No. 14-1373

In the Supreme Court of the United States

UTAH,

Petitioner,

v.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Writ of Certiorari to the Utah Supreme Court

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the evidence seized from respondent incident to his arrest on a minor traffic warrant discovered during a patently unconstitutional detention is inadmissible under the "attenuation" exception to the exclusionary rule.

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STATEMENT

A. Background

The police in some jurisdictions run routine warrant checks on the people they encounter, regardless of whether the police have particularized suspicion that the person being stopped is involved in criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants. The question presented in this case cannot be understood without an appreciation of this context.

1. Arrest warrants

There are many millions of outstanding arrest warrants in the United States, enough to cover a very large percentage of the population. Most of these arrest warrants are for traffic violations. While there do not appear to be any publicly-available nationwide data, the state-wide and city-wide figures that are available present a sobering picture.

In Ferguson, Missouri, for example, a city with a population of 21,000, the Justice Department found that more than 16,000 people have outstanding arrest warrants. U.S. Department of Justice, *Investigation of the Ferguson Police Department* 6, 55 (2015) (http://goo.gl/AFQDW3). In fiscal year 2013 alone, Ferguson issued arrest warrants to more than 9,000 people, nearly half the city's population. *Id.* at 55. Some of the neighboring jurisdictions likely have a comparable percentage of residents with outstanding warrants. *Id.* at 57 (noting "the large number of mu-

nicipalities in the region, many of which have warrant practices similar to Ferguson").

Ferguson is hardly the only jurisdiction with an enormous number of outstanding arrest warrants. New York City has 1.2 million outstanding warrants, some dating back to the 1970s. Al Baker, *Brooklyn Program Erasing Warrants for Low-Level Offenses*, N.Y. Times, Oct. 7, 2015 (http://nyti.ms/1LliL5b). In 2002, California's Attorney General reported that "we have 2.5 million unserved warrants in this state," and that figure did not include warrants for incidents of domestic violence or for failure to appear in court. Bill Lockyer, *Leadership Issues in Criminal Justice Policy*, 33 McGeorge L. Rev. 665, 668 (2002). In 2007, Pennsylvania had 1.4 million outstanding warrants. Associated Press, *Pa. Database: 1.4 Million Warrants Unserved*, NBC News, Apr. 8, 2007 (http://goo.gl/3Yq3Nd). Massachusetts had more than 775,000 in 1999. Massachusetts Senate Committee on Post Audit and Oversight, *Warranting Improvement: Reforming the Arrest Warrant Management System* 7, 13 n.49 (1999) (https://goo.gl/gsdrJL).

In 2003, officials in Washington estimated that the state had around 370,000 outstanding warrants. Philip J. Van de Veer, *No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 Seattle U.L. Rev. 847, 852 n.33 (2003). Florida has reported 323,000 outstanding arrest warrants. Eric Helland and Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 98 (2004). As of 2005, Kentucky had any-

where from 265,000 to 385,000—no one knew for sure, because of the lack of any statewide system for keeping track. Kentucky Legislative Research Commission, *Improved Coordination and Information Could Reduce the Backlog of Unserved Warrants* vii (2005) (http://goo.gl/6jCYHU).

Smaller jurisdictions report even larger numbers of outstanding arrest warrants relative to the size of the jurisdiction. As of a few years ago, Cincinnati had over 100,000 (one for every three residents), counting only warrants for failure to appear in court, and Baltimore had 54,000. Helland and Tabarrok, *supra*, at 98. Durham, North Carolina, had more than 60,000, some dating back to the 1970s. Erin Hartness, *Durham Cutting Into Warrant Backlog*, WRAL, May 12, 2009 (http://goo.gl/2hM1Ss). Prince George's County, Maryland, had 53,000 as of 2011. Matt Zapotosky, *3 Charged in Killing as Pr. George's Steps Up Anti-Crime Effort*, Washington Post, Jan. 19, 2011 (http://goo.gl/N3t4C3).

Tucson has 40,000 outstanding arrest warrants. Becky Pallack, *City Plans Amnesty Day for Those with Arrest Warrants*, Arizona Daily Star, May 19, 2015 (http://goo.gl/fmA6aB). North Las Vegas, Nevada, has 33,000. Bethany Barnes, *North Las Vegas to Pursue 33,000 Warrant Backlog*, Las Vegas Review-Journal, Jan. 18, 2015 (http://goo.gl/zx2IFT). Mesquite, Texas, has 31,000. Ray Leszcynski, *Mesquite Dedicates Friday Court Sessions to 31,000-Warrant Backlog*, Dallas Morning News, July 23, 2015 (http://goo.gl/6gpRp5). Stark County, Ohio, has 25,000. Jen Steer, *Ohio Attorney General to Hold*

Fugitive Safe Surrender Event in Canton, Fox 8 Cleveland, Sept. 26, 2015 (http://goo.gl/lHH4Ht).

So far as data are available, the vast majority of these outstanding arrest warrants are for failure to pay traffic tickets. In Ferguson, for example, the Justice Department found that such warrants "are overwhelmingly issued in non-criminal traffic cases that would not themselves result in a penalty of imprisonment." *Investigation of the Ferguson Police Department* at 56. The pattern is similar in other jurisdictions. For example, in Tucson and Mesquite most of the outstanding warrants are for failing to pay traffic tickets. Pallack, *supra*; Leszcynski, *supra*.

The present case is typical in this respect. Edward Strieff's outstanding warrant was a "small traffic warrant." JA 19.

In towns with exceptionally large numbers of outstanding arrest warrants, the police can be confident that a substantial percentage of the people they meet on the street will have an outstanding arrest warrant. In Ferguson, for example, that figure exceeds 75%. *Investigation of the Ferguson Police Department* at 6, 55. But every town has residents with outstanding arrest warrants, because traffic infractions are committed by residents of all towns, and anyone who fails to pay a traffic ticket is likely to be named in an outstanding arrest warrant.

Meanwhile, technological changes over the past few decades permit the police to run nationwide warrant checks, quickly and easily, on everyone they meet. Jurisdictions throughout the nation enter their arrest warrants into the FBI's National Crime

Information Center database. This database is available to law enforcement officers all over the country, who can access it on their computers. The FBI's website explains that "a law enforcement officer can search NCIC during a traffic stop to determine … if the driver is wanted by law enforcement. The system responds instantly." Federal Bureau of Investigation, *National Crime Information Center* (https://www.fbi.gov/about-us/cjis/ncic). The police thus have access to "an electronic clearinghouse of crime data that can be tapped into by virtually every criminal justice agency nationwide, 24 hours a day, 365 days a year," a database that in 2014 processed an average of 12 million transactions every day. *Id.*

2. Routine warrant checks

Equipped with this ability to detect whether a person has an outstanding arrest warrant, police officers in some jurisdictions "view a warrants check as a routine feature of almost any citizen encounter," regardless of whether the police have reasonable suspicion to detain the person they are stopping. *Golphin v. State*, 945 So. 2d 1174, 1202 (Fla. 2006) (Pariente, J., concurring in result only). In Salt Lake County, Utah, where the events giving rise to the present case took place, the police "perform a warrants check as part of 'routine procedure' or 'common practice'" even where they do "not have an articulable suspicion that [the person they encounter] had [committed] or was about to commit a crime." *State v. Topanotes*, 76 P.3d 1159, 1160 (Utah 2003). As Detective Fackrell admitted in this case, "it's normal

for me" to run a "normal warrants check" on people with whom he speaks. JA 18.

Police officers in several other jurisdictions share Fackrell's practice of running routine warrant checks on the people they encounter. A police officer in Rockford, Illinois, for example, testified that "whenever he meets someone on the street, he runs a warrant check on that individual," regardless of whether he has any reason to believe that the individual might have an outstanding warrant. *People v. Mitchell*, 824 N.E.2d 642, 644 (Ill. App. Ct. 2005). In New York City, a police supervisor was recorded telling officers, on Halloween night, that if they encountered anyone with "bandanas around their necks, Freddy Krueger masks, I want them stopped, cuffed, alright, brought in here, run for warrants." *Floyd v. City of New York*, 283 F.R.D. 153, 166 n.68 (S.D.N.Y. 2012).

In Salina, Kansas, when the police stop vehicles, it is "'standard operating procedure' to obtain identification from every person in a vehicle and run a records check on the passengers," even where only the driver has been observed to violate the law. *State v. Jones*, 17 P.3d 359, 360 (Kan. 2001). In Arizona, a Forest Service officer explained that he was trained "to run warrant checks … as a matter of routine practice whenever he encounters someone in the course of his work." *United States v. Tuttle*, 2015 WL 5736905, *2 (D. Ariz. 2015). In Elko, Nevada, a police officer testified that "it is his standard practice to verify the identification information of every person he encounters" by reciting that information "to police dispatch for verification and to check for out-

standing arrest warrants." *Torres v. State*, 341 P.3d 652, 654 (Nev. 2015), *pet. for cert. pending*, No. 15-5 (filed June 26, 2015).

