No. 14-1373

In the Supreme Court of the United States

STATE OF UTAH, PETITIONER

v.

EDWARD JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether evidence seized incident to a lawful arrest on a valid warrant is admissible notwithstanding that an officer learned of the outstanding warrant during an unlawful investigatory stop.

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INTEREST OF THE UNITED STATES

This case presents the question whether evidence seized incident to a lawful arrest pursuant to an outstanding warrant is suppressible because a law-enforcement officer initially detained the defendant without reasonable suspicion. The Court's resolution of that question will affect the admissibility of evidence in federal criminal prosecutions under similar circumstances.

STATEMENT

Following the state trial court's denial of respondent's motion to suppress drug evidence, respondent entered a conditional guilty plea. Respondent was then convicted on one count of attempted possession of a controlled substance, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (LexisNexis Supp. 2006), and one count of possession of drug paraphernalia, in violation of Utah Code Ann. § 58-37a-5(1) (LexisNexis

2002). Pet. App. 6. The court of appeals affirmed. *Id.* at 37-98. The Utah Supreme Court reversed, holding that the trial court had erred in denying respondent's motion to suppress. *Id.* at 1-36.

1. Acting on an anonymous tip, Salt Lake City Police Officer Douglas Fackrell conducted intermittent surveillance of a home suspected of drug activity. Officer Fackrell observed "short term traffic" to and from the home that was, in his opinion, consistent with drug sales. Pet. App. 4. During one period of surveillance, he saw respondent leave the house and walk to a nearby convenience store. Officer Fackrell ordered respondent to stop in the store's parking lot. Officer Fackrell identified himself as a police officer, stated that he had been monitoring the house for drug activity, and asked respondent to explain why he had been at the house. *Id.* at 4-5.

During this exchange, respondent provided, at Officer Fackrell's request, a Utah identification card. Officer Fackrell then asked his dispatcher to determine whether respondent was subject to any outstanding arrest warrants. When the dispatcher reported that respondent was subject to an outstanding warrant for a traffic violation, Officer Fackrell arrested him. Officer Fackrell then searched him and discovered a bag of methamphetamine and drug paraphernalia in his pockets. Pet. App. 5.

2. Respondent was charged in Utah state court with one count of attempted possession of a controlled substance, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (LexisNexis Supp. 2006), and one count of possession of drug paraphernalia, in violation of Utah Code Ann. § 58-37a-5(1) (LexisNexis 2002). Respondent moved to suppress the contraband seized from his

pockets, arguing that it had been obtained in violation of the Fourth Amendment. The State conceded that Officer Fackrell had stopped respondent without reasonable suspicion that respondent was committing or had committed a criminal offense, in violation of the rule of *Terry* v. *Ohio*, 392 U.S. 1 (1968). But the State argued that the evidence was admissible because it was discovered during a search incident to the subsequent lawful arrest based on the preexisting arrest warrant and, therefore, was sufficiently attenuated from the unlawful *Terry* stop to dissipate the taint. Pet. App. 5.

The trial court denied respondent's motion to suppress, holding that Officer Fackrell's discovery that respondent was subject to an outstanding warrant was an "extraordinary intervening circumstance that purges much of the taint associated with [his] unconstitutional conduct." Pet. App. 102 (citation omitted). In the course of its analysis, the trial court found that Officer Fackrell did not commit "a flagrant violation of the Fourth Amendment" in initially stopping respondent, but rather merely made "a good faith mistake" about "the quantum of evidence needed to justify an investigatory detention." *Ibid.*

Respondent entered a conditional guilty plea, reserving the right to challenge the trial court's suppression ruling on appeal. Pet. App. 6. A divided court of appeals affirmed, holding that "the discovery of the preexisting warrant was an intervening circumstance that, coupled with the absence of purposefulness and flagrancy on the part of Officer Fackrell in detaining [respondent], sufficiently attenuated" the taint of the unlawful stop. *Id.* at 83-84; see *id.* at 37-98.

3. The Utah Supreme Court reversed. Pet. App. 1-36. The court explained that "[n]o one is contesting—or even could reasonably contest"—that respondent "was lawfully arrested on an outstanding arrest warrant, and a search incident to arrest was thus also perfectly appropriate." *Id.* at 32 & n.12. But the court concluded that the absence of reasonable suspicion for the initial *Terry* stop required suppression of the evidence seized during the search incident to the arrest. The court rejected the contention that the discovery of the outstanding arrest warrant was an intervening circumstance that attenuated the seizure of the contraband from the *Terry* stop, interpreting this Court's decisions to hold that "attenuation is limited" to cases "involving a defendant's independent acts of free will." *Id.* at 27.

