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 RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. A "REASONABLE SUSPICION" MUST BE SUPPORTED BY SPECIFIC, ARTICULABLE, AND INDIVIDUALIZED EVIDENCE OF WRONGDOING	3
II. REASONABLE SUSPICION DOES NOT EXIST WHEN A STOP IS SOLELY PREDICATED ON THE FACT THAT THE REGISTERED OWNER OF A VEHICLE IS UNLICENSED	5
III. THE CATEGORICAL RULE SOUGHT BY THE STATE IS INIMICAL TO THE FACT-INTENSIVE, CIRCUMSTANCE-SPECIFIC ANALYSIS THE FOURTH AMENDMENT REQUIRES	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page(s)

Adams v. *United States Fidelity & Guaranty Co.*, 186 S.E.2d 784 (Ga. Ct. App. 1971)..... 8

Bank of United States v. *Dandridge*, 25 U.S. 64 (1827)..... 9

Brendlin v. *California*, 551 U.S. 249 (2007)..... 4

Brigham City v. *Stuart*, 547 U.S. 398 (2006)..... 3, 17

Brown v. *Texas*, 443 U.S. 47 (1979)..... 12

Camara v. *Mun. Court of City and Cty. of San Francisco*, 387 U.S. 523 (1967)..... 3

Carpenter v. *United States*, 138 S. Ct. 2206 (2018)..... 3, 5

Cary v. *United States*, 343 F. App'x 926 (CA4 2019)..... 8

Cincinnati, New Orleans, & Tex. Pac. Ry. Co. v. *Rankin*, 241 U.S. 319 (1916)..... 8

City of Cleveland v. *Fields*, No. 82070, 2003 WL 1901337 (Ohio Ct. App. Apr. 17, 2003)..... 8

City of Indianapolis v. *Edmond*, 531 U.S. 32 (2000)..... 5

County of Riverside v. *McLaughlin*, 500 U.S. 44 (1991)..... 17

TABLE OF AUTHORITIES—Continued

Page(s)

Delaware v. *Prouse*,
440 U.S. 648 (1979) 4

Fumelus v. *Experian Info. Sols., Inc.*,
No. 18-10237, 2019 WL 1509140
(D.N.J. Apr. 5, 2019) 9

Himmelstein v. *Comcast of the Dist., L.L.C.*,
931 F. Supp. 2d 48 (D.D.C. 2013) 9

Horan v. *Weiler & Ellis*,
41 Pa. 470 (Pa. 1862) 9

Illinois v. *Gates*,
462 U.S. 213 (1983) 15

In re Disqualification of First Dist. Court of Appeals,
143 Ohio St.3d 1245 (Ohio 2015) 9

Kentucky v. *King*,
563 U.S. 452 (2011) 3

Majeska v. *District of Columbia*,
812 A.2d 948 (D.C. 2002) 8

Maryland v. *Buie*,
494 U.S. 325 (1990) 12

Mirabile v. *State Rds. Comm'n*,
231 A.2d 693 (Md. 1967) 9

Missouri v. *McNeely*,
569 U.S. 141 (2013) 16

Mitchell v. *Wisconsin*,
139 S. Ct. 2525 (2019) 17

Navarette v. *California*,
572 U.S. 393 (2014) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Ohio v. *Robinette*,
519 U.S. 33 (1996)..... 15

