No. 07-513

In the Supreme Court of the United States

BENNIE DEAN HERRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule applies when a police officer makes an arrest after receiving information from a different law enforcement agency that an outstanding warrant exists, and that information was incorrect because of a negligent error by that agency in failing to remove the warrant from its files.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 492 F.3d 1212. The opinion of the district court (Pet. App. 13a-18a) is reported at 451 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2007. The petition for a writ of certiorari was filed on October 11, 2007, and granted on February 19, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search-

es and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and possessing methamphetamine, in violation of 21 U.S.C. 844(a). He was sentenced to 27 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-12a.

1. On July 7, 2004, Investigator Mark Anderson of the Coffee County Sheriff's Department was told by another officer that petitioner was retrieving property from an impounded vehicle at the Sheriff's Department. Pet. App. 2a, 13a-14a; J.A. 17. Investigator Anderson, who knew petitioner and had been told by another officer that there was an outstanding warrant for petitioner's arrest, asked warrant clerk Sandy Pope to check the Coffee County Sheriff's Department's internal records. Pet. App. 2a; J.A. 16, 18. When Pope reported that there were no active warrants in Coffee County, Investigator Anderson asked her to check with neighboring Dale County. Pet. App. 2a. Pope telephoned the Dale County Sheriff's Department, and was told by its warrant clerk, Sharon Morgan, that a check of an in-office database maintained by the Dale County Sheriff's Department showed an active warrant for petitioner's arrest on charges of failure to appear on a felony charge. *Ibid.* Pope relayed the information to Investigator Anderson and asked Morgan to fax her a copy of the warrant. *Id.* at 2a, 14a; J.A. 34-35, 40-41.

Investigator Anderson and Deputy Neil Bradley immediately left the station to pursue petitioner, who was already leaving in a pickup truck. Pet. App. 2a; J.A 19-20. The officers pulled over petitioner's truck less than a mile from the Coffee County Sheriff's Department and placed him under arrest. Pet. App. 2a; J.A. 25. In petitioner's pocket, the officers found methamphetamine. Pet. App. 14a. Under the pickup's front seat, they found a handgun. *Id.* at 3a.

Meanwhile, Dale County warrant clerk Morgan unsuccessfully attempted to locate a copy of the warrant for petitioner's arrest. Pet. App. 3a. The Dale County Sheriff's Department and the Dale County Clerk's Office do not share a computer network, J.A. 45, 55, so Morgan called the Dale County Clerk's Office, and was told that the warrant had been recalled. Pet. App. 3a, 14a. Morgan "immediately" called Coffee County warrant clerk Pope, who relayed the information to Investigator Anderson and Deputy Bradley. *Id.* at 3a; J.A. 42. By that point, however, the officers had already arrested petitioner and searched his person and the pickup. Pet. App. 3a. Between 10 and 15 minutes elapsed between the time Dale County warrant clerk Morgan told Coffee County warrant clerk Pope that there was an active warrant for petitioner's arrest and when Morgan called back with the correct information. *Ibid.*

At the time of the suppression hearing in this case, Investigator Anderson had been a police officer for 16 years, J.A. 15, and Coffee County warrant clerk Pope had been at her job for five years, J.A. 32. Coffee County and Dale County are adjacent to one another, J.A. 27, and Anderson and Pope both testified that they had previously relied on information from Dale County about warrants. J.A. 26-27, 32. Anderson and Pope further testified that, before petitioner's arrest, they had never had cause to question any

information they received from Dale County. J.A. 16, 27, 33.

2. a. Petitioner moved to suppress the physical evidence against him on the ground that it was the fruit of an unlawful arrest. Pet. App. 3a.[1] After holding a suppression hearing, a magistrate judge recommended that petitioner's motion be denied in relevant part. J.A. 66-72. The magistrate judge specifically found that Investigator Anderson and Deputy Bradley "acted in good faith when they stopped and arrested [petitioner] based on the representations of the warrant clerks that there was an active outstanding felony warrant for [petitioner] in Dale County." J.A. 70.

b. The district court held a supplemental hearing, and issued an opinion adopting the magistrate judge's recommendation. Pet. App. 13a-18a.[2] The district court found

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[1] After being pulled over, petitioner exited his truck and walked towards the officers, at which point Deputy Bradley stated that petitioner was under arrest. J.A. 20. Petitioner then turned and started walking back towards his truck, but he was stopped by Investigator Anderson. J.A. 20. The search of petitioner's truck occurred after petitioner had been handcuffed and placed in the officers' car. J.A. 20-22.

On October 7, 2008, this Court will hear argument in *Arizona* v. *Gant*, No. 07-542, which presents the following question: "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?" Petitioner has not made a separate challenge to the search of his vehicle at any point during this litigation, including in his brief on the merits in this Court, which was filed more than two months after the Court granted certiorari in *Gant*.

[2] At the initial suppression hearing, Dale County warrant clerk Morgan answered "[s]everal times" when asked "how many times have you had or has Dale County had problems, any problems with communicat[ing] about warrants." J.A. 42. At the supplemental

that, when a warrant has been recalled, Dale County warrant clerk Morgan will "[n]ormally" receive a phone call from either the Dale County Clerk's Office or a judge's chambers, enter that information in the Dale County Sheriff's Department's computer system, and dispose of the physical copy of the warrant. *Id.* at 14a-15a; J.A. 54-55, 60. In this case, although the recalled warrant had been returned to the Dale County Clerk's Office, the Dale County Sheriff's Department's records did not reflect that fact. Pet. App. 15a. The district court accepted the testimony of Dale County warrant clerk Morgan that "the mistake was probably the fault of the Dale County Sheriff's Department, not that of the Dale County Clerk's Office." *Ibid*.

The district court determined that this Court's decision in *Arizona* v. *Evans*, 514 U.S. 1 (1995), which recognized an exception to the exclusionary rule for arrests that occur as a result of erroneous computer records kept by court employees, should be extended to cover similar mistakes by law enforcement personnel so long as there is a "mechanism to ensure [the recordkeeping's] system accuracy over time" and there is no evidence that "the system 'routinely leads to false arrests.'" Pet. App. 17a (brackets in original) (quoting *Evans*, 514 U.S. at 17 (O'Connor, J., concurring)). In this case, the district court found that "the mistake was

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hearing, Morgan denied having made that statement, and stated: "I have never, that I can immediately remember ever had any problem with communication whatsoever between Coffee County Sheriff's Office, Sandy [Pope], and myself." J.A. 61-62. After reviewing the court reporter's tape, the district court concluded that Morgan's statements were "confusing and essentially unhelpful" because "it is unclear whether Morgan and her questioner were talking about communication problems between the Dale County Sheriff's Department and the Coffee County Sheriff's Department or between the Dale County Sheriff's Department and the Dale County Clerk's Office." Pet. App. 17a-18a.

discovered and corrected within ten to 15 minutes," that there was "no credible evidence of routine problems with disposing of recalled warrants," and that the recordkeeping systems of both the Dale County Clerk's Office and the Dale County Sheriff's Department "were, and are, 'reliable.' " *Id.* at 17a-18a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court concluded that "the searches violated [petitioner's] Fourth Amendment rights," because petitioner's arrest had not been supported by probable cause or a warrant. *Id.* at 5a. But the court also stated that "whether to apply the exclusionary rule is 'an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Ibid.* (brackets in original) (quoting *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983))). Applying the framework developed in *Leon* and *Evans*, the court of appeals determined that suppression is not warranted unless there was "misconduct by the police or by adjuncts to the law enforcement team," "application of the [exclusionary] rule [will] result in appreciable deterrence of that misconduct," and "the benefits of the rule's application [will] not [be] outweigh[ed by] its costs." *Id.* at 9a.

As for the first condition, the court of appeals determined that "[t]he conduct in question" was the failure of an unidentified person in the Dale County Sheriff's Department "to record in that department's records the fact that the arrest warrant for [petitioner] had been recalled or rescinded." Pet. App. 9a. The court described that conduct as "at the very least negligent," and it "assume[d] for present purposes that the negligent actor * * * is an adjunct to law enforcement in Dale County and is to be treated for

purposes of the exclusionary rule as a police officer." *Ibid*. (citation omitted).

Turning to the second issue, the court of appeals concluded that applying the exclusionary rule in "these circumstances * * * will not deter bad record keeping to any appreciable extent, if at all." Pet. App. 10a. The court stated that "[d]eterrents work best where the targeted conduct results from conscious decision making," but here "[t]here is no reason to believe that anyone in the Dale County Sheriff's Office weighed the possible ramifications of being negligent and decided to be careless in record keeping." *Ibid.* The court of appeals also observed "that there are already abundant incentives for keeping records current," including "the inherent value of accurate record-keeping to effective police investigation," "the possibility of reprimand or other job discipline for carelessness," "the possibility of civil liability," and the "risk that the department where the records are not kept up to date will have relevant evidence excluded from one of its own cases as a result." *Id*. at 10a-11a. In addition, the court of appeals emphasized "the unique circumstance here that the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of the negligent record keeping, but instead it would scuttle a case brought by officers of a different department in another county, one whose officers and personnel were entirely innocent of any wrongdoing or carelessness." *Id*. at 11a.

Finally, the court of appeals determined that "any minimal deterrence that might result from applying the exclusionary rule in these circumstances would not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence." Pet. App. 11a-12a. The court of appeals emphasized, however, "that the test for reasonable police conduct is objective," and that "[i]f faulty record-

keeping were to become endemic in [Dale County], * * * officers in Coffee County might have a difficult time establishing that their reliance on records from their neighboring county was objectively reasonable." *Id.* at 12a.

