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 THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of thousands of direct members and up to 40,000 attorneys in affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many *amicus* briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases presenting issues important to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case because it involves the Fourth Amendment, individual liberty, and the right to privacy.

SUMMARY OF ARGUMENT

Kansas asks the Court to adopt a bright-line rule: When a license-plate check reports that the registered owner of a vehicle has a suspended or revoked license, reasonable suspicion exists to stop the vehicle without a warrant. No further investigation is required. No more facts are needed. The constitutional analysis ends.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

The Court, however, has "said repeatedly" that the reasonable-suspicion analysis requires evaluating the "totality of the circumstances" and the "cumulative information" available to law-enforcement officers. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). This flexible standard reflects the colorful "mosaic" of situations that officers confront each day. *Ornelas v. United States*, 517 U.S. 690, 697-98 (1996). To account for the unpredictability of police work and the evolution of technology, the Court has "deliberately avoided reducing" the reasonable-suspicion standard "to a neat set of legal rules." *Arvizu*, 534 U.S. at 274 (quotation marks omitted).

Preferring a rigid rule to a flexible standard, Kansas argues that reasonable suspicion exists to stop a vehicle whenever a license-plate check returns a "hit" for the vehicle indicating that the registered owner has a suspended or revoked license. The mere presence of that owner's vehicle on the road—which is perfectly legal—automatically creates reasonable suspicion that the registered owner is illegally driving the vehicle. This rule might be "clear" and "easy to apply," Pet. Br. 25, but it defies the "essence" of the reasonable-suspicion inquiry, *United States v. Cortez*, 449 U.S. 411, 417 (1981), that "each case is to be decided on its own facts and circumstances," *Ornelas*, 517 U.S. at 696 (quotation marks and alteration omitted).

Indeed, adopting Kansas's proposed rule would incentivize officers not to investigate the "facts and circumstances" at all. If the hit of a license-plate check, standing alone, creates reasonable suspicion, then officers can blindly rely on that hit to justify a warrantless seizure without even trying to determine whether the driver shares some physical characteristic with

the registered owner—something that often can be accomplished with just a quick glance.

Kansas and its *amici* embrace this incentive against investigation. They argue that ever requiring police to identify some evidence corroborating a lead they receive via a license-plate check would "impermissibly transform[ ] the rule of reasonable suspicion into something akin to (or greater than) probable cause." Pet. Br. 7; *see also* U.S. Br. 20-21. To the contrary, the Court's *Terry* cases have consistently required police to corroborate a tip or to perform *some* investigation of the suspect before conducting a stop, and have rejected check-the-box tests for reasonable suspicion where a single data point dictates the results of the reasonableness analysis.

Adhering to these principles in this case is especially important because police are increasingly using automated license-plate readers ("ALPRs") mounted on patrol cars, telephone poles, and other objects. If a hit from one of these cameras, which passively scan the license-plate numbers of all passing vehicles, could create reasonable suspicion that the driver of a car has a suspended or revoked license, then officers could "blindly" rely on the information spit out by ALPRs, improperly using the technology as a *substitute* for their judgment instead of a *tool* to assist with investigation. *Arizona v. Evans*, 514 U.S. 1, 17 (1995) (O'Connor, J., concurring).

Allowing this dragnet technology to dictate when police may conduct a stop—despite never observing any suspicious conduct—would erode the liberty of all drivers (and their passengers) who share or borrow

cars registered to someone with a suspended or revoked license. And because States often suspend or revoke licenses for missed child support payments, unpaid court debts, and other infractions unrelated to unsafe driving, Kansas's per se rule is an overly blunt instrument to protect society from the "danger" posed by those whose "driving privileges have been revoked." Pet Br. 14.

The Court should reject Kansas's attempt to replace the reasonable-suspicion standard with a technological short cut, reiterate that bright-line rules are no substitute for case-by-case judgments, and affirm the decision of the Kansas Supreme Court.