Ornelas v. *United States*,
517 U.S. 690 (1996)..... 14

Payton v. *New York*,
445 U.S. 573 (1980)..... 3

Reid v. *Georgia*,
448 U.S. 438 (1980)..... 4

Richards v. *Wisconsin*,
520 U.S. 385 (1997)..... 16

Riley v. *California*,
573 U.S. 373 (2014)..... 3, 17

Shempf v. *Chaviano*,
126 N.E.3d 503 (Ill. App. Ct. 2019)..... 9

Sibron v. *New York*,
392 U.S. 40 (1968)..... 13

State v. *Glover*,
422 P.3d 64 (Kan. 2018)..... 5, 6, 12

State v. *Granado*,
148 S.W.3d 309 (Mo. 2004)..... 13

Terry v. *Ohio*,
392 U.S. 1 (1968).....*passim*

United States v. *Arvizu*,
534 U.S. 266 (2002)..... 4, 15

United States v. *Brignoni-Ponce*,
422 U.S. 873 (1975)..... 4

United States v. *Hughes*,
606 F.3d 311 (CA6 2010) 13

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Ienco*,
182 F.3d 517 (CA7 1999) 13

United States v. *Lewis*,
672 F.3d 232 (CA3 2012) 13

United States v. *Martinez-Fuerte*,
428 U.S. 543 (1976)..... 5

United States v. *Place*,
462 U.S. 696 (1983)..... 16

United States v. *Sharpe*,
470 U.S. 675 (1985)..... 16

United States v. *Sokolow*,
490 U.S. 1 (1989)..... 5, 15

Wolf v. *Colorado*,
338 U.S. 25 (1949)..... 3

CONSTITUTION

U.S. Const. amend. IV.....*passim*

STATUTES

Alaska Stat. § 25.27.246..... 10

Ariz. Rev. Stat. § 28-3308 10

Ark. Code Ann. § 9-14-239 10

Ark. Code Ann. § 16-17-131 10

Cal. Bus. & Prof. Code § 494.5..... 10

Colo. Rev. Stat. § 26-13-123 10

Conn. Gen. Stat. § 46b-220 10

F.S.A. § 316.1001..... 11

TABLE OF AUTHORITIES—Continued

Page(s)

F.S.A. § 318.18 11
Ga. Code § 19-11-9.3 10
I.C.A. § 321.210a 11
625 I.L.C.S. § 5/6-306.5 11
625 I.L.C.S. § 5/6-306.7 11
Kan. Stat. Ann. § 8-2110(b)(1) 10
Kan. Stat. Ann. § 20-1204a(g) 10
Ky. Rev. Stat. § 131.1817 10
Ky. Rev. Stat. § 159.051 11
La. Rev. Stat. § 47:296.2 10
M.G.L.A. 62C § 47B 10
N.J.S.A. 39:4-139.10 11
N.Y. Tax Law § 171-v (McKinney) 10
O.R.S. § 809.210 11
S.C. Code 1976 § 16-13-185 11
S.C. Code 1976 § 56-1-292 11
S.C. Code 1976 § 56-25-20 10
Va. Code § 46.2-938 10
W. Va. Code, § 62-4-17(c) 10

OTHER AUTHORITIES

Black's Law Dictionary (11th ed. 2019) 4

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the resolution of this case because it concerns the proper balance between the State's power to detain individuals for investigative purposes and an individual's right to be free of such intrusions in the absence of specific, individualized evidence of potential wrongdoing.

SUMMARY OF ARGUMENT

1. The Fourth Amendment protects individuals from unreasonable seizures. This Court has consistently held that a person is seized within the meaning of the Fourth Amendment when law enforcement stops his or her automobile. If law enforcement has not obtained a warrant, the stop must be supported by at least a reasonable suspicion that the person seized has engaged in unlawful activity. Whether a reasonable suspicion of criminal wrongdoing exists must be evaluated based on the totality of the circumstances and must be supported by particularized and articulable evidence that the specific individual being stopped has, is, or soon will be engaged in unlawful conduct.