SUMMARY OF ARGUMENT

The exclusionary rule generates substantial social costs by preventing factfinders from hearing what is often highly probative and inherently reliable evidence. Accordingly, the Court has carefully limited the rule's application to situations where the deterrent purposes that it is designed to serve will be appreciably furthered and where the benefits of suppression outweigh its sizeable costs. Under those principles, suppression is not warranted when police officers in the field make an arrest in objectively reasonable reliance on a statement by another law enforcement agency that there is a warrant for someone's arrest, where that statement was erroneous because of a negligent error in recordkeeping by an employee of that other law enforcement agency.

This Court has previously declined to apply the exclusionary rule where an arresting officer acts in good-faith reliance on information received from magistrates or court employees or on statutes enacted by legislatures. The Court has emphasized that the exclusionary rule is not designed—and should not be deployed—to deter objectively reasonable conduct. The Court has also recognized that police officers in the field must be allowed to rely on information they receive from others when it is reasonable to do so. In this case, there is no basis to conclude that the arresting officers acted unreasonably in relying on the report that there was an outstanding warrant for petitioner's arrest. Rather, the record refutes any suggestion that the officers had any objective basis to question the information

they received. Accordingly, suppression cannot be justified by an interest in deterring future officers in their position.

Nor can suppression be justified by the interest in deterring negligent mistakes in recordkeeping by police employees. This case involves a clerical employee's isolated failure to act diligently rather than the sort of intentional or flagrantly abusive police conduct for which the exclusionary rule was originally designed. Police departments and their employees already have ample built-in incentives to keep accurate records. Arrests based on recalled warrants would ordinarily squander scarce police resources and risk the ire of the citizenry. Failure to keep accurate records could potentially subject both a police department and its employees to civil liability, especially were they to engage in the sort of deliberately shoddy recordkeeping hypothesized by petitioner. Any incremental deterrence would be particularly attenuated and indirect here, because the employee who made the negligent error and the officers who made the arrest work for entirely different police departments. And even if suppression would result in some conceivable deterrence benefits, those benefits cannot outweigh the societal costs where bad faith is not at issue and the arrest occurred despite the best efforts of everyone directly involved to discover the truth.

The fact that the clerical employee who made the negligent recordkeeping error at issue here works for the Dale County Sheriff's Department, rather than a court, see *Arizona* v. *Evans*, 514 U.S. 1 (1995), does not justify a different result. Although this Court has repeatedly stated that the purpose of the exclusionary rule is to deter the police rather than other actors in the criminal justice system, it has never held that suppression is warranted *whenever* a Fourth Amendment violation is attributable to the actions of any-

one who works for a police department, even a clerical employee.

This case affords no opportunity to consider whether the exclusionary rule should be modified in situations involving large-scale information systems that are accessible by multiple law enforcement agencies. No such information system is at issue here. The creation of a computer database by the Dale County Sheriff's Department for in-office use did not amplify the effects of the recordkeeping error that led to petitioner's arrest; the result would have been the same if the records were handwritten on file cards kept in a steel box. The district court heard no evidence and made no findings about the sorts of massive data systems discussed by petitioner and his amici, and even their limited presentations about such systems are misleading and incomplete.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT SUPPRESSION IS NOT WARRANTED IN THIS CASE

The issue in this case is whether the exclusionary rule should be applied to suppress physical evidence obtained when a police officer makes an arrest after receiving information from a different law enforcement agency about an outstanding warrant, where the information was incorrect because of a negligent error by an employee of that other agency.[3] This Court's decisions make clear that the exclusionary rule is a remedy designed to deter future Fourth

[3] This case has been litigated on the assumption that the question is whether the exclusionary rule may properly be applied in the circumstances presented here; the government has not contended that petitioner's arrest was constitutional. Br. in Opp. 7-25. The Court should "take the case as it comes to [it]." *United States* v. *Leon*, 468 U.S. 897, 905 (1984); accord *Arizona* v. *Evans*, 514 U.S. 1, 6 n.1 (1995).

Amendment violations rather than to vindicate rights that have already been violated. Accordingly, it should be applied only when doing so will have tangible benefits that outweigh the rule's substantial social costs. Neither criterion is satisfied here.

A. This Court Has Limited Application Of The Exclusionary Rule To Situations Where It Is Most Likely To Accomplish Its Remedial Aims Without Imposing Undue Costs

1. The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. Amend. IV. The Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995), and this Court has "emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution," *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 362 (1998). "The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself," and "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (quoting *United States* v. *Calandra*, 414 U.S. 338, 354 (1974)).

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights." *Leon*, 468 U.S. at 906 (citation omitted). "[T]he rule is prudential rather than constitutionally mandated." *Scott*, 524 U.S. at 363. Its purpose is not to "cure the invasion of the defendant's rights which he has already suffered," *Leon*, 468 U.S. at 906 (citation omitted), but to prevent "future violations

of Fourth Amendment rights through the rule's general deterrent effect," *Evans*, 514 U.S. at 10; see *Elkins* v. *United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair.").[4] Accordingly, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983).

The Court has repeatedly cautioned against the "reflexive," *Evans*, 514 U.S. at 13, or "[i]ndiscriminate," *Leon*, 468 U.S. at 908, application of the exclusionary rule. "[T]he exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons," *Calandra*, 414 U.S. at 348, and "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence," *Hudson* v. *Michigan*, 547 U.S. 586, 592 (2006). Rather, "[a]s with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. In particular, the Court has repeatedly stated that an exclusionary remedy is "clearly * * * unwarranted" unless its application will

[4] In earlier cases, the Court suggested that the exclusionary rule is also justified by principles of "judicial integrity." *Terry* v. *Ohio*, 392 U.S. 1, 12 (1968); *Elkins*, 364 U.S. at 222-223. The Court has since explained, however, that those principles require "essentially the same [inquiry] as the inquiry into whether exclusion would serve a deterrent purpose," *United States* v. *Janis*, 428 U.S. 433, 459 n.35 (1976), and that the judicial integrity rationale does not furnish "an independent basis for excluding challenged evidence," *Michigan* v. *Tucker*, 417 U.S. 433, 450 n.25 (1974). See *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *Calandra*, 414 U.S. at 355-356 & n.11.

"result in appreciable deterrence" beyond that provided by other mechanisms for preventing Fourth Amendment violations. *United States* v. *Janis*, 428 U.S. 433, 454 (1976); see *Hudson*, 547 U.S. at 597-599; *Evans*, 514 U.S. at 11; *Leon*, 468 at 900.

At the same time, the Court has cautioned that suppression is not warranted *simply* because applying the exclusionary rule in a particular situation would provide some incremental deterrence of Fourth Amendment violations. See *Scott*, 524 U.S. at 368 ("We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."); see also *Hudson*, 547 U.S. at 596; *Leon*, 468 U.S. at 910; *Calandra*, 414 U.S. at 350. The Court has recognized the compelling "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). Exclusion of inherently reliable and often highly probative evidence is an "extreme sanction," *Leon*, 468 U.S. at 916, that "exacts a costly toll upon the ability of courts to ascertain the truth," *United States* v. *Payner*, 447 U.S. 727, 734 (1980), and risks "setting the guilty free and the dangerous at large," *Hudson*, 547 U.S. at 591. In addition, because "[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice," the exclusionary rule can "generat[e] disrespect for the law and administration of justice." *Stone* v. *Powell*, 428 U.S. 465, 490 (1976).

As a result, "[s]uppression of evidence * * * has always been [a] last resort, not [a] first impulse," *Hudson*, 547 U.S. at 591, and any "possible benefit" of applying the exclusionary rule in a given situation "must be weighed

against the 'substantial social costs' exacted by" doing so, *Illinois* v. *Krull*, 480 U.S. 340, 352 (1987) (quoting *Leon*, 468 U.S. at 907); cf. *United States* v. *Patane*, 542 U.S. 630, 645 (2004) (Kennedy, J., concurring) (in Fifth Amendment context, concluding that "[i]n light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation").

2. In several contexts, this Court has held that the exclusionary rule should not be applied where an arresting officer acts in objectively reasonable reliance on decisions of, or information received from, official actors other than fellow police officers. In *Leon*, the Court concluded "that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 468 U.S. at 922. After determining that exclusion could not be justified by "its behavioral effects on judges and magistrates," *id.* at 916; see *id.* at 916-917, the Court rejected as "speculative" various arguments that suppression would "alter the behavior of individual law enforcement officers or the policies of their departments," *id.* at 918. The Court stated that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity," *id.* at 919, and it explained that mandating suppression in such circumstances "can in no way affect [an officer's] future conduct unless it is to make him less willing to do his duty," *id.* at 919-920 (citation omitted).

In *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), the Court applied the good-faith exception recognized in *Leon* to a search warrant that had not sufficiently described the items to be seized. The Court explained that the arresting

officers had taken "every step that could reasonably be expected of them" by preparing a warrant affidavit, presenting it to a neutral judge, and relying on the judge's assurances that the resulting warrant authorized them to conduct the search for which they had requested permission in the affidavit. *Id.* at 989-991. The Court noted that "it was the judge, not the police officers, who made the critical mistake," *id.* at 990, and stated that the "exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges," *ibid.* (citation omitted).

