

B. Other Modes of Readily Available Evidence Could Also Have Supported the State's Claim.

Finally, it bears noting that even if the State were for some reason unable or unwilling to present data

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[17] To be sure, the computer would need to be told (by judges) the threshold for reasonable suspicion—a question not squarely presented here. *See supra* nn.1 & 5. A ruling for the State does not, however, avoid setting that threshold—it simply sets it at zero. For under the State's approach, the police could stop tens of millions of innocent drivers solely because they share a vehicle with someone whose license is suspended; and the government will never have to demonstrate that those stops are effective at catching suspended drivers. *See* Crespo, *Probable Cause Pluralism*, at 6–7, 67–69; *see also* Nat'l Ctr. for State Courts, Trends in State Courts: Fines, Fees, and Bail Practices 21 (2017) (reporting that nearly seven million people have suspended licenses "for nonpayment of court debt" in California, Texas, and Virginia alone); *cf. Reid v. Georgia*, 448 U.S. 438, 441 (1980) (rejecting a justification for a stop that "describe[s] a very large category of presumably innocent travelers"); Resp. Br. 46–50 (discussing the harms of stopping millions of innocent drivers).

from its own traffic records or dashboard computers to substantiate its core factual claim, it still might have prevailed below had it simply presented some other meaningful form of statistical evidence. It might, for example, have done what its *amici* attempt to do now—namely, introduce studies illuminating the underlying rates of suspended driving in the relevant population. *Cf.* Br. of Okla. et al. as *Amici Curiae* 7–12. The particular study offered by the State's *amici* suffers from a number of flaws—including that it has never been subjected to adversarial testing.[18] *See supra* Part II. But the very fact that the State of Oklahoma was able to produce such data highlights the State of Kansas's failure to produce *any* relevant data when it had the burden to do so.

Indeed, the unusually spare record here lacks the most basic form of evidence one expects to encounter in a Fourth Amendment case: testimony from the arresting officer. Once again, the State's *amici* elide

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[18] Statisticians often use crash statistics to approximate rates of unlicensed driving. *See* Sukhvir S. Brar, *Estimating the Over-Involvement of Suspended, Revoked, and Unlicensed Drivers as At-Fault Drivers in California Fatal Crashes,* 50 J. Safety Res. 53 (2014). The *amici* States, however, focus on a different—and misguided—question: "*[W]ith no other information*, what is the probability that a vehicle on the road is being driven by the registered owner?" Br. of Okla. et al. as *Amici Curiae* 5 (emphasis added). That inquiry omits the one essential fact we *do* know here: this "stop was based . . . on the information that Glover's license *had been revoked*," Pet. Br. 2 (emphasis added), which substantially decreased the likelihood that he would be the driver. *See supra* Part I.B; *see also* Resp. Br. 22. By failing to isolate suspended drivers within their data, the *amici* States thus offer little in the way of useful data. (Nor is it clear that statewide data from Oklahoma will help assess driving habits in Lawrence, Kansas.)

this omission, suggesting that Officer Mehrer must have drawn on "his experience" with prior traffic stops when he "inferred that the owner in this instance" was "driving without a valid license." Br. of Nat'l Dist. Att'ys Assoc. as *Amicus Curiae* 8; *see also* Br. of Okla. et al. as *Amici Curiae* 3–4; Br. of Nat'l Fraternal Order of Police as *Amici Curiae* 20. But Officer Mehrer never took the stand in this case. And as a result, the record contains no information whatsoever about his relevant experience. *See* Resp. Br. 25–27. More specifically, it contains no information about the key statistic at issue: the number of times that Officer Mehrer pulled over a car he knew to be registered to an unlicensed owner and saw that, in fact, that unlicensed owner was behind the wheel.[19]

Officer Mehrer never provided that information because the State never called him to testify. To be sure, some of the answers that he might have given to questions along these lines may have been insufficient to justify the stop. Other answers, however, could have been enough—depending on how frequently he has actually encountered unlicensed owners driving their registered vehicles.[20]

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[19] *See* Oral Arg. at 34:08 (Nuss, C.J.) ("[O]fficers . . . often will say, 'in my experience when you see rolled-up bills, that suggests drug activity' . . . . There's nothing like that here . . . . [This officer never said] 'in my experience . . . when . . . a vehicle is moving down the road, and I run the plate [I've] learned that the owner has a revoked license, 10% of the time or 25 out of 30 times' . . . ."); *id.* at 25:56 (Stegall, J.) ("How would we know if it was reasonable without having . . . even just some . . . vague testimony about [the officer's] experience . . . ?").

[20] *Cf. supra* n.16 (observing that a few dozen stops could yield a statistically significant answer). Note that the officer himself

And that is the central point: facts matter. In this case, the State failed to present any relevant facts below, even though it easily could have done so, as prosecutors routinely do in suppression hearings across the country. By departing from that ordinary practice and relying instead on a stipulation that lacks any relevant facts, the State injected a fatal but narrow error into this case. That error requires suppression of the evidence obtained from the unconstitutional stop here, even if that result would be unlikely in a more typical case—litigated on an actual, factual basis.

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need not have this statistic—or any other statistic—in mind when effectuating a stop. *Cf. Devenpeck v. Alford*, 543 U.S. 146, 153–55 (2004); *Whren v. United States*, 517 U.S. 806, 813–14 (1996). The officer could thus stop a driver based on the subjective belief that registered owners frequently drive their own cars—what the State here calls "common sense." Pet. Br. 4. A court reviewing the constitutionality of that stop, however, cannot simply take the officer's asserted common sense as gospel. Rather, it must probe the officer's assumption to see if it is supported by facts. Indeed, that is precisely how judges determine whether the officer's purported common sense consists of "reasonable inferences which he is entitled to draw from the facts in light of his experience," or is instead merely "his inchoate and unparticularized suspicion or 'hunch,'" which cannot support a stop. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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