ARGUMENT

I. KANSAS'S BRIGHT-LINE RULE IS INCOMPATIBLE WITH THE FLEXIBLE REASONABLE-SUSPICION STANDARD.

"Articulating precisely what 'reasonable suspicion' . . . mean[s] is not possible." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Kansas and its *amici*, however, seek to make the impossible possible, proposing a bright-line rule that reasonable suspicion exists when police see a car on the road and "know[ ] the registered owner cannot legally drive." Pet. Br. 9. This singular focus on the status of the registered owner—not the actions of the driver—defies the Court's *Terry* precedents, which ask whether officers have reasonable suspicion that the "particular individual being stopped is engaged in wrongdoing" after taking into account "the totality of the circumstances—the whole picture." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

Kansas and its *amici* nevertheless argue that the hit of a license-plate check, standing alone, is enough to create reasonable suspicion that the driver is breaking the law. According to them, "requiring corroborating evidence" before making the stop—e.g., even so much as expecting officers to try to obtain evidence that the driver is female if the registered owner is female—would "impose[ ] a higher burden than reasonable suspicion requires, effectively transforming the rule of reasonable suspicion into something akin to (or greater than) probable cause." Pet. Br. 21; *see also* U.S. Br. 20-21 (arguing that the Kansas Supreme Court "applied a standard much higher than what the Fourth Amendment demands").

That is wrong. The Court's *Terry* cases have repeatedly rejected per se rules that would allow warrantless seizures based on a single data point. Because no two cases are the same, *Cortez*, 449 U.S. at 417, the test for reasonableness must leave space for "officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them," *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Rigid bright-line rules transform the analysis into a check-the-box exercise, and thus "run[ ] counter to our cases and underestimate[ ] the usefulness of the reasonable-suspicion standard in guiding officers in the field." *Id*. at 275.

In *Brown v. Texas*, 443 U.S. 47 (1979), for example, "[t]he fact that [Brown] was in a neighborhood frequented by drug users, standing alone, [was] not a basis for concluding that [he] was engaged in criminal conduct." *Id.* at 52. Likewise in *Illinois v. Wardlow*, 528 U.S. 119 (2000), an "individual's presence in an

area of expected criminal activity, standing alone, [was] not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Id.* at 124. And in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the "Mexican appearance" of a vehicle's occupants did not, "standing alone, . . . justify stopping all Mexican-Americans to ask if they are aliens." *Id.* at 887; *see also United States v. Sokolow*, 490 U.S. 1, 9 (1989) ("Any one of these factors is not by itself proof of any illegal conduct.").

These cases recognize that a check-the-box test cannot possibly account for every conceivable situation officers might encounter. For that reason, the Court has "expressly disavowed any 'litmus-paper test' or single 'sentence or paragraph rule,' in recognition of the 'endless variations in the facts and circumstances' implicating the Fourth Amendment." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (alterations omitted) (quoting *Florida v. Royer*, 460 U.S. 491, 506 (1983)). Instead, the Court has required at least *some* corroboration of a tip or a lead before concluding that reasonable suspicion exists to conduct a *Terry* stop. *See* Resp't Br. 14-16.

In *Wardlow*, the Court refused to adopt a per se rule that reasonable suspicion exists whenever someone flees upon seeing police. *See* 528 U.S. at 125. Police had reasonable suspicion to stop the suspect in that case because, in addition to his "unprovoked flight," he also was in "an area known for heavy narcotics trafficking" and was "standing next to [a] building holding an opaque bag." *Id.* at 121-22. Taken together, these "contextual considerations" supported the officer's judgment that "the circumstances [were]

sufficiently suspicious to warrant further investigation." *Id.* at 124; *see also id.* at 126-27 (Stevens, J., concurring in part and dissenting in part) ("The Court today wisely . . . rejects the proposition that flight is necessarily indicative of ongoing criminal activity." (quotation marks and alterations omitted)).

Likewise, in *Cortez*, the officers pieced together "fact on fact and clue on clue" that, taken together, provided reasonable suspicion to stop a truck they believed was transporting illegal aliens. 449 U.S. at 419. Specifically, "officers knew that the area was a crossing point for illegal aliens," "knew that it was common practice for persons to lead aliens through the desert from the border," observed one recurring "Chevron" shoeprint pattern in the desert that tended to reappear "on clear weekend nights," and saw a truck drive through the desert on a clear weekend night tracking the expected route of the suspect who wore the "Chevron" pattern shoes. *Id.* Based on those and other prestop observations, officers could "reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." *Id.* at 421-22.

The same type of corroboration existed in *Alabama v. White*, 496 U.S. 325 (1990), where police had reasonable suspicion to stop a vehicle because "an anonymous telephone tip, . . . as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." *Id.* at 326-27. Although the tip, "standing alone, would not warrant a man of reasonable caution in the belief that a stop was appropriate," there was "more than the tip itself." *Id.* at 329 (quotation marks and alteration omitted). Officers there-

fore had sufficient information for "reasonable suspicion that [the defendant] was engaged in criminal activity." *Id.* at 331.