In *Krull*, the Court held that the exclusionary rule should not be applied where police officers conduct a search in reasonable reliance on a statute that purports to authorize such searches but is later declared unconstitutional. 480 U.S. at 349-361. The Court began by considering the effect of suppression on the arresting officer. It concluded that, because "an officer cannot be expected to question the judgment of the legislature" unless a statute is "clearly unconstitutional," mandating suppression when an officer reasonably relies on a statute "will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 349-350. The Court also stated that the exclusionary rule was not designed to deter legislators from enacting unconstitutional statutes, *id.* at 350, and that no evidence indicated that suppression would significantly deter the actions of legislators, *id.* at 351-352.

Finally, in *Evans*, this Court applied the same analysis to evidence seized by a police officer who had acted in reliance on an erroneous entry in a police computer system indicating that there was an outstanding warrant for the defendant's arrest. 514 U.S. at 3-4, 14-16. Assuming for purposes of its decision that "the erroneous information

resulted from an error committed by an employee of the office of the Clerk of Court," *id.* at 4, the Court concluded that "the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction," *id.* at 14. The Court explained that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees," and it noted that the party seeking exclusion had "offer[ed] no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among th[o]se actors require[d] the extreme sanction of exclusion," *id.* at 14-15. The Court also concluded that application of the exclusionary rule "could not be expected to alter the behavior of the arresting officer," because nothing indicated that he did not act "objectively reasonably when he relied upon the police computer record." *Id.* at 15-16. To the contrary, the Court agreed with the district court's assessment that the arresting officer had been "bound to arrest" and "would [have been] derelict in his duty if he failed to arrest." *Ibid.* (citation omitted; brackets in original).

B. Suppression Is Not Warranted Here

1. The arresting officers could not, and should not have, been deterred

This case does not involve "any disputed issues of fact regarding the arrest and search." Pet. 19. Investigator Anderson saw petitioner, a person he knew, at the Coffee County Sheriff's Department. Pet. App. 2a. Although Investigator Anderson "had reason to suspect that there might be an outstanding warrant for [petitioner's] arrest," he neither confronted petitioner nor detained him immediately. *Ibid.* Instead, Investigator Anderson asked Coffee County warrant clerk Pope to check the Coffee County records. *Ibid.* When Pope reported that there were no

outstanding warrants in Coffee County, Anderson asked her to call her counterpart in Dale County. *Ibid.* Pope spoke with Dale County warrant clerk Morgan, who told her that there was an outstanding warrant for petitioner's arrest in that county. *Ibid.* Pope then relayed the information to Anderson, who "[a]ct[ed] quickly" to pursue petitioner as he departed from the Coffee County Sheriff's Department, and, along with Deputy Bradley, arrested petitioner minutes later and before the officers or anyone else in the Coffee County Sheriff's Department learned that the warrant had been recalled. *Id.* at 1a-3a.

This Court has recognized that it is generally reasonable for police officers to rely on information received from dispatchers and other officers. *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965). And here, as in *Evans*, "[t]here is no indication that the arresting officer[s] [were] not acting objectively reasonably when [they] relied upon" the information they had received. 514 U.S. at 15-16; see *id.* at 17 (O'Connor, J., concurring). Investigator Anderson specifically testified that, although Coffee County and Dale County are adjacent to one another and relying on information from Dale County was "just something that we do," he had never previously in his sixteen years in law enforcement had cause "to question a Dale County warrant" or "to question information coming out of Dale County." J.A. 27; see J.A. 16.[5]

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[5] Petitioner asserts (Br. 47 n.16) that "[i]t would be difficult for a defendant in an individual criminal proceeding to ascertain the internal recordkeeping procedures of the arresting agency and establish that the recordkeeping system had a sufficiently well-known history of errors to render reliance on it by the arresting officer objectively unreasonable." Nothing precludes a defendant, however, from asking the arresting officers about their knowledge of recordkeeping errors or from questioning warrant clerks about the rate of errors in the relevant

Nor is there anything about this particular case that should have led the arresting officers to question the reliability of the information they had received from Dale County. Dale County warrant clerk Morgan stated unequivocally that there was a warrant for petitioner's arrest, and that report was consistent with what Investigator Anderson had previously been told by another officer. J.A. 18. Petitioner claims that he himself "explained [to the arresting officers] that he had recently seen the Dale County Circuit Judge and that no such warrant existed," Pet. Br. 5; see *id.* at 44, but self-serving assertions by suspects are both common and easy to make, and this Court has recognized that police officers in the field are not required to credit or investigate a suspect's protestations of innocence before proceeding in a manner that would otherwise be justified. *Baker* v. *McCollan*, 443 U.S. 137, 145-146 (1979); see *United States* v. *Grubbs*, 547 U.S. 90, 98-99 (2006) (stating that the Fourth Amendment does not require an "executing officer * * * [to] present [a] property owner with a

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system. Indeed, the government elicited that information here. J.A. 27, 33, 46, 61-62. This Court in *Evans*, moreover, seemingly contemplated that a showing could have been made that an officer's reliance on a court record system was unreasonable, 514 U.S. at 15-16, and Justice O'Connor's concurrence explicitly stated that "it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests," *id.* at 17 (O'Connor, J., concurring). This Court thus envisioned the feasibility of proving objective unreasonableness based on systemic problems in a recordkeeping system. In any event, there is no evidence of any systemic problems with regard to the recordkeeping system in this case, and to the extent that building a record of systemic problems may be difficult in a single criminal case, that point underscores that such issues would be better addressed through a civil action, with its more wide-ranging discovery, than through a suppression motion.

copy of the warrant before conducting his search" and does not grant "property owners * * * license to engage the police in a debate over the basis for the warrant"); *Curley* v. *Village of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001) ("the arresting officer does not have to prove [an arrestee's] version wrong before arresting him").

The exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 919. Here, Investigator Anderson and Deputy Bradley "took every step that could reasonably be expected of them," *Sheppard*, 468 U.S. at 989, and did what reasonable officers would have done under the circumstances. As in *Evans*, they "[were] bound to arrest" and "would [have been] derelict in [their] duty if [they] failed to arrest." 514 U.S. at 15 (citation omitted). Suppressing the evidence seized from petitioner's person and truck "can in no way affect [arresting officers'] future conduct unless it is to make [them] less willing to do [their] duty." *Leon*, 468 U.S. at 920 (citation omitted).

2. Suppression is not warranted in order to deter other police employees

For the reasons explained in the previous section, application of the exclusionary rule in the circumstances presented here cannot be justified by an interest in "alter[ing] the behavior of the arresting officer." *Evans*, 514 U.S. at 15. Accordingly, the question becomes whether "the exclusion of evidence at trial would * * * sufficiently deter future errors" by other persons "so as to warrant such a severe sanction." *Id.* at 14. The answer is no.

a. "In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred." *Janis*, 428 U.S. at 448. Here, the evidence reflects that the recordkeeping error was an isolated mistake, rather than

the result of a systemic inattention to the need to to maintain accurate databases. To the extent, therefore, that suppression would be designed to send a message to policymakers to improve their systems and training of personnel, nothing in this case suggests anything more than a single instance of human error by an employee. Accordingly, the only person the exclusionary rule could reasonably be intended to deter is that unknown individual in the Dale County Sheriff's Department who negligently failed to update that Department's records to reflect the recall of the warrant for petitioner's arrest.

Suppression would not—and should not be expected to—deter a person in the position of Coffee County warrant clerk Pope, who testified that in five years she had "[n]ever" previously "had a reason to doubt information that came from Dale County." J.A. 33. Nor would suppression be appropriate to deter a person in the position of Dale County warrant clerk Morgan, because the district court expressly found that "there is no credible evidence of routine problems with disposing of recalled warrants" in Dale County, and that the Dale County Sheriff's Department's recordkeeping system was "reliable." Pet. App. 17a-18a; cf. *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment) (noting that the case before the Court did not involve "any demonstrated pattern of knock-and-announce violations").[6]

b. Fourth Amendment violations vary considerably in both their severity and their amenability to deterrence. "[T]he deterrent value of the exclusionary rule is most

[6] Petitioner has not challenged "the objective reasonableness" of the actions of any officers "who originally obtained [the later recalled warrant for petitioner's arrest] or who provided information material to the probable-cause determination," *Leon*, 468 U.S. at 923 n.24, so there is no need to consider deterrence with respect to them.

likely to be effective" in situations where a violation of the Fourth Amendment is "flagrantly abusive," *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J. concurring in part), or "substantial and deliberate," *Franks* v. *Delaware*, 438 U.S. 154, 174 (1978). The converse is also true: the "extreme sanction" of exclusion (*Leon*, 468 U.S. at 916) is both less necessary and less appropriate in situations, like this one, that involve only "a negligent failure to act." Pet. App. 10a.

Petitioner is of course correct (Br. 43) that even negligent conduct is *capable* of being deterred to a point and that "[m]uch of the edifice of modern tort law is built upon the understanding that the prospect of future liability will provide incentives for regulated actors to take the appropriate level of care." But that same body of law recognizes that certain kinds of conduct—most notably, deliberate violations of another's rights or reckless wrongdoing—may require greater deterrents than a negligent and apparently isolated mistake. For example, deterrence is one of two primary justifications for permitting punitive damages for certain torts, but "[t]he prevailing rule" limits the availability of that remedy to cases "where a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for the rights of others, or behavior even more deplorable." *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2621 (2008) (internal quotation marks and citations omitted); see *Smith* v. *Wade*, 461 U.S. 30, 51 (1983) (requiring showing of "reckless or callous disregard for the plaintiff's rights" to authorize punitive damages under 42 U.S.C. 1983); Restatement (Second) of Torts § 908 cmt. b, at 464-465 (1979).