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[1] This amicus brief is filed with the parties' consent. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

2. Stopping an individual based solely on the fact that the vehicle he was driving was registered to an individual who lacked a valid driver's liscense fails this standard. The State's arguments to the contrary are flawed for at least three reasons. First, the State's position not only disregards but indeed inverts the presumption afforded to members of our society that they will act in accordance with the law. Second, the State's intimation that stopping such vehicles is necessary to protect public safety ignores the fact that licenses are regularly suspended for conduct that has no nexus at all to automotive safety (*e.g.*, failure to appear in court or to pay child support). Third, the State's claim that such stops are justified by the high rate of recidivism among those who drive with suspended licenses ignores both the fact that the State possessed no such evidence about Mr. Glover at the time it detained him and the Fourth Amendment's requirement that law enforcement collect particularized and individualized evidence of illegal activity prior to effecting a stop. At bottom, the State simply desires a rule stating that because *some* drivers disregard license-suspension orders, officers are justified in detaining *any* vehicle owned by a person whose license is suspended. The Fourth Amendment, however, requires more.

3. The State's proposed rule is also problematic because it threatens to erode the flexible, fact-intensive totality-of-the-circumstances analytical framework that this Court routinely applies to Fourth Amendment inquiries. If the Fourth Amendment is to serve as an effective bulwark against governmental encroachment on individuals' privacy and property, then the State's ability to effect such encroachments must depend on the particular facts of each individual case rather than generic presumptions that rely on inapposite statistics.

ARGUMENT

I. A "REASONABLE SUSPICION" MUST BE SUPPORTED BY SPECIFIC, ARTICULABLE, AND INDIVIDUALIZED EVIDENCE OF WRONGDOING.

The Fourth Amendment "gives concrete expression to a right of the people which is 'basic to a free society.'" *Camara* v. *Mun. Court of City and Cty. of San Francisco*, 387 U.S. 523, 528 (1967) (quoting *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949)). Its specific provisions guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and ensure that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized." U.S. Const. amend. IV. These core protections give substance to the Amendment's "'basic purpose'" of "'safeguard[ing] the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara*, 387 U.S. at 528).

"As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is reasonableness.'" *Riley* v. *California*, 573 U.S. 373, 381–382 (2014) (quoting *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006)). "In the absence of a warrant," searches and seizures are "reasonable only if [they] fall[] within a specific exception to the warrant requirement." *Id.* at 382; *see also Kentucky* v. *King*, 563 U.S. 452, 459 (2011); *Payton* v. *New York*, 445 U.S. 573, 583–586 (1980).

"[S]topping an automobile . . . constitute[s] a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); *see also Brendlin* v. *California*, 551 U.S. 249, 255 (2007) (same); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. . . . '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person' . . . and the Fourth Amendment requires that the seizure be 'reasonable.'" (quoting *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968))). Thus, in the absence of a warrant, such a stop "must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980).

Reasonable suspicion must be determined based on "the 'totality of the circumstances' of each case" and exists when "the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002); *see also Terry*, 392 U.S. at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."); *Suspicion*, Black's Law Dictionary (11th ed. 2019) (defining reasonable suspicion as "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity").

Accordingly, a "reasonable suspicion" cannot be supported only by "an 'inchoate and unparticularized suspicion or hunch.'" *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 27). And, correlatively, "[a] search or seizure is ordinarily *un*reasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000) (emphasis added); *see also Carpenter*, 138 S. Ct. at 2221 ("The Court usually requires 'some quantum of individualized suspicion' before a search or seizure may take place." (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560–561 (1976))).

II. REASONABLE SUSPICION DOES NOT EXIST WHEN A STOP IS SOLELY PREDICATED ON THE FACT THAT THE REGISTERED OWNER OF A VEHICLE IS UNLICENSED.

In the decision under review, the Kansas Supreme Court was required to decide "whether spotting a vehicle owned by an unlicensed driver," without more—*i.e.*, without evidence of any traffic or vehicular violations, without personal observations of any identifying characteristics of the driver, without any personal familiarity with the owner of the vehicle, without any information concerning why the owner was unlicensed, and without "personal knowledge" of the owner's "driving habits"—"provides reasonable suspicion that an unlicensed motorist is driving the car." *State* v. *Glover*, 422 P.3d 64, 68–69 (Kan. 2018). That court held that it does not.