Likewise, in the "close case" of *Navarette v. California*, 572 U.S. 393 (2014), reasonable suspicion existed because an anonymous caller reported "she had been run off the road by [the] vehicle" and detailed how "the driver's conduct" was "dangerous," and an officer corroborated the truck's location shortly after receiving the tip. *Id.* at 401-04. The Court again refused to adopt a per se rule that investigative stops are permissible whenever police receive an anonymous tip, explaining that the circumstances of the stop at issue made the tip an "especially reliable" "contemporaneous report," but that a "tip *alone* seldom demonstrates . . . reasonable suspicion to make an investigatory stop." *Id.* at 397, 399-400 (quotation marks and alteration omitted).

No similar corroboration existed in this case. When Deputy Mehrer seized an unknown driver of a vehicle, he had only the information from a computerized license-plate check that the vehicle belonged to an owner whose license had been revoked. Pet. Br. 2. He did not observe anything suspicious about the truck. Nor did he know whether the driver shared any physical characteristics with the registered owner. *See generally State v. Donis*, 723 A.2d 35, 36-37 (N.J. 1998) (explaining that police can learn the "sex," "date of birth," "weight," and other information about the registered owner of a vehicle when they run a license plate through the "mobile data terminal" in patrol cars). And there was no other evidence of possible illegal activity—e.g., a report that the truck had been stolen or had an expired registration. *See Delaware v.*

Prouse, 440 U.S. 648, 650 (1979) (finding no reasonable suspicion where "the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity").

Instead, Deputy Mehrer stopped the vehicle based solely on the report from his computer that the registered owner had a revoked license, even though he had no evidence that the registered owner was actually driving. Affirming such cookie-cutter policing in this case—and adopting a rule allowing it in all future cases—would defy the Court's Fourth Amendment jurisprudence, which has "consistently eschewed bright-line rules" as "contrary to our traditional contextual approach." *Robinette*, 519 U.S. at 39 (quotation marks omitted); *see also Ker v. California*, 374 U.S. 23, 33 (1963) ("[S]tandards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application.").

II. AUTOMATED LICENSE-PLATE READER TECHNOLOGY HIGHLIGHTS THE CONSTITUTIONAL PROBLEMS WITH KANSAS'S RULE.

The Court's steadfast rejection of per se rules based on a single data point makes sense: "One simple rule will not cover every situation," *Adams v. Williams*, 407 U.S. 143, 147 (1972), and "'bright-line' rules usually become blurred as the police and the adversarial process test their outer limits," Christopher Slobogin, *World Without a Fourth Amendment*, 389 UCLA L. Rev. 1, 71 (1991). ALPR technology causes such blurring for Kansas's rule.

A. Kansas's Rule Lets Computers, Not Case-By-Case Judgments, Control The Constitutional Analysis.

Police today can receive a hit of a license-plate reader simply by installing an ALPR on a telephone pole and walking away. If that hit, standing alone, gives police authority to stop a vehicle, the reasonable-suspicion analysis would be delegated to a computer, relieving police of their constitutional responsibility to exercise informed judgment based on the totality of the circumstances and "permit[ting] police technology to erode the privacy guaranteed by the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

ALPRs use high-speed, computerized cameras to capture images of license plates on passing cars. Am. Civil Liberties Union, *You Are Being Tracked: How License Plate Readers Are Being Used To Record Americans' Movements* 2 (July 2013), https://tinyurl.com/ptnxme7. Software converts these images into readable text, which is instantly compared against law-enforcement databases—or "hotlists"—of license-plate numbers that interest law enforcement. Keith Gierlack et al., *License Plate Readers for Law Enforcement: Opportunities and Obstacles*, RAND Corp. (2014), https://tinyurl.com/yxpdxmja. If the computer detects a match, the ALPR immediately sets off an audible or other alarm in the police cruiser or police station. Tyson E. Hubbard, *Automatic License Plate Recognition: An Exciting New Law Enforcement Tool with Potentially Scary Consequences*, Syracuse Sci. & Tech. L. Rep. 3 (Spring 2008).

By installing an ALPR on a police car, toll booth, or other object, police can indiscriminately and passively surveil up to 1,800 license plates per minute of vehicles traveling up to 140 miles per hour. Randy L. Dryer & S. Shane Stroud, *Automatic License Plate Readers: An Effective Law Enforcement Tool or Big Brother's Latest Instrument of Mass Surveillance? Some Suggestions for Legislative Action*, 55 Jurimetrics 225, 229 (Winter 2015); *see also* Cynthia Lum et al., *The Rapid Diffusion of License Plate Readers in U.S. Law Enforcement Agencies: A National Survey*, at 24 fig. 6 (2016), https://tinyurl.com/yyp2yqcm (reporting that 50% of ALPRs are mounted on patrol cars and 26% are mounted on fixed locations). ALPRs capture information about all license plates that pass by, regardless of whether law enforcement has any suspicions about that particular vehicle or driver.