The same is true of substantive criminal law. Deterrence is one of "the two primary objectives of criminal punishment," *Kansas* v. *Hendricks*, 521 U.S. 346, 361-362 (1997),

and "our criminal law is to no small extent justified by the assumption of deterrence." *Breithaupt* v. *Abram*, 352 U.S. 432, 439 (1957). Yet both the magnitude of a criminal sanction—and, indeed, the difference between criminal and purely civil liability—often depends on whether the defendant had a particularly culpable state of mind. The same basic point holds true when assessing the need for "the harsh deterrent of exclusion." *Scott*, 524 U.S. at 369.[7]

c. "[T]he value of [the] deterrence" provided by the exclusionary rule also "depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. Where there is no "forbidden act" in the first place, only a negligent and apparently isolated failure to update a local police department's records, the value of any deterrence provided by applying the exclusionary rule is likely to be extremely low. Even when they receive their paycheck from a police department, clerical employees whose job responsibilities include maintaining records are simply not "engaged in the often competitive enterprise of ferreting

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[7] In *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974), the Court observed that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at very least negligent, conduct which has deprived the defendant of some right." The Court did not state that deterrence works equally well with respect to those fundamentally different kinds of wrongdoing, and it did not say that the existence of any degree of negligence, no matter how minor or isolated, invariably justifies the "massive remedy" (*Hudson*, 547 U.S. at 599) of suppression. "Negligence in law ranges from inadvertence that is hardly more than accidental to sinful disregard of the safety of others." *Black's Law Dictionary* 1062 (8th ed. 2004) (citation omitted). In its customary and ordinary sense, the term "negligent" connotes more a habitual failure to exercise proper care than a single isolated mistake. *Webster's Third New International Dictionary* 1513 (1993) (defining "negligent" as "that is marked by or given to neglect: that is neglectful esp. habitually or culpably").

out crime" (*Leon*, 468 U.S. at 914 (citations omitted)) in the same way as officers in the field. Rather, they are likely to view their jobs in much the same way as their counterparts who maintain similar records for courts.

In addition, police departments, like other organizations, have built-in incentives to keep accurate records. That common-sense proposition is supported by Federal Rule of Evidence 803(6), which creates an exception to the general prohibition on hearsay for records created and "kept in the course of a regularly conducted business activity." That Rule defines "business" to include "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit," Rule 803(6), and its advisory committee note makes clear that it encompasses otherwise qualifying records created and kept by police departments, see Rule 803(6), advisory committee note, 1972 Proposed Rules. The very premise of Rule 803(6) is that such records have "unusual reliability," because of "systematic checking, * * * regularity and continuity which produce habits of precision, * * * actual experience of business in relying upon them, or * * * a duty to make an accurate record as part of a continuing job or occupation." *Ibid.*

Petitioner contends (Br. 37-38) that failure to require suppression here "would give law enforcement a perverse incentive" to structure their recordkeeping to indicate routinely that there is a basis for an arrest when there is not. Petitioner cites no evidence that the sort of thing he posits is actually occurring, and there is no suggestion that it happened here. Cf. *Missouri* v. *Seibert*, 542 U.S. 600, 605-606 (2004) (plurality opinion) (citing testimony by an interrogating officer "that he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught") (citation omitted); *id.* at 608 n.1,

609-611 (citing evidence of that technique's widespread use). To the contrary, the error in this case appears to have been entirely inadvertent, and it was detected and corrected within 15 minutes of Dale County warrant clerk Morgan's original report. Pet. App. 3a.

Petitioner acknowledges (Br. 36-37) that this Court's decisions already establish that officers in the field are not entitled to make an arrest based on information they know to be false or in reliance on a record-keeping system they have cause to know is inaccurate. See *Evans*, 514 U.S. at 15-16; *id.* at 17 (O'Connor, J., concurring); *Leon*, 468 U.S. at 923. Accordingly, petitioner must further posit (Br. 37-38)—again, without any evidence or even intuitive force—that police departments will conspire "to leave officers in the field ignorant of the deficiencies in police record management" and thus "manufacture * * * good faith." Petitioner provides no explanation for how this sort of far-fetched scheme would actually work, and it would seem bound to be short-lived because it is difficult to see how officers in a department that regularly arrested people without legitimate basis could maintain "plausible deniability about inaccuracies in police records." *Id.* at 38.[8]

Finally, petitioner's argument on this point rests on the implausible—and entirely unproven—assumption that police officers in the field invariably *benefit* from being told

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[8] Petitioner also posits (Br. 38) a scenario where one police officer "tell[s] colleagues that a warrant was in force, when in fact, it had not yet even been sought." This Court has made clear, however, that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of whether the costs of applying the exclusionary rule outweigh its benefits. *Leon*, 468 U.S. at 911. A case involving a law enforcement officer's deliberate deception of another officer differs entirely from a case involving an isolated and negligent error in recordkeeping, on which an officer reasonably relies.

that people for whom there is no valid arrest warrant are actually subject to arrest. It is of course true that, in this particular case, "[p]olice negligence * * * enabled the discovery of evidence that would otherwise have been outside the reach of the police." Pet. Br. 34; see *id.* at 48. But officers could not predict that having expired warrants in a recordkeeping system would usually produce that result. And "the appropriate perspective from which to consider the deterrent effects of excluding evidence based on police department negligence is *ex ante*, not *ex post*." *Id.* at 44.

In the typical situation, an arrest based on inaccurate information or a recalled warrant will result in nothing more than a fruitless waste of police resources, a matter of particular concern given the inability of most departments to devote adequate resources to pursuing *genuine* leads and ensuring execution of *valid* warrants. See Pet. Br. 42 (acknowledging that "many * * * searches" conducted as a result of inaccurate or outdated information "will produce no incriminating evidence"). In such cases, improper arrests may bring negative attention to the police, inspire the ire of citizens, and erode the trust and good will that a police department normally seeks to cultivate. In addition, a flawed recordkeeping system is likely to make mistakes that cut both ways, including expired warrants and omitting current ones. Erroneous information that no warrant exists when one is outstanding will not only forestall justified arrests, but also deprive officers of information that could enhance their ability to protect their own safety. Cf. *Hiibel* v. *Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). The court of appeals was thus on solid ground when it stated that "[i]nacccurate or outdated information in police files is just as likely, if not more likely, to hinder police investigations as it is to aid them." Pet. App. 10a.

d. Whether the exclusionary rule can be expected to provide appreciable marginal deterrence is also a function of other deterrents that are already in place. See *Scott*, 524 U.S. at 368 (framing inquiry as what "additional deterrence" would be provided by application of the exclusionary rule). It is true that this Court has concluded that criminal remedies are inadequate as the sole means of safeguarding Fourth Amendment requirements. See *Mapp* v. *Ohio*, 367 U.S. 643, 651-653 (1961). But the Court should not "assume that exclusion in this context is necessary deterrence simply because [it] found that it was necessary deterrence in different contexts and long ago." *Hudson*, 547 U.S. at 597. As explained, see pp. 23-25, *supra*, police departments have a strong incentive to maintain adequate records. In addition, substantial deterrents to sloppy recordkeeping already exist, even without "the harsh deterrent of exclusion." *Scott*, 524 U.S. at 369.

i. One deterrent is "the possibility of reprimand or other job discipline for carelessness in record keeping." Pet. App. 10a. Petitioner faults the court of appeals (Br. 45) for "fail-[ing] to offer any factual support for its assertion that internal discipline might address the problem here." But as early as 1980, this Court "felt it proper to 'assume' that unlawful police behavior would 'be dealt with appropriately' by the authorities." *Hudson*, 547 U.S. at 598-599 (quoting *Payner*, 447 U.S. at 733-734 n.5). More recently, the Court recognized that "modern police forces are staffed with professionals" and stated that "it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect." *Id.* at 599; accord *Nix* v. *Williams*, 467 U.S. 431, 446 (1984) ("Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline * * *—also lessen the likelihood that the ultimate or inevitable discovery exception will pro-

mote police misconduct."). At any rate, virtually all employees are subject to reprimand and discipline for negligent performance of their jobs, and there is no reason to assume, particularly without any actual evidence, that police department employees are somehow uniquely immune from consequences for slipshod recordkeeping.

Petitioner invokes "common sense" in support of his assertion (Br. 45) that internal discipline is unlikely to follow "[i]f employees' negligence leads to the discovery of admissible evidence that otherwise would be unavailable." Like petitioner's earlier erroneous argument about the nature of a police department's incentives to keep accurate records, however, that contention overlooks that most instances of lax recordkeeping will *not* lead to the discovery of admissible evidence, and it is impossible for a given employee to know ahead of time whether a particular instance of laxity will do so.

Petitioner also contends (Br. 45) that the fact that "the employee who failed to make the proper change to Dale County's records has not been identified" means that employee discipline cannot be an effective deterrent against future mistakes. There are at least two problems with that argument. The first is that it overreads the existing record. The most recent evidentiary hearing in this case was held on October 21, 2005, the only witness from the Dale County Sheriff's Department was warrant clerk Morgan, and petitioner never asked Morgan if she knew what internal steps had been taken to identify or discipline the person who returned the physical warrant but failed to update the computer record. The Court cannot assume that the Dale County Sheriff's Department would be unable to discover which employee was responsible for the error, particularly if this single and apparently isolated one were to develop into a more substantial problem.

