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 *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICUS CURIAE*[1]

The National District Attorneys Association (NDAA) is the largest association of prosecuting attorneys in the country, representing 2,500 elected and appointed district attorneys across the United States, as well as 40,000 assistant district attorneys. NDAA provides professional guidance and support, serves as a resource and education center, and follows and addresses criminal justice issues of national importance.

[1] Petitioner consented to the filing of this brief by filing blanket consents with the Clerk. Respondent was timely notified of *amicus curiae's* intent to file this brief and consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

As active prosecuting attorneys, NDAA and its members have front-line experience with the challenges law enforcement officers face in keeping our nation safe. Likewise, NDAA and its members are intimately familiar with the applicable standards of proof in law enforcement and criminal proceedings. District attorneys make daily judgments about whether given factual scenarios can satisfy the reasonable-suspicion, probable-cause, and beyond-a-reasonable-doubt standards. Given the experience of its members, NDAA is in an ideal position to evaluate the day-to-day application of these legal standards. NDAA's members are acutely attuned to the important distinctions between these standards and the dangers of conflating them, as the Kansas Supreme Court did below.

SUMMARY OF ARGUMENT

The Kansas Supreme Court incorrectly concluded that police officers lack reasonable suspicion for a traffic stop when officers see a vehicle being driven on the road, check that vehicle's license plate, and find that the vehicle's owner has a suspended driver's license. It is eminently reasonable in that situation for an officer to suspect that the owner may be driving the vehicle—and thus that the driver may be unlawfully driving with a suspended license.

This Court has recognized that reasonable suspicion is not a heavy burden. Officers may draw assumptions based on objective and particularized indicia that illegal conduct may be occurring. This does not require officers to rule out innocent behavior or to accumulate additional information to supplement what they can already reasonably infer.

The Kansas Supreme Court impermissibly raised the Fourth Amendment's reasonable-suspicion standard by importing requirements from the beyond-a-reasonable-doubt standard. Officers in these circumstances do not need additional confirmation that the registered owner is operating the vehicle. The opinion below ignores that a car's

presence on a motorway and a license-plate check showing an owner with a suspended license are objective and particularized facts that can form the basis for reasonable suspicion that the driver may not be validly licensed to drive. This stacking of interferences may be impermissible when asking a jury at trial to conclude that every element of a crime has been proven beyond a reasonable doubt. But such inference stacking is permissible in assessing whether reasonable suspicion exists for a brief investigative stop. Forcing officers to first confirm the very fact the investigatory stop is intended to adduce—the driver's identity—obliterates the reasonable-suspicion standard altogether.

The decision not only hamstrings law-enforcement officers, but it also threatens Kansas's interest in prosecuting wrongdoing. The decision below provided no guidance on what additional facts officers need to gather to meet the reasonable-suspicion standard. This will inevitably lead to more instances of excluding key evidence, with no way for officers to know if they accumulated enough supplemental information. Defendants will be emboldened to challenge evidence and prosecutors will be forced to second-guess whether to bring cases arising out of traffic stops. Reversal is necessary to prevent this confusion and provide law enforcement with the proper breathing room afforded by the Fourth Amendment's reasonable-suspicion standard.

ARGUMENT

I. THE KANSAS SUPREME COURT MISAPPLIED THE REASONABLE-SUSPICION STANDARD AND IMPORTED REQUIREMENTS FROM THE BEYOND-A-REASONABLE-DOUBT STANDARD

Reasonable suspicion requires that officers must reasonably infer that criminal activity "*may* be afoot." *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002) (emphasis added). This standard is met when an officer can reasonably believe that unlawful driving may be occurring. And an officer reasonably believes that unlawful driving may be occurring when the officer (1) sees an automobile traveling on the road, (2) knows or learns that the vehicle's registered owner has a suspended driver's license, and (3) has no reason to believe that the owner is not driving.

In holding otherwise, the Kansas Supreme Court misapplied this Court's reasonable-suspicion analysis by imposing a far heavier burden on law enforcement than the Fourth Amendment requires. First, that court erred in prohibiting so-called "inference stacking"—the drawing of one inference based on another—when that prohibition only applies to prosecutors proving cases beyond a reasonable doubt. Second, the court ignored that the Fourth Amendment permits officers to draw inferences based on their experience and knowledge, whether an officer calls them inferences or assumptions. Third, it required officers essentially to rule out the possibility of innocent conduct—something that has never been necessary for reasonable suspicion. Finally, nothing in this Court's precedents regarding *random* traffic stops supports the decision below.