SUMMARY OF ARGUMENT

When an individual is arrested under a preexisting and valid warrant, and evidence is discovered during a lawful search incident to that arrest, the evidence is admissible notwithstanding that the initial stop of the individual was not supported by reasonable suspicion.

A. The purpose of the exclusionary rule is to deter Fourth Amendment violations. But because the exclusionary rule produces substantial societal costs when people who have committed criminal offenses go free, this Court has limited the rule's application to those circumstances where it is most efficacious and least costly. The "attenuation" doctrine is one way in which this Court has restricted the scope of the exclusionary rule. Under that doctrine, even if evidence would not have been discovered but for a Fourth Amendment violation, the evidence is not suppressible if the connection between the violation and the discov-

ery and seizure of the evidence is so attenuated as to dissipate the taint. Attenuation questions cannot be answered in the abstract, but rather require a pragmatic analysis of whether suppression is necessary to vindicate the interest protected by the constitutional guarantee and whether its societal costs outstrip any deterrence benefits.

B. In the situation presented here, the connection between the illegal stop and the discovery of evidence is attenuated. That follows for two related but independently sufficient reasons.

First, the interest protected by the constitutional guarantee at issue—the rule of *Terry* v. *Ohio*, 392 U.S. 1 (1968)—would not be served by suppression of evidence obtained in a search incident to arrest based on a valid, preexisting warrant. The *Terry* rule is designed to protect ordinary citizens from the intrusion on personal privacy of a brief detention and frisk based on officers' unsupported hunches or unreasonable assumptions. That purpose is fully vindicated by suppressing any evidence discovered during those activities. But once an officer learns that an individual is subject to a preexisting arrest warrant, suppressing evidence discovered in a search incident to arrest would far outrun *Terry*'s purpose. In similar contexts, this Court has held that a search pursuant to a valid warrant or other superseding legal authority is attenuated from an antecedent Fourth Amendment violation.

Second, the only information that Officer Fackrell acquired from the unlawful stop—respondent's identity—is not itself information that may be suppressed under the exclusionary rule. It follows that information Officer Fackrell derived from respond-

ent's identity was not tainted by the unlawful stop. Any other rule would threaten to insulate criminal suspects—including, as here, suspects with outstanding arrest warrants—from criminal investigation and apprehension.

C. The costs of suppression in this context far outweigh the deterrence benefits. Law-enforcement officers already face a substantial disincentive to conduct unlawful *Terry* stops, because evidence discovered during questioning or a frisk is suppressible. In addition, officers are subject to numerous other powerful deterrents to conducting random unlawful stops, including internal discipline, civil-rights laws enforced by the Department of Justice, the potential for community hostility, and the inherent safety threat that accompanies any attempt to detain an unknown individual. Any marginal deterrent benefit from excluding evidence lawfully seized incident to a warrant-authorized arrest would not outweigh the considerable costs of applying the exclusionary rule. This case, moreover, does not present the question whether suppression of evidence discovered incident to a lawful arrest on a valid outstanding warrant could be justified to remedy a flagrant violation of the Fourth Amendment, such as a police force's dragnet detention of members of a community on no suspicion, because the district court found that Officer Fackrell made a reasonable mistake in detaining respondent.

ARGUMENT

THE EVIDENCE SEIZED FOLLOWING RESPONDENT'S WARRANT-BASED ARREST IS ADMISSIBLE

As the Utah Supreme Court explained, respondent was lawfully arrested under a valid warrant, and the evidence he seeks to suppress was discovered during a lawful search incident to that arrest. Pet. App. 32. The question here is whether the evidence discovered in that lawful search should nevertheless be suppressed because Officer Fackrell's initial stop of respondent was not justified by reasonable suspicion. Under established attenuation principles, the answer to that question is no.

A. Attenuation Analysis Requires A Pragmatic Assessment Of The Relationship Between A Fourth Amendment Violation And The Evidence Sought To Be Suppressed

1. The Fourth Amendment prohibits unreasonable searches and seizures. Although "[t]he Amendment says nothing about suppressing evidence obtained in violation of [its] command," this Court fashioned the exclusionary rule as "a prudential doctrine * * * to compel respect for the constitutional guaranty." *Davis* v. *United States*, 131 S. Ct. 2419, 2426 (2011) (citations and internal quotation marks omitted). "Exclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Ibid.* (citation and internal quotation marks omitted). Rather, "[t]he rule's sole purpose * * * is to deter future Fourth Amendment violations." *Ibid.* This Court's decisions have therefore "limited the [exclusionary] rule's operation to situations in which this purpose is 'thought most effi-

caciously served.'" *Ibid.* (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)).