The second problem is that petitioner's argument proves far too much. If the potential difficulty of identifying the most directly responsible employee meant that internal discipline procedures could not be effective in deterring future errors, then suppression would be unlikely to be an effective deterrent for the same reason. And if petitioner were to respond that suppression could underscore the need for better training and monitoring throughout the Dale County Sheriff's Department, that position would assume that the department would be relatively indifferent to errors in its warrant system absent the deterrence force of exclusion. As discussed above, nothing supports that assumption, and much common sense contradicts it. Indeed, the diligence of warrant clerk Morgan in discovering the error and promptly remedying it suggests that interagency law enforcement cooperation is built on reasonable efforts at accuracy, not based on systematic carelessness.

ii. Petitioner's argument that police departments have an incentive to tolerate or even encourage bad recordkeeping is also belied by the fact that such conduct could potentially subject both the department and its employees to civil liability. Cf. *Hudson*, 547 U.S. at 597, 599; *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1045 (1984) (stating that "the availability of alternative remedies" undermines "the deterrent value of the exclusionary rule"). Regardless of whether civil remedies were available or adequate in the past, this Court's more recent decisions establish that it is now appropriate to presume that "civil liability is an effective deterrent." *Hudson*, 547 U.S. at 598.

Petitioner and his amici contend that actions under 42 U.S.C. 1983 are unlikely to provide an effective deterrent with respect to the type of error at issue here, but their arguments largely depend on petitioner's earlier erroneous claim that suppression is essential because plaintiffs

could not identify the responsible employee (Pet. Br. 46) and on claims that this Court has already rejected in other contexts. Petitioner and his amici invoke the prospect that individual government officials would be entitled to qualified immunity. Pet. Br. 47; ACLU Amicus Br. 4-5, 8-9; NACDL Amicus Br. 14. This Court has already determined, however, that "the threat of litigation and liability will adequately deter [individual government officials from committing constitutional violations] no matter that they may enjoy qualified immunity." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001).

At any rate, the relevant inquiry for qualified-immunity purposes is whether a reasonable officer in the defendant's position "could have believed" that a given course of action was lawful. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Officers who deliberately "tell colleagues that a warrant [i]s in force, when in fact, it had not yet been sought," or direct that a database be "set up * * * to return indications that warrants exist" when they do not "in the hope that [it] would permit a broader range of searches" (Pet. Br. 38), are not likely to meet that standard. Experience also indicates "that the lower courts are allowing colorable * * * suits to go forward, unimpeded by assertions of qualified immunity," *Hudson*, 547 U.S. at 598, or the concerns about causation identified by petitioner (Pet. Br. 46) and his amici (ACLU Amicus Br. 9-10).[9]

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[9] See, *e.g.*, *Peña-Borrero* v. *Estremeda*, 365 F.3d 7, 13 (1st Cir. 2004) (reversing dismissal where officers arrested "[d]espite facially authentic documentary evidence that [a previously issued] warrant was no longer effective, and with knowledge that they had failed to follow precautionary procedure to assure its vitality"); *Clanton* v. *Cooper*, 129 F.3d 1147, 1156-1157 (10th Cir. 1997) (affirming denial of summary judgment to fire marshal agent who knowingly transmitted false statements via the National Crime Information Center); *Milligan* v. *United*

A person who is arrested based on an erroneous entry in a government recordkeeping system may also be able to recover from "the deep pocket of municipalities." See *Hudson*, 547 U.S. at 597; see *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). Unlike individual officers, local governments cannot assert qualified immunity, see *Owen* v. *City of Independence*, 445 U.S. 622, 638 (1980), and they may be held liable if a constitutional violation is attributable to their own policies, customs, or usages, see *Monell*, 436 U.S. at 690-691, such as the sort of deliberate failure to maintain accurate records hypothesized by petitioner, or sufficiently serious failures to train or supervise, see *City of Canton* v. *Harris*, 489 U.S. 378, 387 (1989). Here too, there is evidence "that the lower courts are allow-

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States, No. 3:07:1053, 2008 WL 2280178, at *10 (M.D. Tenn. May 30, 2008) (denying summary judgment where "[a]n objective reading of the arrest file reveals that the officers' reliance on that file, and their failure to check on the warrants themselves, was unreasonable"); *Willis* v. *Mullins*, 517 F. Supp. 2d 1206, 1227 (E.D. Cal. 2007) (denying qualified immunity because whether reliance on a list stating that plaintiff was still on parole "was reasonable under the circumstances cannot be determined as a matter of law from the facts provided"); *McMurry* v. *Sheahan*, 927 F. Supp. 1082, 1088 (N.D. Ill. 1996) (denying motion to dismiss where plaintiff had sufficiently alleged that defendants were aware "of the many problems which plague[d]" the relevant data systems but "chose to ignore those problems"); *Gray* v. *Sheahan*, No. 96 C 220, 1996 WL 672255, at *3 (N.D. Ill. Nov. 17, 1996) (denying motion to dismiss where plaintiff had sufficiently alleged that defendant "knew that the computer system inaccurately reported the status of warrants," but "did nothing to correct the situation"); *Kirk* v. *Hesselroth*, 707 F. Supp. 1149, 1152, 1155 (N.D. Cal. 1988) (denying summary judgment to police inspector who caused plaintiff's subsequent arrest by entering inaccurate information into a computer database), aff'd, 914 F.2d 262 (9th Cir. 1990).

ing colorable * * * suits to go forward." *Hudson*, 547 U.S. at 598.[10]

The other arguments raised by petitioner's amici fare no better. They contend that potential plaintiffs "lack * * * resources to litigate civil rights claims" (NACLD Amicus Br. 15), and that "few attorneys will be willing to undertake [such a] case" (ACLU Amicus Br. 7). The number of reported decisions suggests otherwise. See notes 9-10, *supra*. At any rate, 42 U.S.C. 1988(b), which "authorize[s] attorney's fees for civil-rights plaintiffs," "answers this objection." *Hudson*, 547 U.S. at 597. Amici also contend that civil actions cannot provide adequate deterrence because of the limited size of the likely damages awards. ACLU Amicus Br. 14-15; NACDL Amicus Br. 15. But Section 1983 actions are designed to deter constitutional violations "through a mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses," *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986)— and a jury's failure to award sizeable monetary relief would reflect only the jury's appraisal of

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[10] See, *e.g.*, *Berg* v. *County of Allegheny*, 219 F.3d 261, 275-277 (3d Cir. 2000) (per curiam) (holding municipality not entitled to summary judgment where it employed a system for issuing warrants "where the slip of a finger could result in wrongful arrest and imprisonment"), cert. denied, 531 U.S. 1072, and 531 U.S. 1145 (2001); *McMurry*, 927 F. Supp. at 1091 (denying motion to dismiss where plaintiff had pled that a municipality's policymakers had "actual knowledge" for more than a decade "that the warrant computer systems at issue [were] not reliable" but "fail[ed] to train its officers to check for" errors before making arrests and took "no steps to remedy its procedures for investigating the validity of warrants shown by its computer to be outstanding"); *Rogan* v. *City of Los Angeles*, 668 F. Supp. 1384, 1387-1398 (C.D. Cal. 1987) (holding that city was responsible as a matter of law for plaintiffs repeated arrests pursuant to a computer record that failed to describe suspect with particularity).

quantifiable injuries. That those injuries may be limited in a particular case provides scant reason to award criminal defendants the windfall of suppression.

Finally, petitioner and his amici complain that various forms of civil liability may not be available in every State or in every circumstance. But Fourth Amendment protections and remedies do not "vary from place to place." *Virginia* v. *Moore*, 128 S. Ct. 1598, 1605 (2008) (citation omitted). It would likewise be inappropriate to mandate nationwide suppression because a particular State's generally applicable law makes a county sheriff a state officer who cannot be sued under Section 1983, Pet. Br. 46-47; ACLU Amicus Br. 5, 11,[11] or fails to provide state law grounds for recovery, ACLU Amicus Br. 5-6, 15-20. If the citizens of Alabama conclude that additional deterrence is necessary to deter mistaken arrests based on officers' good-faith reliance on negligently maintained records, they are, of course, free to amend their own State's law. See *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in the judgment) (stating that if existing measures for deterring Fourth Amendment violations "prove ineffective, they can be fortified with more detailed regulations or legislation."). Alabama's failure to do so, however, does not supply a basis for expanding the scope of the exclusionary rule throughout the Nation.[12]

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[11] This Court has noted that efforts by "state and local governments [to] manipulate the titles of local officials in a blatant effort to shield the local governments from liability [under Section 1983] * * * are already foreclosed by" *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988). See *McMillian* v. *Monroe County*, 520 U.S. 781, 796 (1997).

[12] For the same reason, petitioner errs in suggesting (Br. 39-40) that this Court should require suppression to avoid undermining efforts by state courts "to regulate [state] police departments" and ensure compliance with "the state constitution, evidence code, or judicial policy."

e. The lack of appreciable deterrent effects that would flow from requiring suppression in this case is further confirmed by the fact that the employee who made the negligent error in recordkeeping works for an entirely different police department than the officers who made the arrest. Cf. *Lopez-Mendoza*, 468 U.S. at 1043 (stating that "the exclusionary rule is likely to be most effective when applied to * * * 'intrasovereign' violations"). Petitioner does not contend that the Coffee County Sheriff's Department, whose officers made the arrest, has any control over recordkeeping in Dale County, or any mechanism for identifying, disciplining, or providing further training to the particular Dale County employee who made the error at issue here. Accordingly, "the deterrent effect of the exclusion of relevant evidence" from petitioner's trial would likely have been both indirect and "highly attenuated." *Janis*, 428 U.S. at 458.