A. Officers May Have Reasonable Suspicion by Stacking Inferences

Among the most significant problems with the decision below is its holding that reasonable suspicion cannot be derived from interdependent inferences. Specifically, the

court below saw two inferences that it held needed to be "stacked" to arrive at reasonable suspicion on the facts stipulated. "First, it had to assume the registered owner was likely the primary driver of the vehicle." Pet. App. 11. Second, "that the owner will likely disregard the suspension or revocation order and continue to drive." *Id.* at 12. The latter inference relies on the former—hence the inferences are "stacked." *Id.* at 13. Citing its own precedent, the court below concluded that such stacking was impermissible and could not be the basis for reasonable suspicion. *Id.* at 13-14 (citing *State* v. *Banks*, 397 P.3d 1195, 1200 (Kan. 2017)).

But even the *Banks* case the court cited makes clear that Kansas's prohibition on inference stacking comes from the *beyond-a-reasonable-doubt* standard the prosecution must prove at trial to obtain a conviction—not the reasonable-suspicion standard for an officer to make a brief investigatory stop. See *Banks*, 397 P.3d at 1200. *Banks* expressly held that the evil of stacking arises from asking "*the jury*" during a criminal trial—not an investigating police officer before a stop is ever made—"to make a presumption based upon other presumptions," rather than relying on facts proven through evidence. *Ibid.* (emphasis added); see also *State* v. *Herndon*, 379 P.3d 403, 409 (Kan. Ct. App. 2016) ("[T]here is no impermissible stacking of inferences if each element of the crime charged is supported by substantial evidence, either direct or circumstantial.").[2]

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[2] States may, of course, develop stricter, state-law based reasonable-suspicion standards that disfavor inference stacking. See, *e.g.*, Or. Rev. Stat. § 131.615(1); *State* v. *Lichty*, 835 P.2d 904, 907 (Or. 1992); *State* v. *Oller*, 371 P.3d 1268, 1272-1273 (Or. Ct. App. 2016). But breaches of those more protective state standards do not violate the Fourth Amendment. Moreover, by predicating its holding on Fourth Amendment grounds rather than state law, the Kansas Supreme Court effectively precluded Kansas lawmakers from overturning the decision legislatively.

As NDAA's members are intimately aware, the beyond-a-reasonable-doubt standard is a stringent evidentiary burden aimed at minimizing the wrongful conviction of innocent persons. See, *e.g.*, *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). But the beyond-a-reasonable-doubt standard cannot apply in assessing reasonable suspicion because the two standards exist in entirely different contextual spheres, where the policy concerns are markedly different. The only real danger to the law-abiding public of an investigatory stop, for example, is momentary detention for just long enough to investigate—not imprisonment. See *Illinois* v. *Wardlow*, 528 U.S. 119, 126 (2000) ("If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way."). Reasonable suspicion is thus naturally a much lower standard than beyond a reasonable doubt. See *Navarette* v. *California*, 572 U.S. 393, 397 (2014) ("Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." (citations and internal quotation marks omitted)).

The Kansas Supreme Court made no effort to explain why it transplanted beyond-reasonable-doubt strictures into the reasonable-suspicion standard. And it would be absurd to require police officers to establish the elements of a crime beyond a reasonable doubt before they can even make an investigative stop to assess whether criminal activity is even occurring.

Officers can reasonably stack inferences, therefore, to satisfy the reasonable-suspicion standard. In this very context, several federal courts of appeals have held it to be, not prohibited inference stacking, but plain old common sense, that a vehicle's driver is reasonably likely to be its owner. See, *e.g.*, *United States* v. *Pyles*, 904 F.3d 422, 424-425 (6th Cir. 2018) ("It is fair to infer that the

registered owner of a car is in the car * * * ."); *United States* v. *Cortez-Galaviz*, 495 F.3d 1203, 1207 (10th Cir. 2007) (Gorsuch, J.) ("[C]ommon sense and ordinary experience suggest that a vehicle's owner is, while surely not always, very often the driver of his or her own car.").

