No. 18-556

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

CHARLES GLOVER,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment, U.S. Const. amend. IV, always permits a police officer to seize a motorist when the only thing the officer knows is that the motorist is driving a vehicle registered to someone whose license has been revoked.

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INTRODUCTION

Whether a police officer's warrantless seizure of a citizen is permitted by the Fourth Amendment is a fact-intensive inquiry. In any particular case, that question can be answered only by examining the totality of the circumstances. And that is exactly what this case lacks: facts and circumstances. In the proceedings below, the State agreed to stipulate to one material fact and only one material fact: the officer knew that the car respondent Charles Glover was driving was owned by someone with a revoked license. No other information is available about the circumstances surrounding the traffic stop or about the officer's observations on the ground.

Because this case involves only one relevant fact, the Kansas Supreme Court's holding is extremely narrow. That court held that the one relevant fact here—viewed *in isolation*—is not sufficient under the Fourth Amendment to justify a seizure. The court reserved judgment on literally *every* other fact that might influence an officer's decision to initiate a traffic stop. The court explained that the State need produce only "some" evidence to support the officer's inference of unlawful behavior and noted that it could not even "imagine all the ways the [evidentiary] gap could be filled." Pet. App. 18-19. That narrow holding will have exceedingly little practical effect because it is difficult to imagine a scenario in which an officer is unable to produce just "*some*" evidence to support the officer's inference of unlawful activity. For that reason, the decision below does not implicate a conflict warranting this Court's review.

STATEMENT

1. The parties stipulated to the following facts. On April 28, 2016, during a routine patrol, Deputy Mark Mehrer of the Douglas County Sheriff's Office saw a pickup truck. Pet. App. 4. Although he had not "observe[d] any traffic violations," he decided to run a license-plate check. *Id.* at 5. The state database revealed that the truck was registered to Charles Glover, Jr., and that Glover's driver's license had been revoked. *Id.* at 4. Based on that information alone, Deputy Mehrer assumed that Glover was currently the one driving the truck. *Ibid.* He made no effort to "attempt to identify the driver [of] the truck." *Id.* at 5. Instead, he initiated a traffic stop "based solely on the information that the [driver's license of the] registered owner of the truck was revoked." *Ibid.* During the stop, he identified the driver as Glover, *ibid.*, and issued him a citation.

Those facts reflect the entirety of the record. The stipulation does not disclose what motivated Deputy Mehrer to run a plate check (*e.g.*, the reason the vehicle came to his attention); what information the database returned beyond the owner's license status (*e.g.*, the reason for or length of the revocation, or any demographic information about the owner); what information accounted for Deputy Mehrer's assumption that the owner was the driver (*e.g.*, knowledge that the owner had previously driven on a suspended license or observation of the driver's physical characteristics); or why Deputy Mehrer did not to attempt to identify the driver before initiating the stop (*e.g.*, because identification would not have been possible given road, traffic, or weather conditions).

2. Petitioner State of Kansas subsequently charged Glover with driving as a habitual violator. Pet. App. 4. In response, Glover filed a motion to suppress the evidence arising from the traffic stop, arguing that the stop violated the Fourth Amendment, U.S. Const. amend. IV, because Deputy Mehrer did not have reasonable suspicion of unlawful activity. Pet. App. 4. The district court granted the motion to suppress. *Id.* at 35-43. The court did not think it reasonable for an officer to assume—with no evidence or explanation—that the registered owner of the vehicle was also the driver of the vehicle, in part because there are many families with "multiple family members and multiple vehicles" where "somebody other than the registered owner often is driving that vehicle." *Id.* at 38-39. The court also noted that cases from other jurisdictions that have reached different outcomes had "other factors present that were not present in this case." *Id.* at 38.

3. The Kansas Court of Appeals reversed. Pet. App. 21-34. That court held that "a law enforcement officer's knowledge that the vehicle owner's license is revoked *alone* provides reasonable suspicion to initiate a vehicle stop," *id.* at 28, as long as "the officer is unaware of any evidence or circumstances which indicate that the owner is not the driver of the vehicle," *id.* at 33.