The Justice Department's investigation of the Ferguson police likewise determined that "[m]any of the unlawful stops we found appear to have been driven, in part, by an officer's desire to check whether the subject had a municipal arrest warrant pending." *Investigation of the Ferguson Police Department* at 17. For example:

> An African-American man recounted to us an experience he had while sitting at a bus stop near Canfield Drive. According to the man, an FPD [Ferguson Police Department] patrol car abruptly pulled up in front of him. The officer inside, a patrol lieutenant, rolled down his window and addressed the man:
>
> Lieutenant: Get over here.
>
> Bus Patron: Me?
>
> Lieutenant: Get the f*** over here. Yeah, you.
>
> Bus Patron: Why? What did I do?
>
> Lieutenant: Give me your ID.
>
> Bus Patron: Why?
>
> Lieutenant: Stop being a smart ass and give me your ID.
>
> The lieutenant ran the man's name for warrants. Finding none, he returned the ID and said, "get the hell out of my face." These allegations are consistent with other, independent

> allegations of misconduct that we heard about this particular lieutenant, and reflect the routinely disrespectful treatment many African Americans say they have come to expect from the Ferguson police.

Id. at 17-18.

For additional examples of routine warrant checks without reasonable suspicion, see *Groves v. Croft*, 2011 WL 5509028, *7 (D. Mont. 2011) (involving an officer in Red Lodge, Montana, who conducted a routine suspicionless warrant check of a man admitted to a hospital); *State v. Winbush*, 152 Wash. App. 1020, *1 (Wash. Ct. App. 2009) (involving an officer in Snohomish County, Washington, who conducted a routine suspicionless warrant check where the police already knew that no crime had occurred); *United States v. Lopez*, 443 F.3d 1280, 1282 (10th Cir. 2006) (involving an officer in Denver who conducted a routine suspicionless warrant check of a man found standing next to his own car); *State v. Johnson*, 645 N.W.2d 505, 507 (Minn. 2002) (involving an officer in Brooklyn Park, Minnesota, who conducted a routine suspicionless warrant check of a passenger in the back seat of a car with a broken brake light); *State v. Jackson*, 542 N.W.2d 842, 843 (Iowa 1996) (involving an officer in Cedar Rapids, Iowa, who conducted a routine suspicionless warrant check of a man whose car overheated).

The primary reason the police conduct these routine suspicionless warrant checks appears to be that when the police make an arrest they can also conduct a search, of a person who would not otherwise

be searchable. "The discovery of an open warrant is likely not independently sufficient to incentivize such unconstitutional detentions," because "[t]he great majority of outstanding warrants are issued for trivial offenses. … The utility of discovering an open warrant therefore is generally not derived from serving the warrant, but rather from conducting a search incident to arrest." Michael Kimberly, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177, 181 n.22 (2008). When the police conduct stops without suspicion, they are aware that a substantial percentage of the people stopped will have outstanding arrest warrants. "If the check does not reveal a warrant, then the officer lets the individual go, having spent only a few minutes of time. If the warrants check does reveal an open warrant, the officer obtains legal authorization to conduct a search incident to arrest, and the unconstitutionality of the stop is rendered irrelevant." *Id.* at 179.[1]

This powerful incentive for the police to make suspicionless stops is exacerbated by the oft-condemned but still common practice of evaluating police officers based on how many arrests they make. *See* U.S. Department of Justice, *Implementing a Comprehensive Performance Management Approach in Community Policing Organizations: An Executive Guidebook* 28 (2015) (http://goo.gl/xByZUU) (noting that "many departments still rely heavily on numer-

[1] The enormous number of outstanding arrest warrants shows the error in Utah's contention (Pet. Br. 22) that police officers have no incentive to make unlawful stops in the hope of discovering an outstanding warrant.

ical data for evaluating the agency as a whole and for evaluating its personnel …. such as arrest rates"); *Final Report of the President's Task Force on 21st Century Policing* 26 (2015) (http://goo.gl/E8gW1W) (recommending that "[l]aw enforcement agencies and municipalities should refrain from practices requiring officers to issue a predetermined number of tickets, citations, arrests, or summonses"); Saki Knafo, *How Aggressive Policing Affects Police Officers Themselves*, The Atlantic, July 13, 2015 (http://goo.gl/c9KXwb) (providing evidence of the widespread use of arrest quotas in evaluating police officers). When promotion within the police force, or even the retention of one's job, depends on making a certain number of arrests, some officers succumb to the temptation to make unlawful stops in the hunt for outstanding arrest warrants.

There is nothing wrong with routine warrant checks where the police have "the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (noting that the police often conduct a warrant check of the driver when they stop a car after they observe the driver committing a traffic violation); *see also Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 188 (2004) (holding that the Fourth Amendment does not prohibit the police from requesting a suspect's name, provided that the request comes "in the course of a valid *Terry* stop"); *Hayes v. Florida*, 470 U.S. 811, 816 (1985) (observing that a person may be stopped for identification only "if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal of-

fense"). The problem is that the police in some jurisdictions routinely stop people to run warrant checks even when they lack reasonable suspicion, and even when they lack any reason to believe that the person being stopped has an outstanding arrest warrant.

Research suggests that the number of suspicionless stops is very large. A report published by the New York Attorney General found that 15.4% of stops made by the New York City Police Department lacked reasonable suspicion, and that in another 23.5% of stops it was impossible to determine whether the police had reasonable suspicion. *The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* xiv (1999) (http://goo.gl/bRF1pJ). The same police department made at least 170,000 unlawful stops between 2004 and 2009, and another 400,000 stops that lacked sufficient documentation to assess their legality. *Floyd*, 283 F.R.D. at 167 & n.75. *See also* Jon B. Gould and Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 Criminology & Pub. Pol'y 315 (2004) (finding a similar pattern in a medium-sized city).

Research also suggests that the police stop members of minority groups at disproportionately high rates, even controlling for differences in crime rates among groups. *See* Sharon LaFraniere and Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. Times, Oct. 24, 2015 (http://nyti.ms/1kCouxU); Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of*

Racial Bias, 102 J. of the Am. Statistical Ass'n 813, 821-22 (2007); Ian Ayres and Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 27 (2008) (http://goo.gl/iHxKns).

Moreover, routine warrant checks often snare people who should not be arrested, because many of the outstanding arrest warrants in the FBI's database are erroneous. In *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 1514 (2012), for example, the person named in the warrant had paid his fine in full, "but, for some unexplained reason, the warrant remained in a statewide computer database" and he was arrested on it again two years later. *Herring v. United States*, 555 U.S. 135, 137-38 (2009), likewise involved an arrest on a warrant that erroneously remained in the database despite having been recalled several months earlier. The same error occurred in *Arizona v. Evans*, 514 U.S. 1, 4-5 (1995).

These cases are just the tip of an enormous error-filled iceberg. In Los Angeles, for instance, the county sheriff announced he would create a task force to figure out why at least 1,480 people had been jailed in a five-year period due to such warrant errors, including one man who had been arrested and jailed for nine days in 1989 on a warrant meant for someone else, and who was then rearrested on the same warrant twenty years later and jailed for more than a month before the error was discovered. Robert Faturechi and Jack Leonard, *Errant Jailings Focus of Probe*, L.A. Times, Dec. 28, 2011 (http://goo.gl/kwI25H).

The Justice Department has found that states typically do not audit their warrant databases to remove errors. Bureau of Justice Statistics, *Improving Access to and Integrity of Criminal History Records* 13 (2005) (http://www.bjs.gov/content/pub/pdf/iaichr.pdf). Erroneous arrest warrants are often discovered only after the person named in the warrant has been wrongly arrested. As Justice O'Connor presciently warned, "it would *not* be reasonable for the police to rely … on a recordkeeping system … that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests." *Evans*, 514 U.S. at 17 (O'Connor, J., concurring).

B. Facts and proceedings below

Detective Doug Fackrell detained respondent Edward Strieff after Strieff left a house that Fackrell was watching. Pet. App. 4. Fackrell knew nothing about Strieff. He had never seen Strieff before. JA 20. He did not know who Strieff was. JA 20. He had not seen Strieff enter the house. Pet. App. 4. He did not know how long Strieff had been inside. Pet. App. 5. He did not know whether Strieff lived in the house. JA 20. As the court below found, Fackrell "knew nothing of him other than that he left the house." Pet. App. 5.

Fackrell also knew very little about the house. He had been watching the house "off and on for a week or so" for a total of approximately three hours, JA 16, after an anonymous caller left a message on a drug tip line saying "they believed there was narcotics activity at the house and they described some short stay traffic at the house." JA 15. Fackrell did not

know who owned the house, or who lived in it, or whether any crimes took place inside.