In reversing the contrary decision of the Kansas Court of Appeals, the Kansas Supreme Court reasoned, in part, that its intermediate appellate court had impermissibly accepted a presumption that the owner

of a vehicle is also the driver of that vehicle. That presumption was faulty because it required the acceptance of "two unstated assumptions," namely that (1) "the registered owner was likely the primary driver of the vehicle," and (2) "the owner will likely disregard the suspension or revocation order and continue to drive." *Id.* at 69–70.

The Kansas Supreme Court rightly took particular issue with the second assumption, concluding that, without any information about the actual identity of the driver of Mr. Glover's vehicle or any knowledge "of Glover having previously disregarded the revocation order," the police officer "should have presumed Glover was obeying the revocation order and was therefore not the driver." *Id.* at 70; *see also ibid.* ("This assumption is flawed because it presumes a broad and general criminal inclination on the part of suspended drivers. . . . The clear implication of *Terry* is that absent specific and articulable facts rationally suggesting criminal activity, officers and courts should presume that citizens are engaged in lawful activities and have a right to remain free from police interference." (citation omitted)); *ibid.* ("Without further factual support, it was not reasonable for Deputy Mehrer to believe Glover was disregarding the revocation order simply because his vehicle was being driven."); *id.* at 72 ("We cannot assume someone is breaking the law.").

The State argues that this second assumption—that any individual with a suspended license is likely to disregard the suspension and drive—is justified in light of the "known and dangerous fact" of "[r]ecidivism, especially among those whose license has been repeatedly suspended." Pet. Br. at 14.

This argument is flawed for at least three related reasons: (1) it inverts the presumption of legality our legal system affords its citizens; (2) it ignores the fact that licenses are regularly suspended for conduct that has no nexus to automotive safety; and (3) it dispenses with the Fourth Amendment's typical requirement of *individualized* suspicion.[2]

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[2] The State's reliance on *Navarette* v. *California*, 572 U.S. 393 (2014), is equally misplaced. The State cites that decision in support of its contention that "Deputy Mehrer was not required to assume Glover would adhere to his license revocation." Pet. Br. at 14. The State misreads *Navarette*. There, in deciding that there had been reasonable suspicion to support a stop of Mr. Navarette, the Court examined "certain driving behaviors" that are "sound inidicia of drunk driving," and credited a 911 caller's report of petitioner running her vehicle off the roadway, which it found to be "more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving." *Id.* at 402–403. Thus, while the Court recognized that innocent conduct does not need to be ruled out in order to establish reasonable suspicion, it nevertheless required—and found—specific, articulable, and individualized facts about the manner in which a vehicle was being driven in order to establish the officer's belief that he possessed a reasonable suspicion of unlawful conduct.

Indeed, the Court noted that there were other circumstances, such as "[u]nconfirmed reports of driving without a seatbelt or slightly over the speed limit" that "are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect." *Id.* at 402. Further, although the Court found that the officer did not need to observe the conduct that suggested that petitioner was driving under the influence firsthand, it was critical that the officer did not initiate the stop without a reasonable suspicion based upon the 911 caller's report. *See id.* at 403–404. By contrast here, the deputy could point to no observations whatsoever, whether about the manner in which Mr. Glover's vehicle was being driven on the day of the stop or about its driver, that would indicate an unlawful act was occurring.