4. The Kansas Supreme Court reversed the Court of Appeals and reinstated the suppression order. The court viewed the question presented as whether, on the "limited facts" of the stipulation, "spotting a vehicle owned by an unlicensed driver provides reasonable suspicion that an unlicensed motorist

is driving the car." Pet. App. 9. It reaffirmed that reasonable suspicion must be determined "on a case-by-case basis under a totality-of-the-circumstances analysis." *Id.* at 19. It concluded that the State must provide "*some* more evidence" beyond the bare fact of a registered owner's license revocation to show that an officer had reasonable suspicion for a particular stop. *Id.* at 18.

In doing so, the court rejected a "bright-line, owner-is-the-driver presumption" for two reasons. Pet. App. 18. First, the court determined that the presumption would require "applying and stacking unstated assumptions that are unreasonable without further factual basis." *Id.* at 9. Here, on "narrow, stipulated facts," the officer had to "assume the registered owner was likely the primary driver of the vehicle" despite "common experience in Kansas communities [that] suggests families may have several drivers sharing vehicles legally registered in the names of only one or two family members." *Id.* at 11. In addition, the officer had to assume "that the owner will likely disregard the suspension or revocation order and continue to drive," which impermissibly "presumes a broad and general criminal inclination on the part of suspended drivers." *Id.* at 12. By way of contrast, the court referred approvingly to a Kansas intermediate appellate decision that found reasonable suspicion where an officer had knowledge that the owner had recently driven on a suspended license. *Id.* at 12-13 (citing *State v. Hamic*, 129 P.3d 114, 207 (Kan. Ct. App. 2006)).

Second, the court rejected the Kansas Court of Appeals' adoption of a bright-line rule because it would "relieve[] the State of its burden by eliminating the officer's need to develop specific and articulable facts . . .

on the determinative issue of whether the registered owner is driving the vehicle, not whether the vehicle is being driven." Pet. App. 14. It stressed that "without appropriate foundation," the State's presumption would ratify "unparticularized suspicions or inarticulate hunches." *Id.* at 15. And it raised concerns that the rule would lead to gamesmanship, "motivat[ing] officers to avoid confirming the identity of the driver because learning facts that suggest the registered owner is not driving undermines reasonable suspicion." *Id.* at 14.

The court stressed that its holding was narrow: it "recognized that in other cases, the State, by presenting some more evidence, may meet its burden." Pet. App. 19. But the court "decline[d] to delineate the type of corroborating evidence that will satisfy the State's burden" because it could not "imagine all the ways the gap could be filled." *Ibid*. Instead, it noted only that "[w]hat more is required turns on the totality of the circumstances," with "evidence showing the officer rationally inferred criminal activity based on specific and articulable facts." *Id.* at 18. The court reiterated that "the State did not present any such evidence here." *Ibid.*

THE PETITION SHOULD BE DENIED

Kansas asks this Court to review the Kansas Supreme Court's narrow holding rejecting a bright-line rule that one specific fact is always presumptively sufficient as a constitutional matter to justify a warrantless traffic stop. Review of that narrow holding is not warranted both because it does not implicate a split in authority meriting this Court's attention and because it will apply to a vanishingly small number of cases in the real world.

I. There Is No Meaningful Conflict Between The Kansas Supreme Court And Federal Courts Of Appeals Or Other State Courts Of Last Resort.

This Court has often explained that "[a]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible," *Ornelas v. United States*, 517 U.S. 690, 695 (1996), and that "the standards are 'not readily, or even usefully, reduced to a neat set of legal rules,'" *id.* at 695-696 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). Because this Fourth Amendment inquiry is fact-intensive, a "split" arises in this context only when the same set of facts would necessarily result in different outcomes in different jurisdictions. Kansas contends (Pet. 6) that 16 decisions—from 12 other state supreme courts and 4 federal circuit courts—conflict with the Kansas Supreme Court's decision below. But most of those decisions do not in fact conflict.[1] Almost none of those decisions involved facts as bare as those presented here. In decisions from 13 of the 16 courts Kansas relies on, at least one (and often more than one) additional fact was present that supported the officer's inference of unlawful activity. Because each of those cases involved "*some* more evidence," Pet. App. 18, the Kansas Supreme Court would very likely have found reasonable suspicion for the seizure. Only three decisions upheld a seizure based on a record as devoid of supporting facts as

[1] Kansas also contends (Pet. 5) that 13 intermediate state appellate courts conflict with the Kansas Supreme Court's opinion. Because those decisions do not control state law, they do not create a cert-worthy conflict.

this one. That narrow conflict does not warrant this Court's review.