After Fackrell observed "not terribly frequent" visitors, JA 16, he decided he would detain the next person he saw leaving the house. JA 17. That person turned out to be Strieff. As Fackrell testified, he detained Strieff because "[h]e was coming out of the house that I had been watching and I decided that I'd like to ask somebody if I could find out what was going on [in] the house." JA 17. Fackrell admitted that he "had no reason to stop him other than that he had left that house." JA 20. Fackrell also admitted that Strieff had done nothing to arouse any "suspicion that he was committing a crime other than him leaving the house." JA 21. Utah has conceded throughout this case that Fackrell did not have reasonable articulable suspicion to detain Strieff. Pet. App. 5.

Fackrell detained Strieff about a block from the house. Pet. App. 4; JA 18. He identified himself as a police officer and told Strieff that "I had been watching the house and that I believed there might be drug activity there and asked him if he would tell me what he was doing there." JA 18. Fackrell could not remember Strieff's response. JA 23.

Fackrell asked for Strieff's identification because he wanted "to know who I'm talking to." JA 18. This was Fackrell's standard practice when he stopped someone. As Fackrell explained, "of course it's normal for me to want to know who I'm talking to so I told him that, you know, if he had some ID if I could please see it." JA 18. Fackrell took Strieff's identifi-

cation and asked the dispatcher to check for any outstanding arrest warrants. Pet. App. 5. This was also Fackrell's standard practice when he stopped someone. He testified: "I had dispatch run a warrants check, normal warrants check." JA 18. The dispatcher found that Strieff had a minor traffic warrant. Pet. App. 5.

Fackrell arrested Strieff on the warrant and conducted a search, during which he found methamphetamine and drug paraphernalia in Strieff's pockets. Pet. App. 5. Utah charged Strieff with possession of methamphetamine and drug paraphernalia. Pet. App. 5. Strieff moved to suppress the evidence found in his pockets, on the ground that the evidence was the fruit of an unconstitutional detention. Pet. App. 5. The state district court determined that although the stop was unconstitutional, Fackrell's discovery of the warrant was an "intervening circumstance" that rendered suppression an "inappropriate remedy." Pet. App. 6.

Strieff entered a conditional guilty plea to misdemeanor attempted possession of a controlled substance and paraphernalia. Pet. App. 6. He reserved the right to appeal the order denying his motion to suppress. Pet. App. 6.

The Utah Court of Appeals affirmed by a vote of 2-1. Pet. App. 37-98. The majority held that the evidence was admissible under the "attenuation" exception to the exclusionary rule recognized in *Brown v. Illinois*, 422 U.S. 590 (1975). Pet. App. 49-84. Judge Thorne, dissenting, concluded that the evidence should have been excluded. Pet. App. 84-98.

The Utah Supreme Court unanimously reversed. Pet App. 1-36.

The court explained that this Court has established "a three-factor test to guide the attenuation inquiry. The three factors are: (1) the 'temporal proximity' of the unlawful detention and the discovery of incriminating evidence, (2) the presence of 'intervening circumstances,' and (3) the 'purpose and flagrancy' of the official misconduct." Pet. App. 18 (quoting *Brown*, 422 U.S. at 603-04).

The court concluded that the discovery of an arrest warrant during a routine warrant check is not an intervening circumstance. Under the attenuation exception, the court noted, the "prototypical intervening circumstance involves a voluntary act by the defendant, such as a confession or consent to search given after illegal police action." Pet. App. 18-19. This factor "cannot easily be extended to the discovery of an outstanding warrant," the court continued, because "[t]he discovery of an outstanding warrant is hardly an independent act or occurrence" that could break the causal chain between the police misconduct and the seizure of the evidence. Pet. App. 29. Rather, the discovery of a warrant, as a result of a routine warrant check, "is part of the natural, ordinary course of events arising out of an arrest or detention. And in that sense, even if the warrant could be thought of as somehow intervening, it would hardly be unforeseeable." Pet. App. 29. The court concluded that the discovery of "an outstanding warrant does not qualify" as an intervening circumstance, because "it is not an independent act that is

sufficiently removed from the primary illegality to qualify as *intervening*." Pet. App. 29.

The Utah Supreme Court added that the other two "attenuation factors articulated by the Supreme Court also seem to cut in the same direction." Pet. App. 29. The court accordingly determined that the evidence seized from Strieff was inadmissible under the attenuation exception. Pet. App. 34.

SUMMARY OF ARGUMENT

A. Where the police make an unlawful stop and run a routine warrant check, the discovery of a warrant does not attenuate the causal connection between the unlawful stop and the discovery of evidence, because the discovery of a warrant is the immediate and foreseeable consequence of the stop and the warrant check. The physical evidence found in Edward Strieff's pockets was thus not admissible under the attenuation exception to the exclusionary rule.

1. The exclusionary rule applies where the rule's value in deterring future Fourth Amendment violations exceeds its cost, but the Court does not conduct this cost/benefit analysis from scratch in every case. Rather, the Court's exclusionary rule jurisprudence already incorporates the balance between cost and benefit, by defining certain well-established exceptions to the exclusionary rule, exceptions that have well-established limits to their application.

Evidence is admissible under the attenuation exception where, although a constitutional violation is the but-for cause of the discovery of the evidence, the

taint of the violation has dissipated by the time the police discover the evidence. The attenuation exception uses the tort law concept of proximate cause to ensure that the exclusionary rule does not apply to remote and unforeseeable consequences of constitutional violations, because in such cases excluding the evidence would not deter the police from violating the Constitution.

Where an unlawful stop includes a routine warrant check, the discovery of a warrant is a direct, foreseeable consequence of the unlawful stop. The discovery of the warrant thus does not dissipate the taint of the constitutional violation. All three of the factors the Court has identified as relevant to the attenuation inquiry point strongly against attenuation. First, the constitutional violation and the ensuing search are temporally proximate; the search takes place *during* the unlawful stop. Second, there are no intervening circumstances. Under the Court's attenuation jurisprudence, an intervening circumstance must be an unforeseeable event unrelated to the officer's unlawful conduct. The discovery of a warrant, by contrast, is the foreseeable—indeed, the intended—result of an unlawful stop that includes a routine warrant check. Third, the police misconduct in this case was flagrant; it was an obviously unconstitutional stop made for investigatory purposes. The discovery of evidence in this case was the direct and foreseeable result of Fackrell's decision to detain Strieff and run a warrant check without reasonable suspicion. The evidence seized from Strieff is thus not admissible under the attenuation exception.

2. The Court has also used the word "attenuation" where suppression would not serve the interest protected by the Fourth Amendment, but there was no attenuation in this sense either. Here, the interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression. Indeed, in the cases in which the Court has found this kind of attenuation, the Court has been careful to distinguish cases (like the present case) involving the fruits of unlawful warrantless searches. In this case the police committed a straightforward *Terry* violation, for which suppression has long been the standard remedy.

3. The United States' argument concerning evidence of a defendant's identity is misplaced in this case. The evidence at issue is not evidence of Edward Strieff's identity or evidence solely derived therefrom, but rather the physical evidence found in Strieff's pockets while he was being unlawfully detained. The United States' argument is incorrect in any event. Evidence of a defendant's identity *is* suppressible if the police obtain that evidence by violating the Fourth Amendment.

B. The exclusionary rule is necessary to deter the police from making unconstitutional stops to run routine warrant checks. The exclusionary rule's deterrence value is at its highest in circumstances where, in the rule's absence, the police would be very likely to engage deliberately or recklessly in a pattern of Fourth Amendment violations. This is such a circumstance. In some jurisdictions, the police run routine warrant checks on the people they encoun-

ter, regardless of whether the police have reasonable suspicion of criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants.

For this reason, many state courts, which have a broad view of how the state's police officers conduct themselves, have recognized that the only realistic way to deter the police from conducting warrant checks without reasonable suspicion is to exclude the evidence so obtained. The theoretical deterrents posited by the United States—civil suits, investigation by the Justice Department, and community hostility—are evidently not working.

In the leading lower court case taking the opposing view, the Seventh Circuit was concerned that applying the exclusionary rule would allow the defendant to go free despite the arrest warrant. But this concern is unfounded, because the defendant will not go free. The police have every right to make a lawful arrest of a person named in an arrest warrant. The exclusionary rule is necessary to deter unlawful stops, but in this situation the defendant can still be prosecuted for the offense that gave rise to the warrant.

Utah and the United States err in contending that the exclusionary rule is needed only to deter a subset of unlawful stops the state refers to as "dragnet-type" stops. No doubt, if the police were to cordon off a neighborhood and run dragnet-type warrant searches on every person within the perimeter, the police would be committing a wholesale violation of the Fourth Amendment, and the exclusionary rule

would be an appropriate deterrent to such behavior. But the Fourth Amendment violation would be just as wholesale, and the exclusionary rule would be just as appropriate a deterrent, if the unlawful warrant checks were being run by a single police officer who simply walks around a neighborhood and runs warrant checks without reasonable suspicion on the people he happens to encounter. There is nothing special about "dragnets" that justifies treating them differently from any other widespread pattern of violations.