ALPRs have become a near-universal arrow in law enforcement's quiver. The technology "is currently used by at least two-thirds of larger police agencies, which represents a more than threefold increase . . . in the last 10 years." Cynthia Lum et al., *The Rapid Diffusion of License Plate Readers in U.S. Law Enforcement Agencies*, 42 Policing: An Int'l J. 376, 377 (2019). Newly installed ALPRs in Brentwood, California—a suburb of Oakland—increased the number of license-plate scans from approximately 2.2 million in 2016 to nearly 13 million in 2017. Electronic Frontier Foundation, *Explore the Data*, https://tinyurl.com/yy4lfjdg (Nov. 15, 2018). Today, police in Washington, D.C., have approximately 35 mobile ALPRs, *see* Police Executive Research Forum, *How Are Innovations in Technology Transforming Police?*, at 32 (Jan. 2012), https://tinyurl.com/y6y95bst, and

there are a total of "[m]ore than 250 cameras in the District and its suburbs"—roughly "one plate-reader per square mile," Allison Klein & Josh White, *License Plate Readers: A Useful Tool for Police Comes with Privacy Concerns*, Wash. Post (Nov. 19, 2011), https://tinyurl.com/6vvuh85.

For city drivers, or for those who live near a stoplight or other fixed object where an ALPR is installed, it is conceivable that their license plates might be scanned *at least once every day*. If the Court adopts Kansas's per se rule, drivers using a vehicle registered to someone with a suspended or revoked license could conceivably be stopped multiple times a week, even though there is nothing illegal about driving a car registered to someone with a suspended license.

Many innocent drivers would be captured in this dragnet. A high school student driving to school or sports practice could be routinely stopped for driving a car registered to a parent whose license is suspended. So too could a friend or neighbor who borrows the car to run errands. This dragnet would be even wider if the parent used the car to earn money with a peer-to-peer car-sharing service such as "Getaround," as everyone who rented the car and passed an ALPR could be stopped. *See* Getaround, *How Getaround Works*, https://tinyurl.com/y3v9z3wp (last visited Aug. 30, 2019).

The Fourth Amendment does not tolerate such blunderbuss encroachment on individual liberty. The per se rule Kansas advances would ensnare far too many innocent victims, and potentially subject them to repeated deprivations of liberty. Avoiding such per-

verse results is precisely why the Court has "consistently eschewed bright-line rules" in the Fourth Amendment context, and "instead emphasiz[ed] the fact-specific nature of the reasonableness inquiry." *Robinette*, 519 U.S. at 39. "While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute . . . significant privacy interests." *Missouri v. McNeely*, 569 U.S. 141, 158 (2013); *see also Florida v. Harris*, 568 U.S. 237, 244 (2013) (explaining that in the Fourth Amendment context, "[w]e have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach").

None of this is to suggest that ALPRs are inherently unconstitutional. The technology, however, should be used to *help* police exercise their informed judgment; it should not *replace* that judgment with automated reasonable suspicion to stop a vehicle. "With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities." *Arizona v. Evans*, 514 U.S. 1, 17-18 (1995) (O'Connor, J., concurring); *see also Kyllo*, 533 U.S. at 36 ("[T]he rule we adopt must take account of more sophisticated systems that are already in use or in development.").

Adopting Kansas's proposed rule would pass those responsibilities to a computer and eliminate an important safety net for Fourth Amendment rights: the constitutional requirement that, before police may conduct a *Terry* stop, the totality of the circumstances create reasonable suspicion that "the *particular individual* being stopped is engaged in wrongdoing." *Cortez*, 449 U.S. at 417-18 (emphasis added).

B. The Proposed Cure For "Mistaken Stops"—That They Will Be Brief—Is No Substitute For The Fourth Amendment's Protections Against Unreasonable Seizures.

Kansas accepts that mistaken stops will happen under its proposed rule, but argues that such stops are acceptable collateral damage because *Terry* "allow[s] for the fact that sometimes an innocent person will be stopped," and such inconvenience will be brief. Pet. Br. 11. That argument not only ignores the wide swath of innocent drivers who would be swept into the ALPR dragnet, but it also gives short shrift to the substantial invasions of liberty that even a shortened *Terry* stop imposes.