1. This Court has held, and every relevant court agrees, that the reasonableness of a traffic stop under the Fourth Amendment is a fact-intensive inquiry that depends in every case on the "totality of the circumstances." *Navarette v. California*, 572 U.S. 393, 397 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). A "particularized and objective basis" to suspect criminal activity justifies a seizure, *Ornelas*, 517 U.S. at 696 (1996); a mere "hunch" does not, *Terry v. Ohio*, 392 U.S. 1, 21 (1968). And in any given case, distinguishing one from the other requires "common[ ]sense." *Navarette*, 572 U.S. at 402.

Appropriately, then, the decision below declined to reach even an inch beyond its facts, emphasizing that "[w]hat more is required turns on the totality of the circumstances, which courts must determine case by case." Pet. App. 18. As a result, the holding below governs only the thin record presented in the stipulation. In other words, the decision below *does not* apply where an officer can articulate: (1) *any* independent reason to believe an occupant of the car is violating the law; (2) *any* reason for thinking the owner is driving; or (3) *any* reason obtaining more information would have been undesirable or unworkable. Because nearly every case Kansas relies on includes at least *some* such additional evidence, nearly every case falls outside the scope of the decision below.

2. *First*, nine decisions do not conflict because the officers in those cases had an independent reason to believe that an occupant of the car was violating the law.

In five of those decisions, the officer conducted the license check based on the driver's suspicious behavior. In the Tenth Circuit case, the officer was staking out a drug-dealing dwelling when he saw the defendant interact with someone outside the house before getting into a parked car. *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1204 (10th Cir. 2007) (Gorsuch, J.). In two additional jurisdictions, the officer noticed that the vehicle in question was driving unusually slowly. *United States v. Pyles*, 904 F.3d 422, 424 (6th Cir. 2018); *see also State v. Pike*, 551 N.W.2d 919, 920-921 (Minn. 1996). And in two more jurisdictions the officer found the driver's behavior suspicious, because the car was oddly parked, *State v. Vance*, 790 N.W.2d 775, 778 (Ia. 2010), or because the car stopped in the middle of the street in an area being watched for gang retaliation, *State v. Smith*, 905 N.W.2d 353, 359 (Wis. 2018). Kansas would not be bound to disagree with any of those decisions because each featured "*some* more evidence" of the sort required below. Pet. App. 18.

In four additional cases, the officer had an alternative basis to believe that an occupant of the car had broken the law because the owner of car the had an outstanding arrest warrant. *See United States v. McBrown*, 149 F.3d 1176, 1998 WL 413981, at *10 (5th Cir. 1998); *Pyles*, 904 F.3d at 424 (6th Cir. 2018); *People v. Cummings*, 46 N.E.3d 248, 249 (Ill. 2016); *Traft v. Commonwealth*, 539 S.W.3d 647, 651 (Ky. 2018). Those decisions would almost certainly have come out the same way in the Kansas Supreme Court. In the decision below, the court declined to "assume someone is breaking the law," Pet. App. 17, by "disregard[ing] the suspension or revocation order," *id.* at 12. But as

the Kansas Court of Appeals explained in a decision the Kansas Supreme Court specifically distinguished in this case, *ibid*., "the existence of an active arrest warrant is reliable information supporting the reasonable suspicion that the subject of the warrant has committed an offense justifying detention." *State v. Hamic*, 129 P.3d 114, 207 (Kan. Ct. App. 2006). In that context, an officer need not assume any further criminal conduct on the part of the owner; he need only judge whether the owner is likely to be in the vehicle. For just that reason, Kansas is no more bound to disagree with, *e.g.*, Kentucky in an arrest-warrant case than Kentucky would be bound to dispute Kansas in a suspended-license case. *Traft*, 539 S.W.3d at 651 (Ky.) (expressly limiting its holding to "the fact that the owner of the vehicle was subject to seizure for violation of law").