Indeed, the exclusionary rule's deterrent value is at its greatest when brought to bear on the individual officer's judgment in an individual case. An officer observing a person in circumstances falling short of reasonable suspicion must choose between gathering more information, which may give him reasonable suspicion to make a *Terry* stop, or detaining the person unlawfully, in the hope that the person will turn out to have an outstanding arrest warrant. Officers make this choice every day, including in cities where the police know that a significant percentage of the residents have outstanding warrants. This is exactly why we have the exclusionary rule.

ARGUMENT

The evidence seized from Edward Strieff is inadmissible under the "attenuation" exception to the exclusionary rule, because it was obtained as a direct consequence of a patently unconstitutional detention.

The evidence seized from Edward Strieff while he was being unlawfully detained is inadmissible under the "attenuation" exception to the exclusionary rule. Utah has conceded throughout this litigation that the detention of Strieff violated the Fourth Amendment, because the police lacked reasonable suspicion that Strieff had committed any crime. Under the Court's extensive and detailed attenuation jurisprudence, the discovery of an outstanding arrest warrant, during a routine warrant check, is not an intervening circumstance breaking the causal chain between the unlawful stop and the search. Rather, the discovery of the warrant is an immediate and foreseeable consequence of the stop and the warrant check. The interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression.

The purpose of the exclusionary rule is to deter future police misconduct. Here, the deterrence value of exclusion is at its highest. The police have a powerful incentive to make unlawful stops to conduct routine warrant checks, in order to arrest people they could not otherwise arrest, and in order to search people they could not otherwise search. Because of

this strong incentive, the police in some jurisdictions routinely conduct warrant checks on the people they encounter, regardless of whether the police have any reason to believe a person has committed a crime or has an outstanding warrant. The exclusionary rule is the only remedy capable of deterring this pattern of police misconduct, a pattern that is sure to become pervasive if the Court finds the exclusionary rule inapplicable.

A. Where the police make an unlawful stop and run a routine warrant check, the discovery of a warrant does not attenuate the causal connection between the unlawful stop and the ensuing search.

The exclusionary rule applies where the rule's value in deterring future Fourth Amendment violations exceeds its cost, *Davis v. United States*, 131 S. Ct. 2419, 2426-27 (2011), but the Court does not conduct this cost/benefit analysis from scratch in every case. For most cases, including this one, the Court's exclusionary rule jurisprudence already incorporates the balance between the rule's deterrent value and its cost, by defining certain well-established exceptions to the rule, exceptions that have well-established limits to their applicability. *United States v. Leon*, 468 U.S. 897, 910-11 (1984) (observing that the attenuation exception incorporates the balance between the exclusionary rule's benefits and costs); *Nix v. Williams*, 467 U.S. 431, 442-44 (1984) (same for the inevitable discovery exception); *Murray v. United States*, 487 U.S. 533, 537-

40 (1988) (same for the independent source exception).

Evidence is admissible under the attenuation exception where, although "a constitutional violation was a 'but-for' cause of obtaining evidence," the causal connection is "too attenuated to justify exclusion." *Hudson v. Michigan*, 547 U.S. 586, 592 (2006). As Justice Frankfurter observed in his opinion for the Court in *Nardone v. United States*, 308 U.S. 338, 341 (1939), while the government should not gain from the wrongdoing of its officers, "[a]s a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

The attenuation exception uses the tort law concept of proximate cause to ensure that the exclusionary rule does not apply to remote and unforeseeable consequences of constitutional violations.[2] *United States v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998) (describing the attenuation exception as "akin to a proximate causation analysis"); Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463, 478-79 n.75 (2009) ("The exclusionary rule suppresses evidence only when a constitutional violation is the proximate cause of the government's receipt of this evidence.") Where the discovery of evidence is not a direct, foreseeable re-

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[2] Although Utah errs in suggesting (Pet. Br. 37) that the attenuation exception is unrelated to proximate cause, Utah's error has little practical importance, because Utah agrees that the purpose of the attenuation exception is to reserve the exclusionary rule for cases in which the rule will have a deterrent effect by excluding evidence obtained as a direct and foreseeable result of police misconduct.

sult of police misconduct, excluding the evidence would not deter the police from committing the misconduct, so "the deterrent effect of the exclusionary rule no longer justifies its cost." *Leon*, 468 U.S. at 911 (citation and internal quotation marks omitted). By contrast, where the discovery of evidence *is* a direct, foreseeable consequence of the police misconduct, excluding the evidence *will* deter the police from committing similar misconduct in the future.

The only evidence at issue in this case is the physical evidence found in Strieff's pockets during the search that Fackrell conducted while unlawfully detaining him. Strieff has never claimed that the arrest was unlawful or that the arrest warrant itself is suppressible. As the court below correctly observed, "[n]o one is contesting—or even could reasonably contest—the arrest on the outstanding warrant." Pet. App. 32 n.12. Both sides agree that Strieff's person is not suppressible. Both sides agree that Strieff was rightly punished for the traffic violation for which the warrant was issued. The only dispute in this case is whether the discovery of evidence in Strieff's pockets while Fackrell was unlawfully detaining him was so attenuated from Fackrell's constitutional violation that the taint of the violation had dissipated.

1. The discovery of the warrant in these circumstances is an immediate and foreseeable consequence of the stop and the warrant check.

The "burden of persuasion [is] on the State" to show that evidence is admissible under the attenua-

tion exception. *Kaupp v. Texas*, 538 U.S. 626, 633 (2003). The Court has identified three factors that are relevant to this attenuation inquiry: "the temporal proximity" of the stop and the discovery of the evidence, "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct." *Id.* (citation and internal quotation marks omitted). In this case, all three factors point strongly against attenuation.[3]

1. Temporal proximity. The first factor is the "temporal proximity" of the unlawful stop and the discovery of the evidence. *Brown v. Illinois*, 422 U.S. 590, 603 (1975). The shorter the time between the two, the more likely it is that the taint of the Fourth Amendment violation has not dissipated—i.e., the more likely it is that the police misconduct was the proximate cause of the discovery of the evidence.

Where only a short time elapses between the wrongful detention of the defendant and the officer's discovery of the evidence, the Court has thus found no attenuation. *See, e.g.*, *Kaupp,* 538 U.S. at 633 (finding no attenuation where police obtained defendant's confession only 10 to 15 minutes after unlawfully arresting him); *Taylor v. Alabama*, 457 U.S. 687, 691 (1982) (finding no attenuation where

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[3] Utah (Pet. Br. 15) and the United States (U.S. Br. 13) urge the Court to pay no mind to these factors, on the theory that they are relevant only to whether a confession, but not other evidence, is sufficiently attenuated from an unconstitutional detention. This theory is wrong. As we explain in our discussion of each factor, each captures part of the proximate cause inquiry and is thus relevant to the ultimate question of whether suppressing the evidence will deter future police misconduct.

"[p]etitioner was arrested without probable cause in the hope that something might turn up, and he confessed shortly thereafter"); *Dunaway v. New York*, 442 U.S. 200, 203 & n.2, 218 (1979) (finding no attenuation where defendant confessed within an hour after wrongful arrest); *Brown*, 422 U.S. at 604 (finding no attenuation where defendant's confession "was separated from his illegal arrest by less than two hours"); *Wong Sun v. United States*, 371 U.S. 471, 486 (1963) (finding no attenuation where defendant confessed shortly after being unlawfully arrested).

By contrast, where a long time elapses between the wrongful police conduct and the discovery of the evidence, the Court has found attenuation. *United States v. Ceccolini*, 435 U.S. 268, 272, 279 (1978) (finding attenuation where several months elapsed between the police misconduct and the obtaining of the evidence sought to be suppressed); *Wong Sun*, 371 U.S. at 491 (finding attenuation where several days elapsed between the wrongful arrest and the defendant's statement).

This "temporal proximity" factor weighs heavily against attenuation in this case. Where the police make a wrongful stop, run a warrant check, and conduct a search, the entire episode is one continuous transaction. The search takes place *during* the unlawful detention. In this case, the amount of time that passed between the wrongful stop and the search was much less than the hour or two the Court has found too short for attenuation in prior cases.

2. Intervening circumstances. The second factor the Court has found relevant to the attenuation inquiry is "the presence of intervening circumstances." *Brown*, 422 U.S. at 603-04. This factor also points strongly against attenuation, because in this situation, there are no intervening circumstances. The discovery of a warrant is an intended and foreseeable consequence of a warrant check.