As an initial matter, Kansas and its *amici* acknowledge that officers need not immediately end a stop once they realize that the registered owner is not the person driving—e.g., if they see upon approaching the vehicle that the driver is male when the car is registered to a female. Rather, they contend that such mistaken stops *can continue* even after officers realize their mistake: "[O]fficers must be permitted to make ordinary inquiries such as checking for valid license and registration *even if* the investigatory stop reveals that the driver is indeed *not* the owner." Nat'l Fraternal Order of Police Br. 26-27 ("NFOP Br.") (emphases added); *see also id.* at 23 (arguing that an officer may still "validate that the driver is . . . insured"); Pet. Br. 12 ("[I]f the officer learns that a properly licensed individual is driving the vehicle, the innocent motorist will be free to leave *after* . . . a brief encounter." (emphasis added)).

Several courts agree with this view that mistaken stops can continue. In *State v. Smith*, 905 N.W.2d 353 (Wis. 2018), for example, an officer ran the license plate of a car and "learned [that] the registered owner, Amber Smith, had a suspended driver's license." *Id.* at 356. When the officer stopped the car and walked to the driver's door, however, he realized that "the driver was not Amber Smith because the driver appeared to be a man." *Id.* Although the State "conceded that the reasonable suspicion underpinning the traffic stop dissipated at that moment," *id.* at 359, the court nevertheless held that "[n]either the Fourth Amendment nor the cases interpreting it require[d] this traffic stop seizure to end," *id.* at 362, and the officer could continue to check the identification of the driver and run a computer check on his license, *id.*; *see also People v. Cummings*, 46 N.E.3d 248, 252-53 (Ill. 2016) (holding that, although reasonable suspicion "vanished upon seeing [the driver], [the officer] could still" request the driver's license); *State v. Reynolds*, 890 P.2d 1315, 1316-18 (N.M. 1995) (similar).

Why would it stop there? If the mistaken stop is lawful because it was based on reasonable suspicion, and if officers can continue the stop by asking for a driver's license and proof of insurance after learning of the mistake, then presumably officers may complete *all* "ordinary inquiries incident to [the] . . . stop." *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (quotation marks omitted); *see also* Resp't Br. 51-52 (reviewing this Court's decisions allowing officers "to engage in a range of intrusive conduct without exceeding the scope of the initial stop"). These would include asking for consent to inspect the car, *see Florida v. Bostick*, 501 U.S. 429, 438 (1991); conducting a

"frisk" of the driver's body if the officer feels threatened, *Terry v. Ohio*, 392 U.S. 1, 17 (1968); and ordering the driver and any passengers to step out of the vehicle for questioning, *see Rodriguez*, 135 S. Ct. at 1615 (finding no Fourth Amendment violation where an officer ordered "a driver, already lawfully stopped, to exit the vehicle"); *Maryland v. Wilson*, 519 U.S. 408, 414 (1977) (holding that an officer may require passengers to exit a lawfully stopped vehicle).

A rule that allows intrusions of this nature—for *admittedly* law-abiding citizens—can't be right. A licensed driver whom police mistakenly stop solely for driving a vehicle registered to someone with a suspended or revoked license has done nothing wrong. Although "*Terry* accepts the risk that officers may stop innocent people," *Wardlow*, 528 U.S. at 126, that risk must be balanced against the substantial "physical and psychological intrusion visited upon" those stopped by police, *Prouse*, 440 U.S. at 657. Far from a "minimal intrusion" on individual liberty, Pet. Br. 24, or a "modest[ ]" invasion of privacy, U.S. Br. 16, a traffic stop involves an "unsettling show of authority" that "may create substantial anxiety," "interfere with freedom of movement," and "consume time," *Prouse*, 440 U.S. at 657. For some, a traffic stop and identification check might even cause them to fear for their life.

Kansas's rule might be "clear" and "easy to apply," Pet. Br. 25, but those benefits come at the unacceptable cost of imposing huge burdens on the Fourth Amendment rights of many innocent drivers.

C. Adopting Kansas's Rule Would Create An Incentive Against Investigation.

Rather than adopt Kansas's rule and allow police to impose these substantial burdens on the rights of innocent people based on nothing more than the hit of an ALPR, the Court should put the burden on police to corroborate the hit *before* they conduct a stop. Otherwise, police would be incentivized to follow the hit blindly and to stop the car without even trying to identify the driver.