Second, five decisions do not conflict because officers in those cases had a concrete and particularized basis for believing that the driver was in fact the owner. In some, the officer had already made a full or partial visual identification of the driver. *See Commonwealth v. Deramo*, 762 N.E.2d 815, 817-818 (Mass. 2002) (officer "testified that he identified the defendant prior to making the stop"); *State v. Tozier*, 905 A.2d 836, 838-839 (Me. 2006) (officer "observe[d] that the driver [was] of the same gender as the registered owner"); *State v. Donis*, 723 A.2d 35, 37-38 (N.J. 1998) (officer observed that the driver matched the owner's gender and height); *Pike*, 551 N.W.2d at 921 (Minn.) (officer observed that the driver matched the owner's gender and age). In another, the officer had knowledge that the owner had recently been stopped while driving unlawfully, *Vance*, 790 N.W.2d at 778

(Ia. 2010), a fact specifically flagged below as a way the State could meet its burden, Pet. App. 14. Each of those officers offered more than *no* evidence to support an inference that the owner was driving, and a complete vacuum is all the Kansas Supreme Court ruled out. *Id.* at 18.

Finally, two decisions do not conflict because officers provided specific reasons why acquiring more information was unworkable or dangerous. Specifically, Kansas relies on an Eighth Circuit opinion that explicitly limited its conclusion to circumstances in which the officer could not easily identify the driver. *See United States v. Chartier*, 772 F.3d 539, 543 (8th Cir. 2014). Emphasizing that "it was dark, weather conditions were poor, and there was no passing lane that [the officer] could use to pull up safely alongside the vehicle," the court found sufficient suspicion to justify a stop "[g]iven the road and weather conditions." *Ibid.* And in *Armfield v. State*, the Indiana Supreme Court specifically noted that dark tinted windows prevented the officer from identifying the driver, even as it purported to articulate a more general rule. 918 N.E.2d 316, 322 (Ind. 2009). Had the facts presented in those cases been presented in this case, the Kansas Supreme Court would very likely have agreed that the Fourth Amendment permitted the stop.

To be sure, "*once* reasonable suspicion . . . arises, '[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigative techniques.'" *Navarette*, 572 U.S. at 404 (quoting *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (emphasis added). But as this Court has acknowledged, whether a given quantum of information justifies a search or seizure in the first place

may turn on the public safety concerns associated with investigating further. *Florida v. J.L.*, 529 U.S. 266, 273-274 (2000). Because the decision below did not purport to address those circumstances—and expressly disclaimed an intent to control cases with any additional evidence—those decisions do not conflict with the decision below.

3. In the final count, only three state supreme courts have found that reasonable suspicion exists on records so bare that the Kansas Supreme Court would be compelled to disagree. *State v. Neil*, 207 P.3d 296, 297 (Mont. 2009); *State v. Richter*, 765 A.2d 687, 689 (N.H. 2000); *State v. Edmonds*, 58 A.3d 961, 964-965 (Vt. 2012). In each of the other cases Kansas relies on, some aspect of the "totality of the circumstances" differs crucially from the case below because additional evidence shed light on the identity of the driver, the likelihood of criminal activity, or the officer's judgment that investigating further was undesirable or unworkable. Even where other courts have purported to articulate a bright-line rule permitting stops based only on knowledge that a vehicle's owner is unlicensed, the officer testified that he had other reasons for making the stop, reasons plainly relevant in a totality-of-the-circumstances inquiry.[2]

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[2] *See Armfield*, 918 N.E.2d at 321-322 (Ind.) (tinted windows prevented officer from observing driver); *Vance*, 790 N.W.2d at 781-782 (Iowa) (officer ran check after noticing "oddly parked" car and remembering he had previously found the driver traveling unlawfully); *Deramo*, 762 N.E.2d at 818 (Mass.) (officer identified driver prior to making stop); *Pike*, 551 N.W.2d at 922 (Minn.) (officer confirmed gender and age of driver prior to making stop). Had the facts presented in any of those four cases been presented

II. Any Division Among State Courts Of Last Resort On The Question Presented Does Not Warrant This Court's Review.

Only three state courts of last resort have held that a traffic stop is permissible based on the single isolated fact presented here. That narrow disagreement does not warrant this Court's review. There is no disagreement among courts on the relevant governing law. And any opinion from this Court would affect an exceedingly small set of cases. The decision below applies only when an officer cannot point to *any* evidence other than the fact of the owner's suspended license. But it is difficult to imagine a scenario going forward where a law-enforcement officer in Kansas will be unable to offer "*some* more evidence," Pet. App. 18, to support this type of stop. When the officer does produce some evidence, the decision below will not govern. The practical consequences of the decision below are therefore minimal.