"Intervening circumstance" is a term borrowed from proximate cause analysis in tort law. *See, e.g.*, *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) ("Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"). To relieve a tort defendant of liability, the intervening circumstance must be *unforeseeable*. W. Page Keeton et al., eds., *Prosser and Keeton on the Law of Torts* 303 (5th ed. 1984) ("Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which the defendant has subjected the plaintiff has indeed come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence."); 3 Stuart M. Speiser et al., *The American Law of Torts* 105 (2008) ("if the original negligent actor reasonably could have anticipated or foreseen the intervening act and its consequences, then the intervening act will not relieve the original actor from liability"); Dan B. Dobbs et al., *The Law of Torts* § 198 (2d ed., Westlaw) ("In these intervening cause cases, courts [ask] whether the intervening

cause itself was foreseeable."). The causal chain is not broken by the "intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct." *Restatement (Second) of Torts* § 443.

The Court's attenuation cases have likewise focused on whether the alleged intervening circumstance was an unforeseeable event unrelated to the officer's unlawful conduct (in which case the Court has found attenuation), or whether the alleged intervening circumstance was itself foreseeably caused by the officer's unlawful conduct (in which case the Court has found no attenuation). The paradigmatic intervening circumstance supporting a finding of attenuation is where the defendant spontaneously confesses to the crime.[4] *See Rawlings v. Kentucky*, 448 U.S. 98, 108 (1980) (finding attenuation where "petitioner's admissions were apparently spontaneous reactions"); *Ceccolini*, 435 U.S. at 276 ("Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition."); *Wong Sun*, 371 U.S. at 491 (finding attenuation where defendant voluntarily returned to the police station to make a statement).

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[4] The Utah Supreme Court took the view that the defendant's confession is the *only* intervening circumstance that can attenuate the causal connection between a wrongful stop and the subsequent discovery of evidence. Pet. App. 27-29. We think this view is too narrow. Intervening circumstances need not be confessions, but they must be events that are not foreseeable consequences of the wrongful stop.

By contrast, the Court has found no intervening circumstance, and thus no attenuation, where the defendant's statement was a foreseeable consequence of the police misconduct. *See Kaupp*, 538 U.S. at 633 (finding no attenuation where the defendant confessed during interrogation that took place shortly after his wrongful arrest); *Taylor*, 457 U.S. at 691 (finding no attenuation where the defendant confessed shortly after wrongful arrest "without any meaningful intervening event"); *Dunaway*, 442 U.S. at 218 (same); *Brown*, 422 U.S. at 604 (same).

The Court's focus on the foreseeability of the alleged intervening circumstance ensures that the exclusionary rule applies only where it will deter police misconduct, because an officer, like any other person, can be deterred only with respect to the foreseeable consequences of his actions. Here again, the attenuation exception to the exclusionary rule is closely analogous to proximate cause analysis in tort law, which likewise deters wrongdoing by holding tortfeasors responsible only for the foreseeable consequences of their negligence.

In this case, where the police made an unlawful stop and ran a routine warrant check, the discovery of an outstanding arrest warrant was of course the intended and foreseeable consequence. It was thus not an intervening circumstance that attenuated the causal connection between the unlawful stop and the search.

An intervening circumstance would be an event that is *not* a foreseeable consequence of the unlawful stop. For example, if while an officer is unlawfully

detaining a person, a bystander points to the person and declares "that man stole my wallet five minutes ago," the bystander's declaration could be an intervening circumstance breaking the causal connection between the unlawful stop and a subsequent search of the person for the wallet. If, in the midst of an unlawful detention, the person being detained commits a new crime such as striking the officer, the new crime would be an intervening circumstance. If a wrongfully detained person is released and then returns to the police station the next week to confess to a crime, his confession would be an intervening circumstance. The bystander's declaration, the new crime, and the spontaneous confession are intervening circumstances because they are not foreseeable consequences of the unlawful stop. But the discovery of an arrest warrant is exactly what one would expect from running a warrant check. It cannot be an intervening circumstance.

The discovery of an arrest warrant *could* be an intervening circumstance that breaks the causal chain between the unlawful stop and the search, but only if the discovery of the warrant is not a foreseeable consequence of the stop. For instance, if while one officer is unlawfully detaining a person, a second officer unexpectedly drives up and announces "I recognize that man as someone named in an arrest warrant," the second officer's announcement would be an intervening circumstance. If a wrongfully detained person spontaneously admits to having an outstanding arrest warrant, his admission could be an intervening circumstance. The second officer's announcement and the spontaneous admission are in-

tervening circumstances because they are not foreseeable consequences of the unlawful stop. By contrast, the discovery of an arrest warrant during a routine warrant check *is* a foreseeable consequence of the unlawful stop. For that reason, it cannot be an intervening circumstance.[5]

3. Purpose and flagrancy of police misconduct. The third factor the Court has found relevant to the attenuation inquiry is "the purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 604. Under this factor the Court has considered the officer's *purpose* in violating the Fourth Amendment, as well as the *obviousness* of the constitutional violation. *Cf. Herring v. United States*, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police misconduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."). This factor points strongly against attenuation as well. The unlawful stop in this case was for an impermissible investigatory purpose, and it was an obviously unconstitutional detention.

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[5] Amici Michigan et al. err in suggesting that the discovery of a warrant during a routine warrant check is a matter over which the "police officer lacks control." Michigan et al. Br. 10. The police have complete control over the decision to make an unlawful stop and run a warrant check. Amici argue that the police lack control over whether a warrant exists in the first place, *id.* at 10-11, but the relevant issue is whether the police control the decision to make the unlawful stop (and can thus be deterred from making the unlawful stop), not whether the police have control over the existence of the warrant.

Where the police violate the Fourth Amendment for investigatory purposes, "in the hope that something would turn up," *Taylor*, 457 U.S. at 691, the Court has refused to find attenuation. *See Kaupp*, 538 U.S. at 633 (finding no attenuation where the defendant was arrested in order to be questioned); *Taylor*, 457 U.S. at 693 (finding no attenuation where the police "involuntarily transported petitioner to the station for interrogation"); *Dunaway*, 442 U.S. at 218 (finding no attenuation where the defendant was "seized without probable cause in the hope that something might turn up"); *Brown*, 422 U.S. at 605 (finding no attenuation where the police acknowledged "that the purpose of their action was 'for investigation' or for 'questioning'").

By contrast, the Court has found attenuation where the police misconduct was not for investigatory purposes. *See Rawlings*, 448 U.S. at 109-110 (finding attenuation where the police detained the defendant, not for questioning, but rather "to avoid the asportation or destruction of the marihuana they thought was present"); *Ceccolini*, 435 U.S. at 279-80 (finding attenuation where there was "not the slightest evidence to suggest that [the officer] entered the shop or picked up the envelope with the intent of finding tangible evidence").

Here, by his own admission, Detective Fackrell deliberately stopped Strieff so Fackrell "could find out what was going on [in] the house." Pet. App. 4-5. After making the unlawful stop, Fackrell asked Strieff to "tell me what he was doing there." JA 18. This was a deliberate stop for investigatory purposes, in the hope that something would turn up. The

warrant check was made with the same investigatory purpose—to investigate whether Strieff had an outstanding warrant. JA 18-19. This was precisely the sort of police misconduct for which the Court has never found attenuation.

Police misconduct is "flagrant" under this standard where the police detain a person in a patently unconstitutional manner. *See Kaupp*, 538 U.S. at 632 (finding flagrancy where "the State does not even claim that the sheriff's department had probable cause to detain him"); *Taylor*, 457 U.S. at 691 (finding flagrancy where "[p]etitioner was arrested without probable cause"); *Dunaway*, 442 U.S. at 218 (finding flagrancy where "[p]etitioner was also admittedly seized without probable cause"); *Brown*, 422 U.S. at 605 (finding flagrancy where "[t]he impropriety of the arrest was obvious"). *Cf. Herring*, 555 U.S. at 143 (noting that "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional").

When Fackrell stopped Strieff, it was glaringly obvious that Fackrell lacked reasonable articulable suspicion that Strieff was involved in criminal activity. A stop such as the one in this case, "involving a brief encounter between a citizen and a police officer on a public street, is governed by the analysis we first applied in *Terry*." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (referring to *Terry v. Ohio*, 392 U.S. 1 (1968)). The *Terry* standard applies where, as here, the police detain a person "for the purpose of requiring him to identify himself." *Brown v. Texas*, 443 U.S. 47, 50 (1979). The Fourth Amendment permits such stops only where "a law enforcement officer has

'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

The suspicion must be *particularized*—that is, it must be suspicion that the individual person being stopped is engaged in criminal activity. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). "[M]ere propinquity to others independently suspected of criminal activity" is not enough. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Even if a "person happens to be on premises" where the police suspect drugs are present, the police can only stop the person if they have "suspicion directed at the person" himself. *Id.* at 94.