This incentive is real. Police officers' "judgment is necessarily colored by their primary involvement in the often competitive enterprise of ferreting out crime." *Terry*, 392 U.S. at 12 (quotation marks omitted). And they are often under pressure to conduct stops to boost their citation and arrest rates. In Baltimore, for example, a Justice Department investigation found that officers tried to boost their rates of drug and gun arrests by frequently predicating stops and searches on low-level offenses, such as loitering. U.S. Dep't of Just., Investigation of the Baltimore City Police Department 42 (2016), https://tinyurl.com/y3cofpgq. In New Orleans, officers were under "strong and unyielding pressure" to meet benchmarks for stops and arrests, which "encourage[d] aggressive enforcement of low-level infractions." U.S. Dep't of Just., Investigation of the New Orleans Police Department viii, 29 (2011), https://tinyurl.com/y5cghwng. And in Ferguson, Missouri, officers were incentivized to aggressively enforce minor infractions because their "evaluations and promotions depend[ed] to an inordinate degree on 'productivity,' meaning the number of citations issued." U.S. Dep't

of Just., Investigation of the Ferguson City Police Department 2 (2015), https://tinyurl.com/y3q63ud8.

Kansas concedes that reasonable suspicion would not exist if officers had "information indicating that the registered owner is not the driver," Pet. Br. 18, but that concession does little to mitigate the threat to Fourth Amendment rights. In fact, the main threat posed by Kansas's proposed rule is that it removes the incentive to seek additional information *before* stopping a vehicle. The hit of the license-plate reader is all they need. The message of this rule to officers is clear: as soon as you get a hit, you have the constitutional green light to seize the vehicle and all of its passengers. Trying to look at the driver or obtain other evidence before conducting the stop will only make the stop harder to defend.

Kansas exaggerates when it argues that requiring police to identify corroborating evidence before making a stop would be "impractical and would endanger law enforcement officers." Pet. Br. 25; *see also* U.S. Br. 5-6 (similar). Common experience teaches that, even for laypeople, it is often easy to determine the sex and other physical characteristics of a driver with only a quick glance, and without "weaving through traffic at high speeds." Nat'l Dist. Attorneys Ass'n Br. 15. Moreover, if people with a suspended or revoked license were as "dangerous" and incapable of operating a vehicle as Kansas suggests, Pet. Br. 26, then officers would not have to wait long to observe some sort of traffic violation that would justify a stop. "Many violations of minimum vehicle-safety requirements are observable, and something can be done about them by the observing officer, directly and immediately."

Prouse, 440 U.S. at 660; *see also* Resp't Br. 44 (explaining that "traffic safety is so pervasively regulated that it is difficult to drive on a regular basis without violating some law").

To be sure, getting a look at a driver might be difficult in "bad weather," "at night," or when the car has "tinted windows." Pet. Br. 26. But even if police might have difficulty finding corroborating evidence in *some* situations, that hardly justifies a bright-line rule that lowers the standard for reasonable suspicion in *all* situations. The Court should not categorically lower the standard for fair weather just because it might be more difficult to meet in bad weather. Nor should the Court lower the standard for cars without tinted windows traveling during the day just because police might have difficulty observing the driver of cars with tinted windows traveling at night.

There's a better way to analyze the constitutionality of stops in various scenarios: apply the same flexible totality of the circumstances test that the Court has always applied, and decide "each case . . . on its own facts and circumstances," *Ornelas*, 517 U.S. at 696 (quotation marks and alteration omitted). Rather than dictate a nationwide bright-line rule that applies to all drivers in all situations, the Court should continue to allow "resident judges" and police officers to consider the unique facts of each "particular case in light of the distinctive features and events of the community." *Id.* at 699; *see also* Pet. App. 11 ("[C]ommon 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.").

III. THE EROSION OF PRIVACY WOULD DISPROPORTIONATELY AFFECT THE POOR.

The erosion of privacy that would result from adopting Kansas's proposed rule would disrupt the lives of millions of innocent drivers, especially the poorest among us. States revoke and suspend driving privileges to punish many criminal and civil infractions, unrelated to safe driving, that disproportionately involve the poorest members of society. People with lower incomes also are more likely to share a car with friends and family and to live in neighborhoods that police disproportionately patrol, increasingly in squad cars equipped with ALPRs.

A. A Suspended Or Revoked License Often Indicates Economic Status, Not Unsafe Driving.

Kansas and its *amici* insist that a bright-line rule is necessary to "promote[ ] public safety," Pet. Br. 25, and to protect the safety of police officers, *see, e.g.*, NFOP Br. 15; Oklahoma Br. 6; U.S. Br. 17. Indeed, Kansas raises "safety" concerns no fewer than 12 times, *see* Pet. Br. 7, 8, 21, 22, 24, 25, and the Fraternal Order of Police refer to "safety" at least 27 times.