Even if the Court were inclined to offer additional guidance on when an officer has reasonable suspicion to initiate a traffic stop, this case is the worst kind of vehicle for doing so. Because the decision below rests on a remarkably spare stipulation, it would provide the Court essentially no opportunity to clarify or illustrate how to apply the Fourth Amendment's fact-intensive inquiry.

1. The decision below does not warrant review because other courts do not disagree with any aspect of the governing law. This Court does not typically

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in this case, the Kansas Supreme Court almost certainly would have agreed that the traffic stop was permitted by the Fourth Amendment.

grant certiorari to review the application of "a properly stated rule of law." Sup. Ct. R. 10. Indeed, this Court has repeatedly explained that it cannot provide more precise legal guidance about how to resolve fact-sensitive disputes about what constitutes reasonable suspicion. "Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible," *Ornelas*, 517 U.S. at 695, and for that reason the Court has "deliberately avoided reducing [either] to a neat set of legal rules," *United States v. Arvizu*, 534 U.S. 266, 274 (2002). *See District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). There is nothing for the Court to do here other than to review the application of the law to the one salient fact at issue.

In that respect, this case is nothing like the cases in which the Court typically grants certiorari to clarify the reasonable-suspicion standard. Almost invariably, this Court intervenes only to *reject* an inappropriately categorical rule adopted in the lower courts. *See Navarette*, 572 U.S. at 401-404 (rejecting a drunk-driver exception to the typical reasonable-suspicion analysis for anonymous tips); *J.L.*, 529 U.S. at 272 (rejecting an "automatic firearm exception" to the typical reasonable-suspicion analysis for anonymous tips); *see also Arvizu*, 534 U.S. at 274 (rejecting a lower court's effort to judge the suspiciousness of individual facts "in isolation from each other"); *Sokolow*, 490 U.S. at 8 (rejecting an approach that gave "ironclad significance" to some kinds of facts and denied it to others). And for good reason. Because "the factual 'mosaic' analyzed for a reasonable-suspicion determination" typically "preclude[s] one case from squarely controlling

another," *Arvizu*, 534 U.S. at 275 (quoting *Ornelas*, 517 U.S. at 697-698), this Court's intervention is typically warranted in this context only when a lower court has adopted a rule that strays from the totality-of-the-circumstances analysis. Because the Court below rejected Kansas's preferred bright-line rule and reaffirmed that reasonable suspicion must be assessed in light of the totality of the circumstances, review is unwarranted.

Even if this Court were inclined to offer occasional illustrations about *how* to apply the totality-of-the-circumstances analysis, moreover, this would be an exceedingly poor case in which to do that—because the totality of circumstances includes only one fact. *See J.L.*, 529 U.S. at 276 (Kennedy, J., concurring) (noting that discussion of other facts potentially relevant to reasonable suspicion "of course, must await discussion in other cases, where the issues are presented by the record").

2. The Kansas Supreme Court's holding in this case is exceedingly narrow: it applies only when an officer knows one fact and one fact alone. The decision below—like any guidance this Court might offer based on that artificially narrow record—will have almost no practical significance.

a. Whether this Court grants or denies the petition, the holding in this case will affect a vanishingly small number of cases. It is difficult to imagine a case in which an officer can see a vehicle, note the license plate number, and run a check but can offer *no* additional evidence about the circumstances of the stop, the characteristics of the driver, or literally any other relevant fact. As Kansas's own authorities make clear,

records as slim as the one presented here are the exception, not the rule. Of the twenty-nine state and federal cases cited by Kansas, only three were litigated on similar records. *See* pp. 6-11, *supra*.

Such limited records are likely to become even more rare in light of the decision below. Because the decision below clarifies that the State needs to present just "*some* more evidence," Pet. App. 18, law-enforcement officers in Kansas who have information beyond the fact of the registered owner's license status will include those facts in the record when responding to a motion to suppress. Officers in other jurisdictions do so regularly. *See*, *e.g.*, *Chartier*, 772 F.3d at 542 (8th Cir.) (officer was not able to observe driver through mist and snow); *Deramo*, 762 N.E.2d at 816-817 (Mass.) (officer learned that owner had multiple revocations); *Tozier*, 905 A.2d at 838 (Me.) (officer observed gender of the driver). And officers in Kansas are well-equipped to do so as well. *See*, *e.g.*, *Hamic*, 129 P.3d at 207 (Kan. Ct. App. 2006) (officer recalled two prior instances when the registered owner had driven unlawfully); *State v. Barraza*, 256 P.3d 897, 2011 WL 3444328, at *2 (Kan. Ct. App. 2011) officer observed driver was a woman with long hair).