And the suspicion must be *objectively reasonable*—that is, it must amount to suspicion "viewed from the standpoint of an objectively reasonable police officer." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). It must be more than a "hunch" that the person being stopped is involved in criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

Measured by this standard, any reasonable police officer would have recognized instantly that Detective Fackrell was making an unlawful stop. By Fackrell's own admission, he decided to stop the first person he saw leaving the house he was watching, regardless of who that person turned out to be. Pet. App. 4-5; JA 17, 20-21. Fackrell had no idea who Strieff was or what Strieff had been doing. Fackrell admitted that he "had no reason to stop him other

than that he had left that house." JA 20-21. This stop was patently unconstitutional. As in *Brown*, "[t]he impropriety of the [stop] was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.'" *Brown*, 422 U.S. at 605.

Moreover, the only reason Fackrell was even watching the house was that the police had received an anonymous tip from a caller who "believed there was narcotics activity at the house" and "described some short stay traffic at the house." JA 15. Officers should know that reasonable suspicion does not arise from "the bare report of an unknown, unaccountable informant who neither explained how he knew about the [alleged criminal activity] nor supplied any basis for believing he had inside information about [the person being stopped]." *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

Fackrell's conduct during the unlawful stop made it even more flagrant. After detaining Strieff and asking him what was going on in the house, Fackrell could not even remember Strieff's answer, JA 23, which indicates that Strieff's answer did not give Fackrell any reason to suspect that Strieff was involved in crime. At that point, any reasonable officer would have recognized that the encounter should have been over. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015). Yet Fackrell continued to prolong the detention by asking for Strieff's identification and running the warrant check.

Utah errs in suggesting (Pet. Br. 31) that Fackrell "reasonably misjudge[d]" whether the Constitution permitted him to detain Strieff. To the contrary, Fackrell made an elementary error. Few rules governing the police are more fundamental and more well-known than the rule that the police may not detain someone without reasonable suspicion that the person being stopped is involved in crime. "Responsible law-enforcement officers [who] take care to learn what is required of them under Fourth Amendment precedent," *Davis*, 131 S. Ct. at 2429 (internal quotation marks omitted), know that they cannot detain people simply to find out what is going on inside a house. Responsible officers know that they need reasonable suspicion that the person they are stopping has committed a crime. *See, e.g.*, *Brown*, 443 U.S. at 50 ("When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment."); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

The trial court's legal conclusion that the stop was "not a flagrant violation of the Fourth Amendment," Pet. App. 102, is simply incorrect. The United States errs in implying (by using the verb "found," U.S. Br. 3) that this was a finding of fact. It was of course a conclusion of law, and for that reason the Utah Supreme Court properly gave it no deference. Pet. App. 8.

Utah is also mistaken in suggesting (Pet. Br. 24) that Fackrell could not have been deterred by the exclusionary rule because he was acting in "good

faith." Good faith is an *objective* standard, not a subjective one. *Davis*, 131 S. Ct. at 2427. The question is not whether the officer was pure of heart, but rather "whether a reasonably well trained officer would have known that the [stop] was illegal." *Leon*, 468 U.S. at 922 n.23. Any reasonably well trained officer would know that the stop in this case was utterly lacking in reasonable suspicion.

Fackrell, in any event, did not even claim to have subjective good faith. He testified, not that he erroneously believed he had reasonable suspicion to detain Strieff, but rather that he detained Strieff in order to "find out what was going on [in] the house." Pet. App. 4-5. As Fackrell conceded, he "had no reason to stop him other than that he had left that house." JA 20.

Moreover, while an officer's objective good faith may entitle him to rely on a facially valid warrant, *Leon*, *id.* at 914-17, on a statute, *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987), or on a court opinion, *Davis*, 131 S. Ct. at 2429, Fackrell was not relying on anything of the kind. He simply conducted an illegal stop. Good faith is not an exception to the requirement of reasonable suspicion. To conduct a *Terry* stop, an officer must actually have particularized, objectively reasonable suspicion. It is not enough that he merely has a good faith belief that he has reasonable suspicion.

All three of the factors the Court has identified as relevant to the attenuation inquiry thus point strongly against attenuation. First, the search was contemporaneous with the unlawful detention, so

the two were as temporally proximate as they could be. Second, there was no intervening circumstance, because Fackrell's discovery of the warrant was a foreseeable (indeed, an intended) consequence of the warrant check. Third, Fackrell's misconduct was flagrant—it was an obviously unconstitutional stop made for investigatory purposes. The evidence obtained from Strieff as a result of the unlawful stop is therefore not admissible under the attenuation exception to the exclusionary rule.

This outcome makes perfect sense in light of the purpose of the attenuation exception. The exception ensures that the exclusionary rule is not applied where the discovery of evidence is a remote or unforeseeable consequence of police misconduct, because in that situation excluding the evidence would not deter the police from violating the Constitution. Here, by contrast, the discovery of evidence was hardly a remote or unforeseeable consequence of Fackrell's unlawful stop. Rather, it was a direct and foreseeable consequence of the unlawful stop. Applying the exclusionary rule will thus deter officers like Fackrell from committing similar constitutional violations in the future.

2. The interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression.

The Court has used the word "attenuation" in a second, newer sense as well, where "even given a direct causal connection, the interest protected by the

constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson*, 547 U.S. at 593. There was no attenuation in this sense either, because here the interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression. The United States errs (U.S. Br. 15-18) in suggesting otherwise.

The Fourth Amendment protects the "inestimable right of personal security," which "belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study." *Terry*, 392 U.S. at 8-9. "[A]s this Court has always recognized, '[n]o right is held more sacred.'" *Id.* at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958). This freedom from the intrusions of police officers is "one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson v. United States*, 333 U.S. 10, 17 (1948).

The purpose of the exclusionary rule is "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). The interest that is served by suppressing evidence obtained during an unlawful detention is to deter the police from conducting similar

unlawful detentions in the future. *See Davis*, 131 S. Ct. at 2426. Here, that is exactly what suppression will accomplish. Police officers in Fackrell's shoes will no longer have the incentive to detain and run routine warrant checks on the people they encounter without reasonable suspicion, because they will know that the fruits of an ensuing search will be inadmissible.

In the cases where the Court has found "attenuation" in this second, newer sense, the constitutional guarantees that were involved protected very different interests, interests other than that of not being wrongfully detained by the police. These were interests that would not have been served by suppression.

Hudson involved a violation of the common law knock-and-announce rule. *Hudson*, 547 U.S. at 589. The Court explained that the interests protected by the knock-and-announce rule—assuring the officers' safety, preventing the destruction of property, and allowing residents to preserve their dignity by getting dressed before the police enter, *id.* at 594—"are quite different" from the interests protected by the Fourth Amendment's prohibition of unlawful warrantless searches, in that they "do not include the shielding of potential evidence from the government's eyes." *Id.* at 593. Indeed, the Court was careful to distinguish *Hudson* from cases—like the present case—"excluding the fruits of unlawful warrantless searches," because in such cases the interest protected by the constitutional guarantee *is* served by suppression. *Id.*

Likewise, *New York v. Harris*, 495 U.S. 14, 16 (1990), involved a violation of the rule prohibiting the police from entering a suspect's home to make a routine warrantless arrest. The Court explained that this rule "was designed to protect the physical integrity of the home," not to prevent the police from arresting the defendant or taking his confession. *Id.* at 17. The Court accordingly concluded that "suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal." *Id.* at 20. The Court carefully distinguished *Harris* from cases—like the present case—involving "the familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *Id.* at 19. In such cases, suppression *does* serve the interest protected by the Fourth Amendment, the interest in not being detained by the police without reasonable suspicion.

Unlike in *Hudson* and *Harris*, the interest protected by the Fourth Amendment in this case is precisely the interest that is served by suppression. It is the interest in not being detained by the police without reasonable suspicion. The discovery of the evidence in this case was thus not attenuated from the unlawful stop in the *Hudson* sense of "attenuation."

In arguing otherwise, the United States conflates the unlawful stop with the arrest on the warrant. The present case challenges the former, not the latter. As the United States concedes (U.S. Br. 16), "[a]pplication of the exclusionary rule … aligns suppression with the basic purpose of the *Terry* doctrine:

to prevent the police from stopping and frisking citizens based only on unsupported hunches." *Terry* is designed to prevent detentions without reasonable suspicion, such as the unlawful stop that took place in this case. Suppression for *Terry* violations is the standard way of enforcing the *Terry* doctrine, in this case just like in any other.

The United States makes a very poor analogy (U.S. Br. 17 n.3) to a negligent driver whose passengers are harmed by a cause unrelated to the driver's negligence, such as an airplane falling from the sky. A much better analogy would be to a negligent driver whose passengers are injured in a crash, the heightened risk of which was created by the driver's own negligence. By running warrant checks on the people they encounter, regardless of reasonable suspicion, the police deliberately heighten their chances of finding an arrest warrant and making an arrest.