First, both state and federal courts have long been clear that, absent contrary evidence, individuals—including drivers—are entitled to a presumption that they are acting in accordance with the law. The Court of Appeals for the District of Columbia, for example, has concluded that "an individual is presumed to exercise reasonable care and obey the law," including in the operation of a motor vehicle. *Majeska* v. *District of Columbia*, 812 A.2d 948, 951 (D.C. 2002). Perhaps even more germane is the Ohio Court of Appeals' statement, made in the course of upholding the granting of a motion to suppress evidence, that "[e]ven in high crime areas, a citizen is entitled to the presumption that he obeys the law." *City of Cleveland* v. *Fields*, No. 82070, 2003 WL 1901337, at *3 (Ohio Ct. App. Apr. 17, 2003); *see also Cary* v. *United States*, 343 F. App'x 926, 929 (CA4 2019) (holding that drivers are "entitled to presume that other drivers will obey the law and exercise reasonable care to avoid collisions"); *Adams* v. *United States Fidelity & Guaranty Co.*, 186 S.E.2d 784, 786 (Ga. Ct. App. 1971) ("The passenger has the right to assume the driver will obey the law and drive properly[.]").

Similar presumptions of legality have been applied for over a century[3] and to various other groups and

[3] *Cincinnati, New Orleans, & Tex. Pac. Ry. Co.* v. *Rankin*, 241 U.S. 319, 327 (1916) (holding that where noncompliance would subject a party to heavy penalties, that party is entitled to a presumption of right conduct).

circumstances, including companies,[4] landowners,[5] government employees,[6] judges,[7] and citizens generally.[8]

Mr. Glover was thus entitled to the benefit of this presumption until it could be shown through specific, articulable evidence that there was reason to believe he was committing a criminal act. Without any specific evidence about the identity of the driver of Mr. Glover's car, about Mr. Glover's driving habits, etc., this presumption of legality could not be overcome here.

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[4] *Bank of United States* v. *Dandridge*, 25 U.S. 64, 69–70 (1827) (extending to corporations the presumption that things are done lawfully until contrary is proven); *Fumelus* v. *Experian Info. Sols., Inc.*, No. 18-10237, 2019 WL 1509140, at *3 (D.N.J. Apr. 5, 2019) (invoking legal presumption that credit agency complied with federal reporting requirements); *Himmelstein* v. *Comcast of the Dist., L.L.C.*, 931 F. Supp. 2d 48, 54–55 (D.D.C. 2013) (same).

[5] *Mirabile* v. *State Rds. Comm'n*, 231 A.2d 693, 696–697 (Md. 1967) (reversing judge's submission of question to a jury regarding violation of zoning regulations because "the Commission produced no evidence sufficient to support a finding by the jury that the presumption of legality has been rebutted" and holding that defendant was entitled "to the benefit of the presumption that the law has been obeyed, that every man will conduct his business in conformity with the law, that an individual intends to do right rather than wrong and that he intends to do only what he has a right to do").

[6] *Shempf* v. *Chaviano*, 126 N.E.3d 503, 513 (Ill. App. Ct. 2019) ("[D]irectors [of a state agency] are presumed and expected to follow the law and the constitution . . . .").

[7] *In re Disqualification of First Dist. Court of Appeals*, 143 Ohio St.3d 1245, 1246 (Ohio 2015) ("A judge is presumed to follow the law . . . .").

[8] *Horan* v. *Weiler & Ellis*, 41 Pa. 470, 472 (Pa. 1862) (discussing "the rule that a breach of law is not to be presumed against any one, and . . . [that] the presumption is to the contrary until proof overcomes it").

Second, the State suggests that the presumption of legality can be set aside because of the public-safety risk posed by motorists who drive with suspended licenses. Pet. Br. at 14–15. The State's argument is flawed, however, because it rests on a false equivalence between license revocation and unsafe driving. To the contrary, as Respondent's brief notes, a license to drive can be suspended or revoked for reasons wholly unrelated to a person's driving behavior, including delinquency in child support[9] or tax payments,[10] failure to appear in court,[11] unpaid tickets[12] or

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[9] *See* Kan. Stat. Ann. § 20-1204a(g); *see also, e.g.*, Ark. Code Ann. § 9-14-239 (providing for suspensions of driver's licenses for failure to pay child support); Alaska Stat. § 25.27.246 (same); Colo. Rev. Stat. § 26-13-123 (same); Conn. Gen. Stat. § 46b-220 (same); Ga. Code § 19-11-9.3 (same).