b. Because the decision is likely to have few, if any, consequences for law-enforcement officials on the ground, it poses no threat to public safety. *Contra* Pet. 17-19. In particular, the Kansas Supreme Court's rule will apply only when a driver is scrupulously observing all applicable traffic and safety regulations, has done nothing suspicious, and can be easily observed—otherwise, the officer would likely have an alternative basis to conduct a stop. *Cf. Whren v. United States*, 517 U.S. 806, 810 (1996) (noting the objection that "the

use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible").

In any event, Kansas dramatically overstates the public-safety concerns at issue here. In Kansas—as is true across the country—the State suspends licenses for a wide variety of reasons that have nothing to do with highway safety, such as unpaid child support, Kan. Stat. Ann. § 20-1204a(g), or unpaid tickets, Kan. Stat. Ann. § 8-2110(b)(1). Those suspensions, along with others that have no relevance to traffic safety, account for 40% of license suspensions.[3] But those drivers pose no special danger to the public: "[D]rivers suspended for the non-driving-related reason of failing to pay child support, have [accident] rates that are comparable to drivers with valid licenses." David J. DeYoung & Michael A. Gebers, *An Examination of the Characteristics and Traffic Risks of Drivers Suspended/Revoked for Different Reasons*, 35 J. Safety Res. 287, 290 (2004). Indeed, those who have a suspended license due to non-driving related reasons have a *lower* crash rate than validly licensed male drivers under the age of 25. *Ibid.* Kansas's across-the-board assumptions about the safety of drivers who have had a suspension do not map onto those facts.

3. Separately, Kansas suggests (Pet. 11, 19) that any tension between the Tenth Circuit and the Supreme Court of Kansas would be "untenable" because

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[3] Joseph Shapiro, *How Driver's License Suspensions Unfairly Target the Poor*, NPR (Jan. 5, 2015), https://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor.

"the Fourth Amendment will apply differently to routine investigative stops in Kansas depending on whether the State of Kansas or the United States files the charge." To reiterate, those decisions do not meaningfully conflict because the Tenth Circuit case had additional reasons for suspecting unlawful activity—including that the defendant was seen at a suspected drug-dealing location. To the extent those courts might disagree in some cases, those cases are vanishingly few. Any additional guidance in this case would have no impact on drivers' primary conduct, because the presence (or absence) of reasonable suspicion turns on factors beyond their control. And any ruling would have little impact on a police officer's authority to search and seize, because, as explained, an officer will almost always have *some* additional reason beyond the bare fact of the registered owner's revocation to initiate a stop. That is not the kind of tension that warrants this Court's intervention.[4]

III. The Decision Below Was Correct.

This Court has long held that "stopping an automobile and detaining the driver in order to check his

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[4] Oklahoma's amicus brief asserts (Okla. Amicus Br. 10) that this Court must resolve any disagreement between the Kansas Supreme Court and the Tenth Circuit to avoid a "legal quagmire" for courts, relying on *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729-1730 (2017). But *LeBlanc* addressed confusion that might arise on federal habeas review when a state supreme court has a more restrictive interpretation of the Eighth Amendment than the federal circuit in which it is located. *Id.* at 1727. There can be no similar confusion here, both because Kansas's rule is more rights-protective, and because habeas relief is generally unavailable for Fourth Amendment violations. *See Stone v. Powell*, 428 U.S. 465, 494 (1976).

driver's license . . . [is] unreasonable under the Fourth Amendment," except when "there is at least articulable and reasonable suspicion that [the] motorist is unlicensed." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). On the exceptionally thin facts of the stop before it, the Kansas Supreme Court refused to create an exception to that rule for vehicles registered to suspended drivers. In doing so, the court reiterated that reasonable-suspicion determinations must always be based on the "totality of the circumstances." *Navarette*, 572 U.S. at 397 (quoting *Cortez*, 449 U.S. at 417), warning that a contrary bright-line rule would encourage officers on the ground to ignore the facts actually before them, Pet. App. 14. The court narrowly held that an officer's knowledge that the owner of a vehicle has a suspended license is not—without at least *some* scintilla of further support—a license to stop that car. That holding was correct and does not warrant this Court's review.