But Kansas and many other States suspend or revoke licenses for a variety of reasons unrelated to safety. *See* Resp't Br. 39-41. For instance, all but a handful of States restrict, suspend, or revoke driver's licenses for failure to pay child support. Nat'l Conf. of State Legis., *License Restrictions for Failure to Pay Child Support* (Jan. 30, 2014), https://tinyurl.com/p9dzlo8. Forty-three States suspend driver's licenses for failure to pay a court debt. Mario Salas & Angela Ciolfi, *Driven By Dollars: A State-By-*

State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt, at 2, 14-15 (2017), https://tinyurl.com/y6g5nqxd. And twenty-nine States suspend or revoke driver's licenses for issues related to school enrollment, academic performance, or truancy. Nat'l Conf. of State Legis., *State Statutes Linking Driver's Licenses to School Enrollment, Attendance, Academic Performance or Behavior* (Jan. 4, 2018), https://tinyurl.com/y3x9votp.

States also suspend or revoke licenses for failure to pay taxes,[2] property violations or drug convictions unrelated to driving,[3] and defaulting on student loans.[4] Indeed, one policy goal for suspending driving privileges is "to change non-highway safety-related behavior, such as underage drinking, truancy, vandalism, unlawful possession of firearms, and many more." Am. Ass'n of Motor Vehicle Adm'rs, *Reducing Suspended Drivers and Alternative Reinstatement Best Practices* 5 (Nov. 2018), https://tinyurl.com/y26a4zxh.

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[2] *See, e.g.*, Cal. Bus. & Prof. Code § 494.5; Ky. Rev. Stat. Ann. § 131.1817; La. Stat. Ann. § 47:296-2; Mass. Gen. Laws ch. 60, § 2A; N.J. Stat. Ann. § 39:5-30.13; N.Y. Tax Law § 171-v (Consol.); 31 R.I. Gen. Laws § 31-3-6.1; Tex. Transp. Code § 521.372; Va. Code Ann. § 18.2-259.1.

[3] *See, e.g.*, Ala. Code § 13A-12-290; Ark. Code Ann. § 27-16-915, *amended by* 2019 Ark. Laws Act 704 (S.B. 513) (2019); Fla. Stat. Ann. § 322.055, *amended by* 2019 Fla. Sess. Law Serv. Ch. 2019-167 (C.S.H.B. 7125); Mich. Comp. Laws § 333.7408a; Miss. Code Ann. § 63-1-71.

[4] *See, e.g.*, Iowa Code § 261.121; S.D. Codified Laws § 1-55-11.

These and other reasons for suspensions and revocations are sometimes more common than suspensions and revocations for traffic violations. In Virginia, for example, until the Commonwealth recently ended its practice of suspending licenses for unpaid court debt, Amy Friedenberger, *General Assembly Ends Policy of Suspending Driver's Licenses for Unpaid Court Debt*, The Roanoke Times (Apr. 3, 2019), https://tinyurl.com/y6ke3hnz, roughly 65 percent of all license suspensions and revocations were for such debts, Salas & Ciolfi, *supra* at 7. In North Carolina, nearly one in seven adult drivers has had their licenses suspended for a reason unrelated to driving. Brandon Garrett, *When the Police Come for Your Driver's License*, The Am. Conservative (Apr. 9, 2019), https://tinyurl.com/y5qr6bpl. In California, more than 4 million people—approximately 17 percent of the adult population—have a suspended license for failure to pay a court debt. Andrea M. Marsh, *Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees*, Trends in State Courts 21 (2017), https://tinyurl.com/y3arhfyg. And in Wisconsin and Vermont, approximately 60 percent of suspensions "are for nonpayment of court debt." *Id.* Nationwide, nearly 7 million people have had their driver's licenses suspended or revoked solely because of court or administrative debt—i.e., court costs and fees that are not necessarily related to any crime, let alone a traffic violation. Justin W. Moyer, *More Than 7 Million People May Have Lost Driver's Licenses Because of Traffic Debt*, Wash. Post (May 19, 2018), https://tinyurl.com/y5yhgv8b; Salas & Ciolfi, *supra* at 1.