[10] *See, e.g.*, Cal. Bus. & Prof. Code § 494.5 (providing for the suspensions of driver's licenses for delinquent tax payments); Ky. Rev. Stat. § 131.1817 (same); La. Rev. Stat. § 47:296.2 (same); M.G.L.A. 62C § 47B (same); N.Y. Tax Law § 171-v (McKinney) (same).

[11] *See* Kan. Stat. Ann. § 8-2110(b)(1); *see also* Ark. Code Ann. § 16-17-131 (providing for suspension of driver's license for failure to comply with notice to appear "for any criminal offense, traffic violation, or misdemeanor charge"); N.H. Rev. Stat. § 263:56-a (providing for the suspension of driver's licenses for "[d]efault on an arraignment or other scheduled court appearance in connection with a charge or conviction of any offense"); S.C. Code 1976 § 56-25-20 (providing for suspension of driver's license for failure to "comply with the terms of a traffic citation or [a] . . . summons for a littering violation"); Va. Code § 46.2-938 (providing for the suspension of driver's licenses for failure to comply with a summons); W. Va. Code, § 62-4-17(c) (providing for suspension of driver's license for criminal defendant's failure "to appear or otherwise respond in court after having received notice to do so").

[12] *See* Kan. Stat. Ann. § 8-2110(b)(1); *see also, e.g.*, Ariz. Rev. Stat. § 28-3308 (providing for suspension of driving privileges for failures to pay motor vehicle "fines, surcharges or assessments");

tolls,[13] and even dropping out of school[14] or failing to pay for gasoline.[15]

Accordingly, the State's implication that any vehicle operated by a person with a suspended or revoked license is for that reason alone presumptively unsafe—and, accordingly, that a stop of that vehicle is justified in order to preserve public safety—is fundamentally unsound.

Third, the State also argues generically that individuals who drive with a suspended license once are likely to "recidiv[ate]"—*i.e.*, to violate any future orders of suspension entered against them, and that the existence of a significant number of repeat offenders justifies stopping any particular vehicle that is owned

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I.C.A. § 321.210a (providing for suspensions of driver's licenses for failure to pay fines associated with motor vehicle violations); 625 I.L.C.S. § 5/6-306.5 (providing for suspension of driving privileges if owner of registered vehicle fails to pay fines or penalties "owing as a result of 10 or more violations of a municipality's or county's vehicular standing, parking, or compliance regulations" or "5 offenses for automated speed enforcement system violations or automated traffic violations"); N.J.S.A. 39:4-139.10 (providing for suspension of driver's license for failure to pay "outstanding parking fines or penalties"); O.R.S. § 809.210 (providing for suspensions of driver's licenses for failure to pay fines associated with motor vehicle violations).

[13] *See, e.g.*, F.S.A. §§ 318.18, 316.1001 (providing for driver's license suspension for ten or more toll violations over a period of thirty-six months); 625 I.L.C.S. § 5/6-306.7 (providing for the suspension of driving privileges for "5 or more toll violations, toll evasions, or both").

[14] *See* Ky. Rev. Stat. § 159.051 (providing that students age 16 or 17 that drop out of school are reported to the Transportation Cabinet and have their "privilege to operate a motor vehicle . . . revoked").

[15] *See* S.C. Code 1976 §§ 16-13-185, 56-1-292.

by an individual with a suspended license. Pet. Br. at 14 ("Recidivism, especially among those whose license has been repeatedly suspended, is a known and dangerous fact.").

The State's argument is a *non sequitur*. By its own terms, its recidivism justification applies only to drivers who have previously violated a suspension of their license. Pet. Br. at 14 (discussing the dangers of "[r]ecidivism"). Yet that is precisely the sort of fact that the officer in this case lacked when he detained Mr. Glover, *see Glover*, 422 P.3d at 70 (noting that the officer "had no knowledge of Glover having previously disregarded [his] revocation order"), and also the sort of evidence that the State says officers do *not* need to possess in order to justify stopping a car, *see generally* Pet. Br. at 25–27.