3. The costs of exclusion cannot be justified

Although the "existence" of appreciable "deterrence benefits * * * is a necessary condition for exclusion," *Hudson*, 547 U.S. at 596, this Court has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence," *Scott*, 524 U.S. at 368; accord *Hudson*, 547 U.S. at 596-597 (deter-

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This Court rejected an analogous claim in *Moore*, concluding that mandating suppression as a matter of federal law in order to deter violations of state law would undermine a State's ability to tailor its remedies for violations of its own law. 128 S. Ct. at 1606. A State may elect to suppress evidence in its own courts in order to deter violations of state law, but that would provide no justification for varying federal law protections or requiring every other State to do the same. In any event, the state court decisions cited by petitioner (Br. 39-40) are based on those courts' erroneous reading of this Court's decisions in *Leon* and *Evans*.

rence is a necessary, not "sufficient condition"); *Leon*, 468 U.S. at 910; *Alderman*, 394 U.S. at 174. Instead, the Court must also determine whether any "incremental deterrent effect," *Calandra*, 414 U.S. at 351, of applying the exclusionary rule would be "outweighed by the acknowledged costs to other values vital to a rational system of justice," *Stone*, 428 U.S. at 494. The Court has declined to depart from this balancing approach even where the failure to apply the exclusionary rule will leave certain types of Fourth Amendment violations undeterred by any suppression remedy. See, *e.g.*, *Hudson*, 547 U.S. at 596 (knock-and-announce violations). Here, the result of the required balancing cuts decisively against suppression.

First, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of whether the costs of applying the exclusionary rule outweigh its benefits. *Leon*, 468 U.S. at 911; accord *Brown*, 422 U.S. at 604. The decisions that initially crafted the exclusionary rule and then applied it to the States involved intentional conduct that directly violated a suspect's Fourth Amendment rights, see *Weeks* v. *United States*, 232 U.S. 383, 386, 393-394 (1914); *Mapp*, 367 U.S. at 644-645, and the Court has stated that suppression is most justified "where a Fourth Amendment violation has been substantial and deliberate," *Franks*, 438 U.S. at 171. In this case, in contrast, any Fourth Amendment violation occurred notwithstanding the objective good faith of everyone involved, and only as a result of several separate acts and omissions that occurred over the course of months. To require suppression of the very instrumentalities of the offenses with which petitioner is charged would bestow upon petitioner an extraordinary windfall, "contrary to the idea of proportionality that is essential to the concept of justice." *Stone*, 428 U.S. at 490; see *United States* v. *Cazares-Olivas*, 515 F.3d

726, 728 (7th Cir. 2008) (Easterbrook, C.J.) ("permitting people to get away with crime is too high a price to pay for errors that * * * stem from negligence rather than disdain for constitutional requirements"), petition for cert. pending, No. 07-10647 (filed Apr. 28, 2008).

Second, this Court has recognized that some latitude must be allowed for honest mistakes. Courts cannot reasonably expect anyone—including the police—to make no errors whatsoever. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990); *Maryland* v. *Garrison*, 480 U.S. 79, 87 & n.11 (1987); *Hill* v. *California*, 401 U.S. 797, 803-804 (1971); *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949); see *Groh* v. *Ramirez*, 540 U.S. 551, 568 (2004) (Kennedy, J., dissenting). The district court expressly held—and petitioner does not contest—that "there [was] no credible evidence of routine problems with disposing of recalled warrants and updating records in Dale County," Pet. App. 12a (internal quotation marks omitted); in fact, there is no evidence in the record that this particular kind of error had *ever* occurred before this case. The error that led to petitioner's arrest was detected within 15 minutes of the check of the in-office computer system that revealed an outstanding warrant for petitioner's arrest, and it came to light as quickly as it did because of warrant clerk Morgan's diligent efforts to locate the physical copy of the warrant. Morgan had no way of knowing that petitioner had already been arrested when she called the Coffee County Sheriff's Department to alert its officers of the error, and the most reasonable explanation of Morgan's actions is that she was attempting to update her earlier report *before* petitioner was apprehended. No sanction—no matter how severe—can deter every possible error, no matter how isolated or brief in duration, and requiring suppression in a case such as this one would be entirely unwarranted.

C. That The Person Who Made The Negligent Error In This Case Works For The Dale County Sheriff's Department Does Not By Itself Require Suppression

The "categorical exception to the exclusionary rule" that this Court announced in *Evans*, 514 U.S. at 16, does not apply here, because both the district court (Pet. App. 15a, 18a) and the court of appeals (*id.* at 9a n.1, 11a) proceeded on the assumption that petitioner's arrest resulted from an error by the Dale County Sheriff's Department rather than the Dale County Clerk's Office. See *Evans*, 514 U.S. at 16 n.5 ("declin[ing] to address" whether a similar analysis "would apply in order to determine whether the evidence should be suppressed if police personnel were responsible for the error"). Petitioner and his amici contend that that distinction alone mandates suppression. Pet. Br. 9-11, 18, 24-32; NACDL Amicus Br. 2, 7, 17-20. They are mistaken.

1. This Court has repeatedly stated that "the exclusionary rule [is] aimed at deterring police misconduct," and that other government officials, including magistrates, court employees, and legislators, "are not the focus of the rule." *Krull*, 480 U.S. at 350; see *Evans*, 514 U.S. at 14; *Leon*, 468 U.S. at 916. Those cases thus establish that the exclusionary rule's deterrent rationale does not apply outside of the police force; they do not hold that the deterrent rationale applies with equal force *whenever* a Fourth Amendment violation is caused by the actions of any person who works for a police department. And no decision of this Court holds that the deterrent rationale applies to clerical workers who engage in back-office police recordkeeping. Indeed, the Court has repeatedly declined to apply the exclusionary rule when a Fourth Amendment violation was attributable solely to the actions of even police officers in the field.

For example, the Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials," *Scott*, 524 U.S. at 363, and it has done so without regard to the identity of the government officials who were responsible for the underlying Fourth Amendment violation. The Court has determined, for example, that the exclusionary rule should not apply in grand jury proceedings, *Calandra*, 414 U.S. at 347-352; on federal habeas corpus in situations where a state prisoner has already been afforded a full and fair opportunity to litigate a Fourth Amendment claim, *Stone*, 428 U.S. at 494; in parole revocation proceedings, *Scott*, 524 U.S. at 364-369; in civil deportation proceedings, *Lopez-Mendoza*, 468 U.S. at 1050; and in federal civil tax proceedings where evidence was illegally seized by state officials, *Janis*, 428 U.S. at 459-460. In all but one of those cases, the underlying conduct that was alleged to violate the Fourth Amendment had been committed by law enforcement officers. *Scott*, 524 U.S. at 360; *Stone*, 428 U.S. at 469-470, 472; *Janis*, 428 U.S. at 434-437; *Calandra*, 414 U.S. at 340-341; see also *Lopez-Mendoza*, 468 U.S. at 1035 (immigration officials).

Even in criminal prosecutions, the Court has never accepted the notion that suppression is appropriate whenever the person most directly responsible for a Fourth Amendment violation was affiliated with the police. See *Scott*, 524 U.S. at 364 n.4 (stating that the Court has "significantly limited [the exclusionary rule's] application even in" the context of criminal trials). The Court has repeatedly reaffirmed that a criminal defendant who was not the victim of an unlawful search may not invoke the exclusionary rule to obtain suppression of evidence seized in violation of another person's Fourth Amendment rights. See, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978); *Alderman*, 394 U.S. at 171-176. The Court has likewise declined to order sup-

pression of evidence unlawfully seized by police officers in situations where the evidence independently was, or inevitably would have been, discovered anyway, *Murray* v. *United States*, 487 U.S. 533, 541 (1988); *Nix*, 467 U.S. at 444, and it has held that violations by police officers of the constitutional "knock-and-announce" rule do not require suppression of evidence found during the resulting search, *Hudson*, 547 U.S. at 590-599. Even when illegally seized evidence is excluded from the government's case in chief, the Court has held that the evidence may still be used to impeach a defendant's own testimony on direct examination, *Walder* v. *United States*, 347 U.S. 62, 65 (1954), or to impeach a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination, *United States* v. *Havens*, 446 U.S. 620, 627-628 (1980).

In short, the Court has declined to adopt any sort of "*per se*" or "'but for' rule" (*Brown*, 422 U.S. at 603 (citation omitted)) that evidence must invariably be suppressed whenever police personnel are at fault. Rather, in the context of police errors as elsewhere, "application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348.

2. Police officers are generally entitled to rely upon information they receive from fellow officers. See, *e.g.*, *Ventresca*, 380 U.S. at 111. In some situations, police may be charged with the knowledge of certain of their fellow officers. Petitioner errs in asserting (Br. 29), however, that "settled Fourth Amendment precedent" establishes any "general principle" that a police officer who makes an arrest or conducts a search "is charged with [the] collective knowledge" of every other law enforcement official.

a. Petitioner relies most heavily (Br. 26-28) on *Whiteley* v. *Warden*, 401 U.S. 560 (1971). This Court has expressly stated, however, that *Whiteley*'s "precedential value regarding application of the exclusionary rule is dubious." *Evans*, 514 U.S. at 13; see *Overton* v. *Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., respecting the denial of the petition for a writ of certiorari) (describing *Evans* as "casting doubt on *Whiteley*'s exclusionary rule discussion").