The United States also errs (U.S. Br. 18-20) in claiming support from *Segura v. United States*, 468 U.S. 796 (1984), and *Johnson v. Louisiana*, 406 U.S. 356 (1972). In *Segura*, "not even the threshold 'but for' requirement was met," because "[t]he illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant." *Segura*, 468 U.S. at 815. To the extent *Segura* nevertheless discussed attenuation, it was only to reject the contention that the causal chain could have included a nonexistent "'constitutional right' to destroy evidence." *Id.* at 816. In *Johnson*, the Court discussed this issue in a single paragraph, at the end of an opinion addressing the completely different topic of whether the Constitution permits

non-unanimous jury verdicts. *Johnson*, 406 U.S. at 365. Even this single paragraph is off-point. The constitutional violation in *Johnson* was a warrantless home arrest, as in *Harris*. *Id.* at 358. As in *Harris*, the Court found the exclusionary rule inapplicable, particularly in light of the fact that Johnson had subsequently been taken before a magistrate and arrested properly. *Id.* at 365. Neither *Segura* nor *Johnson* suggests that suppression would not serve the interest protected by the Fourth Amendment in not being wrongfully detained by the police.

3. The United States' argument concerning identity-related evidence is misplaced in this case and is incorrect in any event.

The United States reproduces (U.S. Br. 22-29) the argument it made in *Tolentino v. New York*, No. 09-11556, *cert. dismissed as improvidently granted*, 563 U.S. 123 (2011), that evidence of a defendant's identity is not a suppressible fruit of an unlawful seizure. This argument is out of place in the present case, which, unlike *Tolentino*, does not involve the suppression of evidence of the defendant's identity or evidence solely derived therefrom. The argument is incorrect in any event.

In *Tolentino*, the defendant sought to suppress Department of Motor Vehicles records that were in the DMV's own possession long before the defendant was unlawfully detained. The stop was not the means by which the government obtained the evidence at issue. The present case, by contrast, involves the suppression of physical evidence found in

Edward Strieff's pockets while he was being unlawfully detained by the police. The unlawful stop *was* the means by which the government obtained this evidence. The United States' argument about identity-related evidence, if accepted, would mean that the *arrest warrant* is not suppressible, but Strieff has never contended that the arrest warrant is suppressible.

Nor does this case involve the suppression of evidence "derive[d] from the bare fact of a suspect's identity." U.S. Br. 25. The "fact" of Strieff's identity was just one of three facts from which the evidence in this case was derived. The others were of course a patently unconstitutional detention and a routine warrant check. The United States' "bare fact" argument, if accepted, would permit the introduction of evidence obtained "*solely* through the *otherwise lawful* use of information." *Id.* (emphases added). But it would not permit the introduction of the evidence found in Edward Strieff's pockets as the direct result of an unconstitutional detention. The present case involves physical evidence and a straightforward *Terry* violation, not evidence of identity or evidence solely derived therefrom.

The United States' argument is, in any event, incorrect. It would allow the police, without any suspicion whatsoever, to stop every pedestrian and every car on the road in order to demand identification, run warrant checks on every person they stop, and conduct searches whenever the database returns a hit. In the view of the United States, any evidence obtained as a result of such stops would be admissible as evidence derived from the defendants' identi-

ty. Likewise, the police could, without any suspicion of wrongdoing, barge into all homes and demand identification from the occupants, run warrant checks on everyone, and conduct searches as above. As the United States sees it, evidence obtained as a result of such home invasions would be admissible as evidence derived from the defendants' identity. This argument is a blueprint for a police state. To our knowledge, it has never been accepted by any court. The three Court of Appeals cases the United States cites (U.S. Br. 27) in support of the rule it proposes do not, in fact, apply any such rule, but merely apply the attenuation exception in a conventional way to the particular facts of each case.

This Court's precedents demonstrate that evidence of a defendant's identity *is* suppressible if the police obtain that evidence by violating the Fourth Amendment. Fingerprints, for example, must be suppressed if the police procure them by means of an unlawful arrest. *Hayes v. Florida*, 470 U.S. 811, 813-18 (1985); *Davis v. Mississippi*, 394 U.S. 721, 722-24 (1969). Photographic and lineup identifications are "suppressible fruits of the Fourth Amendment violation." *United States v. Crews*, 445 U.S. 463, 472 (1980); *see also United States v. Wade*, 388 U.S. 218 (1967). Evidence is likewise suppressible if it was obtained during an unlawful stop for the purpose of discovering the defendant's identity. *See, e.g.*, *Prouse*, 440 U.S. at 650-51, 663 (affirming the suppression of marijuana obtained during an unlawful automobile stop for the purpose of checking the driver's license).

The United States attempts (U.S. Br. 28) to sidestep all these cases by drawing a metaphysical distinction between the use of identity information "to identify the defendants" and the use of identity information "to link the defendants to a crime." But this is no distinction at all. In a criminal investigation, the purpose of identifying a defendant is always to link him to a crime.

The United States bases its theory primarily on a single sentence in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), in which the Court stated: "The 'body' or identity of a defendant … is never itself suppressible as a fruit of an unlawful arrest." *See also id.* at 1043 (paraphrasing this sentence). In context, however, the Court was referring only to the defendant's physical body or identity, not to "identity" in the sense of documentary evidence identifying the defendant. Lopez-Mendoza argued that his unlawful arrest should exempt him from having to appear in court. *Id.* at 1040. The Court rejected this argument, because it was contrary to the familiar principle that the defendant's person is not a suppressible fruit of an unlawful arrest. *Id.* at 1039-40 (citing, *inter alia*, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975), and *Frisbie v. Collins*, 342 U.S. 519, 522 (1952)). *Lopez-Mendoza* had no occasion to discuss the suppression of evidence of identity in the sense of documents identifying the defendant, because Lopez-Mendoza did not seek to suppress any such evidence. *Lopez-Mendoza* thus provides no support for the United States' view.

But there is no need to address this issue in the present case, which involves the suppression of nei-

ther a defendant's identity nor evidence derived solely therefrom.[6] This case involves the suppression of physical evidence found in the defendant's pockets as a direct result of a clear violation of the Fourth Amendment.

B. The exclusionary rule is necessary to deter the police from making unconstitutional stops to run routine warrant checks.

The purpose of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis*, 131 S. Ct. at 2426. In certain situations, the police have such a strong incentive to violate the Fourth Amendment that exclusion is the only remedy that will assure their compliance with the Constitution. As the Court has explained, "the value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. The "benefits of deterrence" thus "outweigh the costs," *Herring*, 555 U.S. at 141, in circumstances where, in the rule's absence, the police would be very likely to engage in a pattern of repeated Fourth Amendment violations.

This is such a circumstance. This case involves a recurring situation in which some police officers are

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[6] Nor does this case provide any occasion to consider amicus CJLF's recitation of the standard arguments against the exclusionary rule, arguments the Court has rejected for decades. *See, e.g.*, *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in the judgment) ("the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt").

not just likely to violate the Fourth Amendment; they already do. In some jurisdictions, the police run routine warrant checks on the people they encounter, regardless of whether the police have reasonable suspicion of criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants.

This is not surprising, considering the incentives the police face. Arrest warrants exist for a large fraction of the population. The police know that if they routinely stop people and check for warrants, a substantial percentage of the checks will yield "hits." Where the police discover an outstanding warrant, they can perform an arrest of a person whom they would otherwise lack probable cause to arrest, and they can conduct a search incident to arrest of a person whom they would otherwise lack probable cause to search. Where the warrant check comes back negative, the police send the person on his way, after subjecting him to the indignity and disruption of an unconstitutional interaction with the police. The exclusionary rule is necessary to deter this practice.

Moreover, the deterrence value of the exclusionary rule is at its peak where police conduct is "sufficiently culpable that such deterrence is worth the price paid by the justice system"—that is, where the police are engaging in "deliberate, reckless, or grossly negligent conduct." *Herring*, 555 U.S. at 144. Exclusion is appropriate where the police act deliberately in circumstances where they ought to know that they are violating the Constitution—where they "may properly be charged with knowledge, that the search was unconstitutional under the Fourth

Amendment." *Krull*, 480 U.S. at 348-49 (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)).

Again, this is such a circumstance. These routine warrant checks, in the absence of reasonable suspicion, are not isolated accidents. They are deliberately undertaken by police officers who ought to know the basic Fourth Amendment principle that reasonable suspicion requires specific, particularized facts demonstrating that the person being detained is or has been involved in criminal activity. This is police misconduct that only the exclusionary rule can deter.

For this reason, many lower courts have recognized that the only realistic way to deter the police from conducting warrant checks without reasonable suspicion is to exclude the evidence so obtained. "Were it otherwise," the Kansas Supreme Court observed, "law enforcement officers could randomly stop and detain citizens, request identification, and run warrants checks despite the lack of any reasonable suspicion to support the detention, knowing that if the detention leads to discovery of an outstanding arrest warrant, any evidence discovered in the subsequent search will be admissible against the defendant." *State v. Moralez*, 300 P.3d 1090, 1102 (Kan. 2013).