If the State instead intends to argue that because *some* drivers drive without a license it is permissible to infer that *any given* individual who possesses a suspended license is likely to violate his or her suspension order, then its argument is a direct assault on this Court's repeated insistence on *particularized*, *individualized* suspicion as a prerequisite to a lawful traffic stop. Indeed, there is little distinction between the State's position and the claim that a person's mere presence in a high-crime area (*i.e.*, one in which, statistically speaking, there is a greater chance that any given individual is engaged in criminal behavior) can justify that person's detention. *See, e.g.*, *Maryland* v. *Buie*, 494 U.S. 325, 334 n.2 (1990) ("Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted."); *Brown* v. *Texas*, 443 U.S. 47, 52 (1979) (holding that "[t]he fact that appellant was in a

neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct"); *cf. Sibron* v. *New York*, 392 U.S. 40, 62 (1968) ("The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.").

That sort of detain-first-find-evidence-later approach has been repeatedly and emphatically rejected by the courts. *See, e.g.*, *Terry*, 392 U.S. at 19–20 ("[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified ***at its inception***, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." (emphasis added)); *United States* v. *Lewis*, 672 F.3d 232, 241 (CA3 2012) (reversing district court's denial of suppression and holding that illegal window tints "were an impermissible *ex post facto* justification for the traffic stop"); *United States* v. *Hughes*, 606 F.3d 311, 320 (CA6 2010) ("[A]n officer may not use after-the-fact rationalizations to justify a traffic stop where, at the time of the stop, the officer was not aware that a defendant's actions were illegal."); *United States* v. *Ienco*, 182 F.3d 517, 524 (CA7 1999) ("[R]easonable suspicion must exist at the time the officer stops an individual . . . ; it cannot come after the fact.") (citation omitted); *State* v. *Granado*, 148 S.W.3d 309, 312 (Mo. 2004) (*en banc*) ("The basis for the reasonable suspicion must arise within the perimeters of the traffic stop itself; suspicions based upon answers to questions asked after the stop is completed are irrelevant to the determination of whether specific, articulable facts supported a reasonable suspicion of criminal activity and provided a justification for

further questioning once the traffic stop was completed."); *cf. Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) ("The principal components of a determination of reasonable suspicion . . . will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion . . . .").

Indeed, application of the State's position to Mr. Glover's case illustrates the flaws with its approach. As already noted, the State can point to no *particularized* facts showing that the operator of Mr. Glover's vehicle was in anything other than full compliance with the law at the time of the challenged stop. There is no evidence the vehicle was not properly registered or that it did not have the required license plates, and it would not have been illegal for a licensed person to drive it. Nor was there anything about the manner in which Mr. Glover's vehicle was being driven that suggested that crime was afoot—*e.g.* there was no evidence of any traffic violations or of any otherwise suspicious or dangerous behavior by the vehicle's operator. And the officer apparently had no information on the day in question about who was driving the vehicle until he actually stopped Mr. Glover. The State, in other words, was simply rolling the dice. The fact that it won the throw does nothing at all to change the character of the game.

III. THE CATEGORICAL RULE SOUGHT BY THE STATE IS INIMICAL TO THE FACT-INTENSIVE, CIRCUMSTANCE-SPECIFIC ANALYSIS THE FOURTH AMENDMENT REQUIRES.

The State's proposed rule is problematic not merely because it conflicts with longstanding *substantive* principles of Fourth Amendment jurisprudence but also because it would risk eroding the analytical framework that this Court has applied in such cases for decades—*i.e.*, a flexible, fact-intensive totality-of-the-circumstances analysis. Indeed, the Court made this point in *Terry* itself, holding that it "need not develop at length in th[at] case . . . the limitations which the Fourth Amendment places upon a protective seizure and search for weapons," explaining that those limitations would "have to be developed in the concrete factual circumstances of individual cases." 392 U.S. at 29.