B. Officers May Rely on Common Sense and Informed Inferences About Human Behavior

Before it rejected the stacking of inferences, the court below improperly rejected the inferences themselves. This Court has "said repeatedly that [courts] must look at the 'totality of the circumstances'" when reviewing an officer's basis for an investigatory stop. *Arvizu*, 534 U.S. at 273. This totality-of-the-circumstances test expressly recognizes that trained police officers need not rely solely on the bare facts before them; they may also "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Ibid.* Officers may also use "commonsense judgments and inferences about human behavior," *Wardlow*, 528 U.S. at 125, and may consider the general "modes or patterns of operation of certain kinds of lawbreakers," *United States* v. *Cortez*, 449 U.S. 411, 418 (1981).

The inferences here were based on the officer's experience, observation, and common sense. Nevertheless, the Kansas Supreme Court granted the officer's inferences no weight because the stipulated facts below had used the word "assumed" instead of "inferred." Pet. App. 8. An officer's imprecise word choice cannot negate this Court's express declarations that "inferences from and deductions about the cumulative information available" are properly considered in the totality-of-the-circumstances analysis. *Arvizu*, 534 U.S. at 273. The officer's inferences here were hardly off-the-cuff guesses. The officer saw the car being driven and learned that the owner's license was suspended.

Given his experience as a certified law enforcement officer and his commonsense observation that the owner is "very often the driver of his or her own car," *Cortez-Galaviz*, 495 F.3d at 1207, the officer reasonably inferred that the owner in this instance may be driving without a valid license.

Such an inference is particularly reasonable here. License suspension or revocation are not penalties for the casual traffic infraction. In Kansas, a driver must have engaged in serious or repeated violations of the traffic laws to have a license suspended or revoked. See, *e.g.*, Kan. Stat. Ann. § 8-292(e) (codifying that a violation of driving restrictions leads to "suspension or restriction of driving privileges"); Kan. Admin. Regs. § 92-52-9a (2019) (explaining that restrictions and license suspension occur following commission of several moving violations within a twelve-month period). Indeed, license suspension and revocation are punishments for violating prior restrictions on a person's license. See Kan. Stat. Ann. §§ 8-285(a)(3)–8-286 (defining "habitual violator"), 8-291(c) (setting time limits on suspension for violating restrictions on a license). The existence of a suspended license is itself a reasonable basis to infer that the owner may be driving illegally.

The totality-of-the-circumstances test, in short, allows an officer to rely on a direct observation that a car is being driven and the knowledge that the car's owner has a suspended license. Coupled with the officer's informed and well-founded inferences about car owners with demonstrated histories of violating traffic laws, this creates reasonable suspicion of illegal driving. The Kansas Supreme Court misapplied this test when it rejected the officer's trained inferences, characterizing them instead as bald assumptions of "a broad and general criminal inclination on the part of suspended drivers." Pet. App. 12.

C. Officers Need Not Rule Out Innocent Conduct Before Making an Investigatory Stop

The court below also erred when it held that the totality-of-the-circumstances test required the officer to first "seek[] to confirm the identity of the driver" before he could have reasonable suspicion to make an investigative stop. Pet. App. 4. But the identity of the driver is the very fact an investigatory stop is intending to adduce.

Respondent insists that officers cannot rely solely on information from a license-plate check before stopping a motorist, positing that an innocent driver with a valid license might be driving that car. BIO 19-20. Of course, an innocent driver other than the car's owner *might* be driving that vehicle. But the standard for reasonable suspicion does not require disproving what else might be happening. Although it "is not necessarily indicative of wrongdoing" that a vehicle is traveling on a motorway and the vehicle's owner has a suspended license, "it is certainly suggestive of such." *Wardlow*, 528 U.S. at 124. That suggestiveness is enough to raise reasonable suspicion. See *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) (reiterating that "police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause" (quoting *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968))).

At its core, reasonable-suspicion doctrine recognizes that otherwise non-criminal behavior can be the basis for suspicion. See, *e.g.*, *Arvizu*, 534 U.S. at 269-270 (driving slowly down a remote road and not acknowledging a police officer's presence). Yet here, the Kansas Supreme Court held that officers must "presume[]" that those with suspended licenses are "obeying the revocation order" and are not driving. Pet. App. 13. Officers must, therefore, first gather "further factual support" indicating that "the

owner is driving the vehicle." *Id.* at 13-14. But demanding further evidence of ongoing wrongdoing before making an investigatory stop directly contradicts this Court's declaration that an officer "need not rule out the possibility of innocent conduct" for a "determination that reasonable suspicion exists." *Arvizu*, 534 U.S. at 277.