Several state courts, which have a broad view of how the state's police officers conduct themselves, have expressed the same concern. As the Texas Court of Criminal Appeals concluded, "to admit the physical evidence because of the fortuity that an arrest warrant happens to come to light before the evidence is discovered perversely serves to encourage,

rather than discourage, official misconduct and renders the Fourth Amendment toothless." *State v. Mazuca*, 375 S.W.3d 294, 306 (Tex. Crim. App. 2012). The Oregon Supreme Court likewise recognized that where "people are unlawfully detained in the hope of ultimately executing outstanding warrants, the exclusionary rule serves as a deterrent to protect the innocent, not just the guilty, from unreasonable searches and seizures." *State v. Bailey*, 338 P.3d 702, 711 (Or. 2014).

The Appellate Court of Illinois noted:

> suppressing evidence under the present circumstance furthers the goal of the exclusionary rule. In fact, it appears to be the only way to deter the police from randomly stopping citizens for the purpose of running warrant checks. …. If we were to adopt the rule that the State advocates, there would be no reason for the police not to stop whomever they please to check for a warrant.

People v. Mitchell, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005). *See also State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011) (applying the exclusionary rule to deter the police from "routinely illegally seizing individuals, knowing that the subsequent discovery of a warrant would provide after-the-fact justification for illegal conduct"); *State v. Shaw*, 64 A.3d 499, 512 (N.J. 2012) ("The random detention of an individual for the purpose of running a warrant check—or determining whether the person is wanted on a particular warrant—cannot be squared with values that inhere in the Fourth Amendment."); *State v. Grayson*, 336

S.W.3d 138, 149 (Mo. 2011) ("To hold that the discovery of a warrant in this case removed the taint of the illegality would be akin to holding that the substance of a confession obtained by coercion removes the taint of the coercive practices used to obtain it.") (citation omitted).

The Sixth Circuit has also thoroughly addressed this need for deterrence. After explaining why the exclusionary rule ought to apply, the court continued:

> To hold otherwise would create a rule that potentially allows for a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a 'police hunch' that the residents may: 1) have outstanding warrants; or 2) be engaged in some activity that does not rise to a level of reasonable suspicion. Despite a lack of reasonable suspicion, a well-established constitutional requirement, the officer may then seize those individuals, ask for their identifying information (which the individuals will feel coerced into giving as they will have been seized and will not feel free to leave or end the encounter), run their names through a warrant database, and then proceed to arrest and search those individuals for whom a warrant appears. Under this scenario, an officer need no longer have reasonable suspicion or probable cause, the very crux of our Fourth Amendment jurisprudence.

United States v. Gross, 662 F.3d 393,404-05 (6th Cir. 2011).

As these courts have recognized, the exclusionary rule is the only meaningful deterrent. The United States asserts (U.S. Br. 29-32) that officers already face substantial deterrents to making these unlawful stops, in the form of danger to themselves, civil liability, investigation by the Justice Department, and community hostility. This assertion cannot be reconciled with the reality that officers in some jurisdictions routinely run warrant checks on the people they meet, even without reasonable suspicion. It is not hard to see why these ostensible deterrents do not work. Someone unable to pay a traffic ticket is unlikely to have the wherewithal to obtain counsel. Lawyers are unlikely to take such cases, which require difficult factual investigation, and in which the possibility of a significant recovery is unlikely. The Justice Department is able to investigate only a tiny percentage of police departments.[7] The officers most prone to making unconstitutional *Terry* stops are often those least concerned about how they are viewed in the communities they police.

The Seventh Circuit, in the leading case taking the opposing view, was concerned that applying the exclusionary rule would allow the defendant to go

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[7] In the past two decades the Justice Department has investigated 67 police departments. Kimbriell Kelly et al., *Forced Reforms, Mixed Results*, Washington Post, Nov. 13, 2015 (http://goo.gl/01WmJ0). There are approximately 18,000 police agencies in the United States. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 Minn. L. Rev. 1343, 1367 (2015).

free despite the arrest warrant. *United States v. Green*, 111 F.3d 515, 521 (7th Cir. 1997) ("It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'") But this concern is unfounded, because the defendant will not go free. The police have every right to make a lawful arrest of a person named in an arrest warrant. As the court below correctly observed, "[n]o one is contesting—or even could reasonably contest—the arrest on the outstanding warrant." Pet. App. 32 n.12. The exclusionary rule is necessary to deter unlawful stops, but in this situation the defendant can still be arrested for the offense that gave rise to the warrant.[8]

Utah (Pet. Br. 26-27) and the United States (U.S. Br. 31) acknowledge the exclusionary rule's deterrent value, but they are mistaken, for several reasons, in supposing that the exclusionary rule is

[8] When the defendant is arrested he can also be searched incident to the arrest, but only to the extent necessary to protect the officer's safety and to preserve evidence of the offense for which the defendant is being arrested. The defendant cannot be searched for evidence of *other* unrelated offenses which the police lack probable cause to believe the defendant has committed. The Court has made clear that "the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence *of the offense of arrest*." *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (emphasis added); *see also id.* at 353 (Scalia, J. concurring) (observing that a search incident to arrest is lawful "only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred").

needed only to deter a subset of unlawful stops the state refers to as "dragnet-type" stops (Pet. Br. 27).

First, the unconstitutional stops that will be deterred by the exclusionary rule are not merely cases of "isolated negligence" as in *Herring*, 555 U.S. at 137. Rather, these warrant checks without reasonable suspicion are common enough to be "systemic error." *Id.* at 147. They form a "demonstrated pattern" of constitutional violations. *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment). It is ordinary police practice in some jurisdictions for officers to run warrant checks on the people they meet, regardless of whether the police have any reason to believe that the citizens they encounter have committed any wrongdoing or have any outstanding arrest warrants. It will quickly become ordinary police practice everywhere if the Court holds that the exclusionary rule does not apply.

Second, these unconstitutional stops need deterring whether or not the police structure them as "dragnets." No doubt, if the police were to cordon off a neighborhood and run "dragnet-type" warrant checks on every person within the perimeter, the police would be committing a wholesale violation of the Fourth Amendment, and the exclusionary rule would be an appropriate deterrent to such behavior. But the Fourth Amendment violation would be just as wholesale, and the exclusionary rule would be just as appropriate a deterrent, if the unlawful warrant checks were being run by a single police officer like Detective Fackrell, who simply walks around a neighborhood and runs warrant checks without reasonable suspicion on the people he happens to en-

counter. There is nothing special about "dragnets" that justifies treating them differently from any other "widespread pattern of violations." *Id.*

Third, these unconstitutional stops are not even necessary for the police to serve arrest warrants. As the United States concedes (U.S. Br. 30), an officer seeking to learn whether a person has an outstanding warrant has several options that would not violate the Constitution. The officer could ask the person his name without detaining him and taking his ID. The officer could follow the individual to his car and use the license plate number to check the warrant database. The officer could do some old-fashioned investigation and speak with the person's neighbors or coworkers. The problem is that some officers are currently choosing the unconstitutional shortcut of detaining people without reasonable suspicion.

Fourth, as recent events have made all too clear, in many communities unconstitutional stops are giving rise to considerable distrust of the police. The Justice Department's investigation of Ferguson concluded that unlawful stops and warrant checks formed part of a pattern of police behavior that has "generated great distrust of Ferguson law enforcement, especially among African-Americans." *Investigation of the Ferguson Police Department* at 79. The Justice Department concluded that this resentment of the police made policing "less effective, more difficult, and more likely to discriminate." *Id.* There are likely many other communities in the United States where the climate would be found to be similar if

they were investigated as thoroughly as the Justice Department investigated Ferguson.

Finally, the exclusionary rule's deterrent value is at its greatest when brought to bear on the individual officer's judgment in an individual case. An officer observing a person in circumstances falling short of reasonable suspicion must make a choice. Should he detain the person unlawfully, in the hope that the person will turn out to have an outstanding arrest warrant? Or should he gather more information, which may give him reasonable suspicion to conduct a *Terry* stop? If the exclusionary rule applies, officers will choose the second option. But if the exclusionary rule does not apply, officers will choose the first. Officers make this choice every day, in cities all over the country, including many cities where the police know that a significant percentage of the residents have outstanding arrest warrants. This is exactly why we have the exclusionary rule.

It bears emphasizing that most of the people protected by the exclusionary rule against these unlawful stops will be people *without* outstanding arrest warrants, people the police have no business disturbing. As Justice Jackson observed, there are many unlawful stops "which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J. dissenting). His conclusion is still true today: "Courts can protect the innocent against such invasions indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Id.*

CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.

Respectfully submitted,

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