1. This Court has made clear that determining whether an officer has reasonable suspicion turns on "commonsense judgment and inferences about human behavior." *Wardlow*, 528 U.S. at 125 (2000). Kansas asks this Court to constitutionalize the presumption that vehicle owners with suspended licenses will violate the law by continuing to drive. Because that presumption is premised on unsound inferences, the Kansas Supreme Court was right to reject it.

Initially, Kansas errs in asserting (Pet. 16) that a stop is justified in this context when an officer can articulate facts about the particular "vehicle he is stopping." Whether a driver is unlawfully driving on a suspended license has nothing to do with the particular vehicle he is driving; it has everything to do with the

identity of the driver. Where the *only* thing that distinguishes between legal and illegal activity is the identity of the driver, it makes little sense to hold as a matter of constitutional law that an officer can infer illegal activity by an individual when the officer has *no information* about the individual in question, *i.e.*, the driver of the car.

To the extent information about a vehicle's owner is relevant to assessing who the driver of the vehicle is, moreover, Kansas errs in contending (Pet. 12-16) that an officer may always assume (with no supporting evidence) that a car is being driven by its owner. As the Kansas Supreme Court noted, "common experience in Kansas communities suggests families may have several drivers sharing vehicles legally registered in the names of only one or two of the family members." Pet. App. 11. For insurance purposes, spouses or children may drive vehicles owned by others. Out of necessity, family members may share vehicles. And to economize, families may drive cars owned by their neighbors, or take advantage of ever-growing peer-to-peer carsharing networks, as millions do already.[5] Common sense therefore tells us that the ratio of licensed drivers to registered vehicles can vary significantly from place to place and time to time.[6] But

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[5] *See* Peter Holley, *Airbnb for Cars Is Here. And the Rental Car Giants Are Not Happy*, Wash. Post (Mar. 30, 2018), https://www.washingtonpost.com/news/innovations/wp/2018/03/30/airbnb-for-cars-is-here-and-the-rental-car-giants-are-not-happy/?utm_term=.67407489cf9f.

[6] In Kansas, for example, there are more than two licensed drivers for every registered automobile. *See The 10 States with the Most Suspended/Revoked Licenses*, Insurify (June 4, 2018),

Kansas's frozen assumption accounts for none of those dynamics.

Kansas also fails to account for the deterrent effect of a suspended license. Whatever the odds are that a car's driver is its owner at any particular moment, those odds certainly fall sharply when an owner's license has been suspended. As the Kansas Supreme Court observed, to hold otherwise would be to "presume[] a broad and general criminal inclination on the part of suspended drivers." Pet. App. 12. The naked observation that *some* unlicensed drivers *sometimes* drive is not individualized suspicion, just as a neighborhood's top-line crime rate would not justify stopping its residents solely on the strength of their "presence in an area of expected criminal activity." *Wardlow*, 528 U.S. at 124 (citing *Brown v. Texas*, 443 U.S. 47, 99 (1979)).

2. Kansas's contrary rule would be tantamount to "standardless and unconstrained discretion." *Prouse*, 440 U.S. at 661. A sound rule of thumb is that "[a] suspicion so broad that [it] would permit the police to stop a substantial portion of the lawfully driving public . . . is not reasonable." *United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014-1015 (7th Cir. 2016) (Posner, J.) (quoting *United States v. Flores*, 798 F.3d 645, 649 (7th Cir. 2015) (omission in original)). Unfortunately, Kansas's rule is just that broad. It sweeps in every vehicle registered to a suspended driver, and therefore every individual who shares those cars. Both the spouse who drives his unlicensed wife to a job site and the older sister who drives her

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https://insurify.com/insights/the-10-states-with-the-most-suspended-revoked-licenses/.

siblings to school during their father's suspension will be at risk of indiscriminate seizures whenever they set out on the road in the family car. And as discussed above, Kansas's rule is relevant *only when those individuals are driving safely and lawfully*. Otherwise, law-enforcement officers would have another basis for initiating a stop.