Reasonable suspicion is not negated simply because there is a chance the driver might turn out to be an innocent third party. See *Wardlow*, 528 U.S. at 126 ("*Terry* accepts the risk that officers may stop innocent people."). A police officer has reasonable suspicion to make an investigatory stop when there is "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Cortez*, 449 U.S. at 417. An investigatory stop based on a verified licensing lapse of the owner of a car that an officer observes on the motorway is indisputably based on "particularized and objective" facts. *Id.* at 417.

In holding that the officer could have no reasonable suspicion until he first obviated the need for an investigative stop, the Kansas Supreme Court disregarded the reasonable-suspicion standard altogether. After all, once the officer confirms who is driving, there is no longer any suspicion, reasonable or otherwise—there is only knowledge.

D. *Delaware* v. *Prouse* Does Not Support the Decision Below Because This Was Not a Random Stop

In the context of vehicle stops, this Court has long recognized a balance between a state's interest in keeping "presumably * * * less safe" unlicensed drivers off of the roads and the privacy interests of drivers generally. *Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979). *Prouse* observed that random traffic stops may be valuable in deterring unlicensed driving. *Id.* at 660. But it concluded that such random checks did not "qualify as a reasonable law-

enforcement practice under the Fourth Amendment" because the number of unlicensed drivers was likely too small to justify the intrusion on law-abiding drivers from arbitrary traffic stops. *Id.* at 661. Importantly, the Court emphasized that the Fourth Amendment did not necessarily prohibit less intrusive methods for checking drivers. *Id.* at 663.

Stopping cars based on (1) observation of a vehicle being driven on a motorway, (2) a license-plate check showing that the registered owner has a suspended license, and (3) the commonsense observation that vehicles are quite often driven by their owners is a world away from the random stops forbidden by *Prouse*. 440 U.S. at 660-661. The stop here posed no risk of significant intrusion on the privacy of most law-abiding drivers, as officers can check a car's plate with no inconvenience to its driver. And if the results show licensing issues, officers have "a 'particularized and objective basis' for suspecting" that the driver may be driving without proper license. *Arvizu*, 534 U.S. at 273; see *Prouse*, 440 U.S. at 661 (holding that a traffic stop requires "an appropriate factual basis for suspicion directed at a particular automobile").

The harm of the practice prohibited in *Prouse*, moreover, explains why the possibility of stopping some innocent drivers does not render impermissible the practice of stopping the vehicles of owners who have a suspended license. A major problem in *Prouse* was that the random spot checks did "not appear sufficiently productive to qualify as a reasonable law enforcement practice." *Id.* at 660. The ratio of unlicensed drivers to law-abiding drivers stopped was likely to be low and thus did not justify the intrusion. *Id.* at 659-660. Stops like the one performed here, by contrast, are dramatically more productive. They are based on articulable facts known that the car is being driven *and* that the vehicle's owner has a suspended license. And they are targeted narrowly at determining whether the owner and

driver are the same, thus "discovering unlicensed drivers or deterring them from driving." *Id.* at 660.

Some innocent drivers could be stopped in this scenario. But as shown by even the estimates the Kansas Supreme Court adopted from the trial court, the probability of capturing unlicensed drivers is exponentially greater here than in the random searches prohibited by *Prouse*. Even assuming that "several drivers shar[e] vehicles legally registered in the names of only one or two of the family members," as the trial court did, Pet. App. 5, the chances of stopping a driver with a suspended license (i.e., the registered owner) are dramatically greater than simply "choosing randomly from the entire universe of drivers" to find unlicensed drivers. *Prouse*, 440 U.S. at 659.

II. The Decision Below Invites Confusion and Threatens to Hinder Valid Prosecution Efforts

Apart from faulting the officer for not first confirming the driver's identity, the Kansas Supreme Court gave scant guidance for when reasonable suspicion can exist—going out of its way to "decline to delineate the type of corroborating evidence that will satisfy the State's burden." Pet. App. 19. Adding insult to injury, the court implied the possibility that even if more facts were gathered by an officer, the evidence may still be insufficient for reasonable suspicion. See *ibid.* ("[W]e recognize that in other cases, the State, by presenting some more evidence, *may* meet its burden." (emphasis added)). Leaving courts, prosecutors, and police officers to guess what is sufficient for reasonable suspicion, the court below remarked simply that the State "needs *some* more evidence. What more is required turns on the totality of the circumstances, which courts must determine case by case." *Id.* at 18.