Many of these offenses and the resulting suspensions disproportionately involve the poor. *See generally* Garrett, *When the Police Come for Your Driver's License*, *supra* (summarizing research findings that driver's license "suspensions disproportionately burden the poor and minorities"). For example, "the rich" typically can pay court fines and other debts and then "walk away," whereas "the poor" often cannot pay and are punished as a result. Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 Harv. C.R.-C.L. L. Rev. 189, 191 (2016). Penalties designed to enforce child support payments also primarily involve "low-income families, especially those with an incarcerated parent." Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 Geo. J. on Poverty L. & Pol'y 127, 127 (2011). And "low-socioeconomic-status students tend to have high[er] rates of misconduct" and "severe attendance problems," subjecting them to punishments for truancy. Gail Heriot & Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 Tex. Rev. L. & Pol. 471, 511 (2018).

Put simply, having a suspended or revoked license is a poor predictor of risk to "police officer and public safety." NFOP Br. 3. To the contrary, in many jurisdictions, a suspended or revoked license more likely indicates that the driver is poor and missed a child support payment, could not pay a court debt, defaulted on a loan, or has a record for something unrelated to safe behavior.

B. ALPR Technology Unduly Affects The Poor.

Consider a hypothetical family of four living just above the poverty line. The Smiths own one car, registered in John's name. But when he fails to pay a parking ticket, the State suspends his license. Because public transportation is unavailable or unreliable, his wife Jane begins to drive John to work. On their way to and from John's workplace, they pass a stationary ALPR attached to a traffic light. Kansas's per se rule puts Jane (and John) at risk of seizure at least ten times a week, all for doing nothing more than following the law and trying to keep bread on the table. And that says nothing of their kids who might be old enough to drive the car to school or work, or a grandparent who uses the car for medical appointments. Families with more means (and more cars) might be able to avoid the risk of such serial stops, but the Smiths must incur these burdens.

This is not a far-fetched hypothetical. Fewer than 60 percent of American households own multiple cars. U.S. Dep't of Transp., Fed. Highway Admin., *Nat'l Household Travel Survey: Popular Household Statistics* (2017), https://nhts.ornl.gov/households. Many of the rest simply cannot afford the luxury of owning additional cars (with additional insurance payments). *See* Susan Shaheen et al., *The Benefits of Carpooling*, U.C. Berkeley Institute of Transportation Studies (2018), https://tinyurl.com/y5qlyawq (reporting that those who carpool tend to be from lower-income households without access to automobiles). Moreover, police spend a disproportionate amount of time in poorer neighborhoods, and "have used license-plate readers heavily in low-income areas." Kaveh Waddell, *How*

License-Plate Readers Have Helped Police and Lenders Target the Poor, The Atlantic (Apr. 22, 2016), https://tinyurl.com/y3ngob93. A study from 2015, for example, reported that police cars in Oakland equipped with ALPRs patrolled low-income neighborhoods at a disproportionate rate, meaning that residents of these neighborhoods were more likely to have their license plates scanned. Dave Maass & Jeremy Gillula, *What You Can Learn from Oakland's Raw ALPR Data*, Electronic Frontier Foundation (Jan. 21, 2015), https://tinyurl.com/om8vsg5; *cf.* Lauren Fash, *Automated License Plate Readers: The Difficult Balance of Solving Crime and Protecting Individual Privacy*, 78 Md. L. Rev. Online 63, 90 (2019) ("[V]ehicles driving or passing through neighborhoods with a higher black or Hispanic population [are] more likely to have their plate read by an ALPR device.").

Given the disparate effect of driver's license suspensions and revocations on the poor, the higher car-sharing rate among the poor, the higher police presence in poorer communities, and the swelling prevalence of ALPR technology, Kansas's per se rule would inequitably impact the Fourth Amendment rights of the most vulnerable among us, despite the relative ease with which officers often can at least determine if the driver and owner of a vehicle are the same sex or share another physical characteristic.

* * *

The bright-line rule that Kansas proposes sweeps far too broadly, allowing the seizure of innocent drivers—and their passengers—who are "guilty" of nothing more than passing an ALPR while driving a car

registered to someone with a suspended or revoked license. This rigid rule based on a technological "gotcha" would change *Terry* from a limited crime-fighting technique based on individual judgments (and good police-work) to a generalized check-the-box exercise that unreasonably erodes individual liberty. The Court should add Kansas's proposed bright-line rule to the rejection pile. *See Robinette*, 519 U.S. at 39 (reviewing cases where the Court rejected "bright-line rules" in the Fourth Amendment context).

CONCLUSION

The Court should affirm the judgment of the Kansas Supreme Court.

Respectfully submitted,

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