In any event, the situation presented here differs from *Whiteley* in at least two significant respects. First, *Whiteley* involved a decision by a county sheriff to seek an arrest warrant based on a complaint that manifestly failed to establish probable cause. 401 U.S. at 561-569; see *Leon*, 468 U.S. at 923 n.24 (describing the warrant application at issue in *Whiteley* as a "'bare bones' affidavit"). This case, in contrast, involves a negligent failure by an unknown clerical employee in the Dale County Sheriff's Department to update the department's records. See *id.* at 911 (stating that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of whether the costs of applying the exclusionary rule outweigh its benefits).

Second, the connection between the underlying culpable conduct and the ultimate arrest is far more attenuated here than in *Whiteley*. In *Whiteley*, the sheriff who had obtained the invalid warrant immediately broadcast a statewide bulletin that led directly to the defendant's arrest on the very same day that the invalid warrant had been issued. 401 U.S. at 562-563. Here, in contrast, a substantial delay separated the underlying negligent mistake and petitioner's arrest, see J.A. 60 (stating that the warrant for petitioner's arrest had been recalled on February 2, 2004), and no "instigating officer" "rel[ied] on fellow officers to make the arrest," *Whiteley*, 401 U.S. at 568; see *Illinois* v. *Andreas*,

463 U.S. 765, 771 n.5 (1983) (describing *Whiteley*'s holding as applicable to situations "where law enforcement authorities are cooperating in an investigation"). "*Whiteley* and its progeny do not support [the] broad[] proposition that all information received by a police department * * * must be imputed to every officer in the department," *United States* v. *Santa*, 180 F.3d 20, 28 (2d Cir.), cert. denied, 528 U.S. 943 (1999), much less to officers in a wholly different department who never spoke with, or received any communication from, the person with the relevant knowledge.[13]

b. Petitioner also partially quotes (Br. 28) this Court's statement in *United States* v. *Hensley*, 469 U.S. 221 (1985), that "*Whiteley* supports the proposition that, when evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its *admissibility* turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest." *Id.* at 231 (first emphasis added). As noted previously, however, this case does not involve a situation in which an officer who lacked information sufficient to establish probable cause sought to evade the Fourth Amendment's requirements by directing a fellow officer to make an arrest. In addition, "[b]ecause the *Hensley* Court determined that there had been no Fourth Amendment violation, the Court never considered

[13] The courts of appeals have generally followed the same approach in determining whether information possessed by one officer may be considered in determining whether an arrest by another officer was supported by probable cause. Although the lower courts employ somewhat different verbal formulations, "even courts that impute knowledge among officers working closely together will not do so absent a close working nexus between the officers during the stop or arrest." *United States* v. *Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996). Cf. *United States* v. *Colon*, 250 F.3d 130, 135-137 (2d Cir. 2001) (declining to impute knowledge of a civilian 911 operator employed by the police department to dispatching or arresting officers).

whether the seized evidence should have been excluded." *Evans*, 514 U.S. at 12 (citation omitted). Finally, to the extent that language in *Hensley* can be read to equate the admissibility of a given piece of evidence with the determination of whether that evidence was acquired in violation of the Fourth Amendment, the Court has "long since rejected that approach." *Hudson*, 547 U.S. at 591; see *Evans*, 514 U.S. at 13.

c. Petitioner's reliance (Br. 28-29) on *Elkins* v. *United States*, 364 U.S. 206 (1960), fares no better. *Elkins* was decided a year before *Mapp*, whose "[e]xpansive dicta" about the scope of the exclusionary rule have been rejected by later decisions. *Hudson*, 547 U.S. 591. Like *Mapp*, *Elkins* expressly equated the question of whether the Fourth Amendment has been violated with whether the exclusionary rule should be applied, 364 U.S. at 213-215, and it cited "the imperative of judicial integrity" as an independent reason for requiring suppression of evidence, *id.* at 222. Neither proposition has survived later review. See *Hudson*, 547 U.S. at 591; note 4, *supra*. And to the extent that *Elkins* suggested that suppression is warranted whenever it would "serve[] the central deterrent purposes of the exclusionary rule," Pet. Br. 29, later cases recognize that the existence of some possible deterrence benefits represents the beginning, not the end, of the analysis about whether suppression is warranted in a particular situation. *Hudson*, 547 U.S. at 596; *Leon*, 468 U.S. at 910; *Calandra*, 414 U.S. at 350.

d. Petitioner also contends that "this Court's approach to other areas of criminal procedure" (Br. 29)—specifically, the doctrines associated with *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Edwards* v. *Arizona*, 451 U.S. 477 (1981)—suggests that it is appropriate to charge an arresting officer with the knowledge of all other law enforcement personnel

for purposes of the Fourth Amendment exclusionary rule. See Pet. 28-29 (making the same claim with respect jurisprudence under *Miranda* v. *Arizona*, 384 U.S. 436 (1966)). This Court's decisions, however, confirm that jurisprudence developed under different constitutional provisions is not interchangeable. See *Brown*, 422 U.S. at 601 ("The exclusionary rule * * * when utilized to effectuate the Fourth Amendment, serves interests and polices that are distinct from those it serves under the Fifth."); *Dickerson* v. *United States*, 530 U.S. 428, 441 (2000) ("unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment"); *Withrow* v. *Williams*, 507 U.S. 680, 686-695 (1993) (restrictions on exercise of federal habeas jurisdiction in Fourth Amendment cases do not apply to claims under *Miranda*); *Oregon* v. *Elstad*, 470 U.S. 298, 303-304 (1985) (refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases to the *Miranda* context, due to the "fundamental differences" between two doctrines).

Even if non-Fourth Amendment decisions were relevant here, the doctrines on which petitioner relies are not analogous to this situation. *Brady* and *Kyles* v. *Whitley*, 514 U.S. 419 (1995) (Pet. Br. 29), involved a prosecutor's obligation "to disclose evidence favorable to the defendant." *Kyles*, 514 U.S. at 432; see *id.* at 437. This case, in contrast, involves no "affirmative duty." *Id.* at 432; see *Santa*, 180 F.3d at 28 n.3. In addition, although a prosecutor has a duty under *Brady* "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles*, 514 U.S. at 437, that duty "does not extend to information possessed by government agents not working with the prosecution," *United States* v. *Hall*, 434 F.3d 42, 55 (1st Cir. 2006). Because the unknown clerical employee who failed to update the Dale

County Sheriff's Department computer system was not "working with" the Coffee County Sheriff's Department officers who made the arrest—much less the United States Attorney's Office that ultimately brought this prosecution—this Court's *Brady* jurisprudence provides no support to petitioner, even by analogy.

Finally, both of the examples cited by petitioner involve situations where the conduct in question—failure to disclosure exculpatory evidence to the defense, and introduction of statements obtained from a suspect who has expressed a desire to deal with the police only through counsel, respectively—violates the commands of the Constitution as construed by this Court. See *Kyles*, 514 U.S. at 434 (noting the prosecutor's "constitutional duty" to disclose material exculpatory evidence); *Janis*, 428 U.S. at 443 (noting "the Fifth Amendment's direct command against the admission of compelled testimony"). In contrast, "the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution," *Scott*, 524 U.S. at 362, and "[t]he exclusionary rule provides no remedy for completed wrongs," *Lopez-Mendoza*, 468 U.S. at 1046.

D. This Case Presents No Opportunity To Consider Large-Scale Information Systems Accessible By Multiple Law Enforcement Agencies

Petitioner and his amici contend that suppression is necessary here because of the increasing use of large-scale computerized databases that are accessible by multiple law enforcement agencies. Pet. Br. 35-37 & nn.12-13, 40-42 & n.15; EPIC Amicus Br. 8-36; NACDL Amicus Br. 21-24. In *Evans*, various members of this Court noted that development as well. 514 U.S. at 17-18 (O'Connor, J., concurring); *id.* at 18 (Souter, J., concurring); *id.* at 22 (Stevens, J., dis-

senting); *id.* at 23, 26-29 (Ginsburg, J., dissenting). The use of computer technology in law enforcement raises important issues. But those issues are not presented by the facts of this case. No record was developed or findings made about them below. And the presentations by petitioner and its amici are both incomplete and skewed. Accordingly, the Court should reject petitioner's invitation to fashion a broad rule of exclusion based on considerations that are inapplicable to the facts of this case. Br. in Opp. 24.

1. The record indicates that the Dale County Sheriff's Department created a database for in-office use in order to keep track of outstanding warrants in that county. Neither the Dale County Clerk's Office (which is in the same building as the Dale County Sheriff's Department, J.A. 59), nor Coffee County Sheriff's Department personnel are able to access the Dale County Sheriff's Department database. J.A. 34, 39-41, 45, 55. Accordingly, the use of computer technology in this case did not "generate[] * * * new possibilities of error" or "amplif[y] [the] effect" of the recordkeeping error that resulted in petitioner's arrest. *Evans*, 514 U.S. at 26 (Ginsburg, J., dissenting). The events of this case presumably would have played out precisely the same if Dale County had used handwritten notecards in a file box to keep track of its own outstanding warrants. See J.A. 59-61 (error occurred because unidentified person who returned the warrant to the Clerk's Office failed to update the database to reflect that the warrant had been recalled).