The Fourth Amendment analysis below, if allowed to stand, would sow confusion and hinder valid prosecution

efforts beyond just traffic infractions. The reasoning below could jeopardize any evidence obtained as a direct or indirect result of a traffic stop based on a license-plate check showing the owner with a suspended or revoked license. The lack of guidance in the decision below deprives trial courts of the ability to render consistent judgments, deprives prosecutors of standards for assessing whether they have enough evidence to bring a case, and deprives police officers of standards for ensuring that traffic stops are supported by reasonable suspicion. This will impair both the investigation and the prosecution of crimes. Neither prosecutors nor police officers can have confidence in moving forward with criminal cases that began as a traffic stop based on reasonable suspicion.

The NDAA and its members take seriously the ethical obligation of prosecutors "to seek justice within the bounds of the law, not merely to convict." Criminal Justice Standards for the Prosecution Function Standard 3-1.2(b) (Am. Bar Ass'n 2018). By not providing clarity in announcing its new reasonable-suspicion standard, the Kansas Supreme Court left prosecutors in the dark about what "may" be sufficient to establish reasonable suspicion. See Pet. App. 19. This will stymie their efforts to understand—and communicate to law enforcement—what the law requires.

The exclusion of evidence for Fourth Amendment violations is a blunt hammer in the justice system because a mistake by police officers can mean that the guilty go free. See *Irvine* v. *California*, 347 U.S. 128, 136 (1954) (plurality opinion per Jackson, J.) ("[The exclusionary rule] deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."). "Resort to the massive remedy of suppressing evidence of guilt" requires a justifiable balance worthy of such a heavy price. *Hudson* v.

Michigan, 547 U.S. 586, 599 (2006). Here, any deterrent effect on police that the exclusionary rule might have is erased if police officers have no clear articulation of the threshold level of factual investigation required before reasonable suspicion exists to justify an investigatory stop.

The Kansas Supreme Court's reasoning will hamper police officers' ability to conform their actions to stated constitutional standards and will increase the risk that the evidence they gather will be excluded. This, in turn, could cause officers to simply stop performing otherwise fruitful traffic stops. Cf. *Maryland* v. *Shatzer*, 559 U.S. 98, 108 (2010) (considering a proposed rule problematic because of the deterrent effect it would have on police officers).

Practically speaking, gathering some set of indefinite additional "facts suggesting the owner is driving the vehicle," as the decision below requires, Pet. App. 14, will likely require officers to maneuver through traffic to get a clear look at the driver while still maintaining control of their vehicles. It takes little to imagine the potential dangers of an officer weaving through traffic at high speeds to get alongside a car in question—to say nothing of the danger of an officer taking eyes off the road to get that good look at another driver. The numbers bear out the risks. A leading cause of officer fatalities is, in fact, car accidents. See *Causes of Law Enforcement Deaths over the Past Decade (2009-2018)*, Nat'l Law Enforcement Officers Memorial Fund (Mar. 29, 2019) (showing that 409 officers were killed in car or motorcycle accidents out of a total of 1582 officer deaths). An officer might understandably think twice before undertaking risky maneuvers when it is not clear how much more evidence will be enough to justify a stop.

Seizure of evidence and suspects puts officers in danger. Situations in which officers suspect criminal activity are often rapidly evolving and can require officers to make

split-second decisions. Officers need clear guidance as to what is and is not acceptable, so they can receive adequate training. Adding to or otherwise complicating an officer's ability to make a traffic stop is thus more than a mere inconvenience. It could expose officers to greater risks. It is unreasonable to expect police officers to subject themselves to those greater risks without at least providing them a reliable standard articulating the evidentiary threshold required for reasonable suspicion to justify an investigatory stop. Because the decision below will "confuse[] courts and police officers and impede[] effective law enforcement," it should be reversed. *California* v. *Acevedo*, 500 U.S. 565, 576 (1991).

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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June 2019