Worse yet, over time, Kansas's preferred rule will sweep in ever more innocent drivers who are increasingly "at the mercy of advancing technology." *Kyllo v. United States*, 533 U.S. 27, 35 (2001). In a world where an officer must run each plate manually, officers would be unlikely to hit upon even a small fraction of the vehicles registered to unlicensed drivers. As four Justices noted in *United States v. Jones*, when it comes to all but the highest-priority offenses, officers have traditionally lacked the resources to "secretly monitor and catalogue every single movement of an individual's car for a very long period." 565 U.S. 400, 430 (2012) (Alito, J., concurring). But greater and greater deployment of automated license-plate readers (ALPRs) changes the calculus dramatically. As one company brags, its cameras "can capture up to 1,800 license plates a minute during day or night, across four lanes of traffic and at speeds of up to 150 miles per hour, alerting officers 'within milliseconds' of suspect plates."[7] Given how saturated some cities already are

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[7] *See* Kaveh Waddell, *How License-Plate Readers Have Helped Police and Lenders Target the Poor*, The Atlantic (Apr. 22, 2016), https://www.theatlantic.com/technology/archive/2016/04/

with ALPRs, vehicles owned by unlicensed drivers would be automatically at risk of seizure throughout significant metropolitan areas, including Washington, DC, and Manhattan.[8] Indeed, ALPRs in such areas are so prevalent that an innocent driver of a borrowed car could trigger an automatic ALPR alert—and the possibility of a warrantless seizure—on half a dozen occasions over the course of any single commute.

3. Finally, Kansas's preferred approach would create perverse incentives, discouraging officers from gathering individualized information for fear that any additional evidence could destroy their prerogative to carry out a stop. As the Kansas Supreme Court warned below, officers would face pressure to "avoid confirming the identity of the driver because learning facts that suggest the registered owner is not driving undermines reasonable suspicion." Pet. App. 14.

In its defense, Kansas caricatures the approach taken below, contending that the opinion "force[s] officers to rule out the possibility that someone other than the owner is driving before stopping the vehicle," even when doing so would be dangerous, difficult, or otherwise inconsistent with the officer's professional

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how-license-plate-readers-have-helped-police-and-lenders-target-the-poor/479436/ (quoting Leonardo, https://www.leonardocompany-us.com/lpr).

[8] *See* Allison Klein & Josh White, *License Plate Readers: A Useful Tool for Police Comes with Privacy Concerns*, Wash. Post (Nov. 19, 2011), https://www.washingtonpost.com/local/license-plate-readers-a-useful-tool-for-police-comes-with-privacy-concerns/2011/11/18/gIQAuEApcN_story.html?utm_term=.e902008659b; Cara Buckley, *New York Plans Surveillance Veil for Downtown*, N.Y. Times (July 9, 2007), https://www.nytimes.com/2007/07/09/nyregion/09ring.html.

judgment. Pet. 16. But the opinion requires no such thing. The Kansas Supreme Court expressly declined to limit the kinds of evidence that might be relevant in future cases. Pet. App. 18. Factors that have been relevant in other instances could be determinative in Kansas, including factors that do not require law enforcement to undertake additional investigation: whether the vehicle was driven unusually in some respect, *e.g.*, *Smith*, 905 N.W.2d at 359 (Wis.); whether the officer had personal knowledge of the owner's driving habits, *e.g.*, *Hamic*, 129 P.3d at 207 (Kan.); or whether the officer observes the driver's gender or height, *e.g.*, *Donis*, 723 A.2d at 37 (N.J.). And the decision below nowhere suggests that Kansas courts must ignore the relevance of road or weather conditions in future cases. *Cf. Chartier*, 772 F.3d at 543 (8th Cir.) (finding reasonable suspicion "[g]iven the road and weather conditions").

The difference between the two approaches is significant. Under the rule below, officers will exercise their professional judgment about the best way to develop reasonable suspicion on the facts of the case—as they routinely do in Kansas and in other jurisdictions. *E.g.*, *People v. Cummings*, 6 N.E.3d 725, 727 (Ill. 2014), *vacated on other grounds*, 135 S. Ct. 1892 (2015) (officer first attempted to identify driver); *Donis*, 905 A.2d at 837 (N.J.) (officer fully identified driver); *Edmonds*, 58 A.3d at 963 (officer partially identified driver) (Vt.); *Barraza*, 2011 WL 3444328, at *2 (same). But under the bright-line rule Kansas proposes, officers will be encouraged to think of the right to seize these vehicles as a "police entitlement," unmoored from the facts of any individual stop. *Arizona v. Gant*,

556 U.S. 332, 347 (2009). Common sense and the Constitution favor the first approach.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February 19, 2019