Not only does this case itself not involve a "powerful, computer-based recordkeeping system[]," *Evans*, 514 U.S. at 17 (O'Connor, J., concurring), no record was made below about such systems. The testimony at the two suppression hearings focused exclusively on the circumstances of petitioner's arrest and the non-computer-based ways information is shared between the Dale County Clerk's Office, the

Dale County Sheriff's Department, and the Coffee County Sheriff's Department. Petitioner presented no testimony or other evidence about the FBI's National Crime Information Center (NCIC), state fusion centers (EPIC Amicus Br. 9-13), or any of the various other databases discussed by Amicus EPIC (at 16-28), nor did the district court make any findings on such issues. Because this Court is one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it would be inappropriate to craft a rule based on factual contentions that are not at issue here and that have not been subject to adversarial testing in the courts below.

2. The soundness of not deciding this case by reference to factual contentions that were not tested below, and that have no bearing on the particular police conduct at issue, is confirmed by the incomplete and skewed presentation about various FBI databases presented by petitioner and amicus EPIC. We provide the following account based on information from the FBI in order to give the Court a more balanced picture.

a. The FBI's Criminal Justice Information Services (CJIS) Division manages two recordkeeping systems: the NCIC, and the Fingerprint Identification Records System (FIRS). The NCIC is supported by the NCIC System, and the FIRS is supported by Integrated Automated Fingerprint Identification System (IAFIS) and the Interstate Identification Index (III).

The NCIC is an automated database of criminal justice information that operates under a shared management concept between the FBI and state and federal criminal justice agencies. It is available to nearly every law enforcement agency in the Nation. The FBI maintains the host computer while providing a telecommunications network to other federal criminal justice agencies and state criminal

justice agencies in all 50 States, four territories, and the District of Columbia. Criminal justice agencies enter records into the NCIC, and those records are, in turn, accessible to law enforcement agencies nationwide. The NCIC consists of a number of separate files. Seven property files contain records for articles, boats, guns, license plates, securities, vehicles, and vehicle and boat parts. The NCIC also includes 11 "person files," including Foreign Fugitive, Missing Person, Violent Gang and Terrorist Organization, and Wanted Person files. NCIC person files are organized by name and other descriptive data.

IAFIS, III, and FIRS are fingerprint-based systems, though III is accessed using name-based queries. The overwhelming majority of information in those systems consists of criminal history information on arrests and convictions, but they also contain identification information on certain other persons, including members of the military and federal civilian employees.

b. Petitioner and his amici fail to distinguish between the NCIC's name-based Wanted Person File, the system in which outstanding warrants are tracked, and fingerprint-based criminal history record systems.[14] A number of the statements cited by petitioner and EPIC about problems in recordkeeping involve criminal history records, rather than

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[14] Amicus EPIC cites nothing in support of its flat assertion (at 14) that "State criminal history records * * * are fed into the NCIC." The FBI advises that, in at least one State, certain biographical data on a subject for whom a state criminal history record has previously been established may be used to populate certain biographical fields in a state-maintained wanted person file, which could, in turn, potentially be forwarded to the NCIC Wanted Person File. In all cases, however, only the criminal justice agency that actually obtained a warrant may enter information about that warrant into the NCIC's Wanted Person File.

the NCIC's Wanted Person File.[15] In addition, one of the studies cited by petitioner (Br. 36 n.13) involved state-managed rather than federally-managed criminal history systems. Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems, 2003*, at 8 (Feb. 2006) <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis03. pdf>.

c. With respect to the NCIC Wanted Person File, the three reports cited by petitioner and his amici are all at least two decades old,[16] and they predate a number of important reforms that are expressly designed to prevent the sort of mistaken arrest that occurred here. In 1975, the FBI established what is now known as the Criminal Justice

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[15] Bureau of Justice Statistics, U.S. Dep't of Justice, *National Criminal History Improvement Program* (last modified May 21, 2008) <http://www.ojp.usdoj.gov/bjs/nchip.htm> (EPIC Amicus Br. 15 & n.4); Bureau of Justice Statistics, U.S. Dep't of Justice, *Improving Criminal History Records for Background Checks: National Criminal History Improvement Program (NCHIP)* (May 2003) <http://www.ojp.gov/bjs/ pub/pdf/ichrbc.pdf> (EPIC Amicus Br. 15-16 & n.5); Peter M. Brien, U.S. Dep't of Justice, *Improving Access to and Integrity of Criminal History Records*, 11, 13 (July 2005) <http://www.ojp.usdoj.gov/bjs/pub/ pdf/iaichr.pdf>(EPIC Amicus Br. 14-15); Bureau of Justice Statistics, U.S. Dep't of Justice, *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update* 38 (Dec. 2001) <http://www.ojp.usdoj.gov/bjs/abstract/umchri01.htm> (EPIC Amicus Br. 14-15).

[16] Congress of the United States, Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and Individual Privacy* 133-134 (June 1986) (Pet. Br. 36 n.13); Kenneth C. Laudon, *Data Quality and Due Process in Large Interorganizational Record Systems*, Communications of the ACM, Vol. 29, No.1, at 4, 8 (Jan. 1986) (Pet. Br. 35 n.12); Secretary's Advisory Comm. on Automated Personal Data Systems, Dep't of Health, Educ. & Welfare, *Records, Computers and the Rights of Citizens* 17-19 (July 1973) (EPIC Amicus Br. 29-30).

Information Services Advisory Policy Board (Policy Board), which consists of representatives from state and local criminal justice agencies; judges, prosecutors, and corrections officials; a representative of federal agencies participating in the CJIS systems; and representatives of criminal justice professional associations. 28 C.F.R. 20.35(b); 40 Fed. Reg. 22,114-22,115 (1975). The purposes of the Policy Board is "to recommend to the FBI Director general policy with respect to the philosophy, concept, and operational principles of various criminal justice information systems managed by the FBI's CJIS Division." 28 C.F.R. 20.35(a). The Policy Board, in turn, employs numerous working groups and subcommittees made up of subject-matter experts that meet biannually and continuously forward recommendations to the Policy Board. In 1999, the FBI completed a major overhaul of the NCIC, which resulted in the issuance of a new operating manual, which is itself continuously being updated.

Under the current system, numerous checks are designed to prevent mistaken arrests. Only approved criminal justice agencies may enter information about outstanding criminal warrants into the NCIC's Wanted Person File, and there is no requirement that a participating criminal justice agency enter all of its outstanding warrants. In addition, NCIC policy requires a law enforcement agency that receives a record as a result of an NCIC inquiry to make contact with the entering agency to verify that the information is accurate and up-to-date before making an arrest.

When warrants are entered, several safeguards seek to ensure that information is accurately entered. The database itself is programed to recognize and reject certain kinds of common errors with regard to data entry (for example, an invalid vehicle identification number), and to prompt the entering official to correct those errors before

proceeding. NCIC policy also requires a "Second Party Check" where an individual other than the person who initially entered the information must double-check all information upon its entry into the database.

Once a record has been entered into the Wanted Person File, the FBI uses a rolling validation system to ensure its continuing accuracy. Every 30 days, the NCIC System generates lists of all active records that were entered within 60-90 days previously and sends those lists to the appropriate CJIS systems agency, which serves as the FBI's point of contact in each state and various federal agencies. The entering agency is then required to verify the record's accuracy, completeness, and continuing validity, the last step of which requires it to check with other entities, including courts and prosecutors. If a record is not properly validated, the relevant CJIS systems agency is required to cancel it. After this initial round of validation, NCIC policy requires entering agencies to re-validate each active record on a yearly basis.

FBI staff also conduct regular audits to ensure information accuracy. Every three years, the FBI conducts a comprehensive audit of every state CJIS systems agency. The auditors visit the CJIS systems agency itself, as well as a number of local agencies within the State. In 2007, for example, the FBI conducted 23 audits and visited 273 local agencies. During the audits, the audit team conducts an administrative interview and reviews a random sample of NCIC records to ensure that they are complete, accurate, and valid. As part of the data quality review, the audit team also contacts courts to ensure the validity of the information contained in the random sample.

Statistics maintained by the FBI demonstrate that these and other procedures lead to the regular purging of out-of-date information and have significantly reduced the number

of errors in the NCIC's Wanted Person File. Although the total number of records is continuously changing, the FBI advises that, as of July 1, 2008, the Wanted Person File contained 1,543,493 records. The FBI further advises that, in 2007 alone, 1,799,462 records were cleared or cancelled from the Wanted Person File. Finally, the FBI advises that records reviewed during the current audit cycle suggest that the Wanted Person File currently has an error rate of 2.86%, with errors being defined to include situations where the warrant was invalid, the record contained inaccurate data, or the case file supporting the warrant could not be located.

Thus, although the record here is not adequate to permit a comprehensive review of all federal and state record-keeping systems, the available information undermines rather than supports petitioner's contention about the incentives of law enforcement officials to ensure the accuracy of computerized arrest records and the need for the "severe sanction" of exclusion. *Evans*, 514 U.S. at 14. The available information, consistent with the record in this case, instead supports the conclusion that suppressing evidence because of a one-time clerical error in a generally reliable law enforcement system cannot be justified by any need for incremental deterrence. Therefore, as in *Evans*, no sufficient benefits of suppression outweigh the high cost of excluding probative evidence of criminal conduct.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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