Terry is by no means unique in this regard. To the contrary, the cases are legion that reject attempts to impose categorical, *per se* rules in place of the flexible, case-specific determination that the Fourth Amendment requires. *See, e.g.*, *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) (holding that in making reasonableness determinations under the Fourth Amendment, this Court "ha[s] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"); *Sokolow*, 490 U.S. at 7 ("The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983))); *see also, e.g.*, *Arvizu*, 534 U.S. at 273 ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly

that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing.") (citation omitted); *Richards* v. *Wisconsin*, 520 U.S. 385, 391–396 (1997) (rejecting Wisconsin's request for categorical exception to knock-and-announce requirement for search warrants executed in felony drug cases); *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985) (rejecting Fourth Circuit's categorical 20-minute time limit for investigative stops as "clearly and fundamentally" at odds with this Court's Fourth Amendment jurisprudence); *id.* at 685 ("Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria."); *United States* v. *Place*, 462 U.S. 696, 724 n.10 (1983) ("We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of a rigid time limitation. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation."); *Missouri* v. *McNeely*, 569 U.S. 141, 158 (2013) (opinion of Sotomayor, J.) ("A case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules."); *id.* at 166 (Roberts, C.J., concurring in part and dissenting in part) ("I have no quarrel with the Court's 'totality of the circumstances' approach as a general matter; that is what our cases require.").

A totality-of-the-circumstances approach, moreover, keeps fidelity with the Fourth Amendment's focus on the (*ex ante*) *reasonableness* of official interference with

individuals' privacy and property—a concept that can only be assessed in the context of both the rights infringed and the interests vindicated by the government's actions. *See Riley*, 573 U.S. at 381–382 ("As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is "reasonableness."'" (quoting *Brigham City*, 547 U.S. at 403)).

Furthermore, even in cases where the Court has incorporated a bright-line rule, it has—by and large—retained flexibility so that cases that do not align with the expectations that gave rise to the general rule may still be handled in a just and reasonable fashion. In *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), for example, the Court held that a post-arrest determination of probable cause is presumptively reasonable if made within 48 hours of a suspect's arrest. *Id.* at 56. The Court hastened to add, however, that even determinations made within that time might be deemed unreasonable in a particular case and, conversely, probable cause determinations made outside that period might be deemed reasonable based on the exigencies of a given case. *Id.* at 57.

And, just last Term, the Court adopted a similar framework in *Mitchell* v. *Wisconsin*, 139 S. Ct. 2525 (2019). There, a plurality of the Court concluded that, in the mine run of cases, a warrant is not required in order to draw blood—for purposes of determining blood-alcohol content—from an unconscious motorist. *Id.* at 2539 (plurality opinion). Even there, however, the plurality's presumption was a rebuttable one, permitting the defendant to show, on the facts of his individual case, that "blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing

needs or duties." *Ibid.* *Compare ibid.*, with *ibid.* (Thomas, J., concurring in the judgment) (proposing a *per se* rule with no exceptions).

This all makes sense, of course, as a matter of Fourth Amendment first principles. If the Amendment is to operate (as it has since its framing) as a bulwark between an individual's private property and personal liberty, on the one hand, and the coercive power of the government, on the other, then the government's ability to surmount that bulwark must be made to turn on the existence of *specific* facts that are *particularized* to the person (or property) at issue. Every additional presumption, analytical shortcut, and categorical rule this Court adopts in place of that fact-specific inquiry diminishes that bulwark. The Court should not effect such a diminution here.

In short, the State's request for a categorical rule is in tension with the Fourth Amendment's text, conflicts with the structural framework this Court has applied to such cases for more than half a century, and extends well beyond what this Court has authorized even in those rare cases where it has found supervening utility in a bright-line standard to guide law enforcement conduct.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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