Although "[r]eal deterrent value is a 'necessary condition for exclusion,' * * * it is not 'a sufficient' one." *Davis* v. *United States*, 131 S. Ct. at 2427 (quoting *Hudson* v. *Michigan*, 547 U.S. 586, 596 (2006)). The Court has recognized that the exclusionary rule exacts "'substantial social costs'" because "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Ibid.* (quoting *United States* v. *Leon*, 468 U.S. 897, 907 (1984)). The Court has therefore held that "society must swallow this bitter pill when necessary, but only as a 'last resort.'" *Ibid.* (quoting *Hudson*, 547 U.S. at 591). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Ibid.*

This Court has thus held that the "massive remedy of suppressing evidence," *Hudson*, 547 U.S. at 599, is unwarranted where officers reasonably execute a facially valid search warrant, *Leon*, 468 U.S. at 922; conduct a search in reasonable reliance on binding appellate precedent, *Davis* v. *United States*, 131 S. Ct. at 2423-2324; reasonably rely on a state statute later held unconstitutional, *Illinois* v. *Krull*, 480 U.S. 340, 349-350 (1987); or make an unlawful arrest due to a negligent clerical error, *Herring* v. *United States*, 555 U.S. 135, 136-137, 147-148 (2009); see *Arizona* v. *Evans*, 514 U.S. 1, 14-16 (1995). The Court has conducted a similar "pragmatic analysis of the exclusionary rule's usefulness" in holding that prisoners generally may not obtain habeas relief for Fourth Amendment violations, *Stone* v. *Powell*, 428 U.S. 465, 488 (1976); see *id.* at 494-495, and that the exclusionary rule does

not apply in civil-deportation hearings, *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040-1050 (1984), grand-jury proceedings, *Calandra*, 414 U.S. at 347-352, or parole-revocation hearings, *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 364 (1998).

2. One way in which this Court has limited the exclusionary rule to circumstances where its deterrence benefits outweigh its societal costs is by requiring a causal connection between the Fourth Amendment violation and the discovery of the evidence sought to be suppressed. The Court has identified two necessary components of that causation requirement.

First, a "necessary * * * condition for suppression" is that the evidence would not have been discovered but for the Fourth Amendment violation. *Hudson*, 547 U.S. at 592. Under the "independent source" doctrine, evidence discovered in an unlawful search will not be suppressed if it was separately acquired through a lawful, independent source. See *Murray* v. *United States*, 487 U.S. 533, 538-539 (1988); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). A corollary to that principle is the "inevitable discovery" doctrine, which provides that evidence discovered in an unlawful search is not suppressible if it would inevitably have been discovered had the illegal search not occurred. *Murray*, 487 U.S. at 539; see *Nix* v. *Williams*, 467 U.S. 431, 448 (1984). The purpose of those doctrines is to ensure that the exclusionary rule does not "put the police in a worse position than they would have been in absent any error or violation." *Murray*, 487 U.S. at 537 (quoting *Nix*, 467 U.S. at 443).

Second, and as particularly relevant here, this Court has held that "but-for cause, or 'causation in the

logical sense alone,' * * * can be too attenuated to justify exclusion." *Hudson*, 547 U.S. at 592 (quoting *United States* v. *Ceccolini*, 435 U.S. 268, 274 (1978)). Accordingly, once but-for causation is established, a court must further determine "whether, granting establishment of the primary illegality, the evidence * * * has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (citation omitted).

That requirement reflects the same basic cost-benefit balancing as this Court's other exclusionary-rule cases. See *Leon*, 468 U.S. at 911. As the Court has explained, "the 'dissipation of the taint' concept * * * 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" *Ibid.* (quoting *Brown* v. *Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)).

3. Once a court finds or assumes a bare causal relationship between a Fourth Amendment violation and the discovery of evidence, the attenuation doctrine requires the court to ask whether that connection is sufficiently close, and the costs sufficiently manageable, to justify suppression in order to deter similar violations in the future. See *Davis* v. *United States*, 131 S. Ct. at 2428-2429. No "talismanic test" for attenuation exists. *Brown*, 422 U.S. at 603. But the Court has explained generally that "[a]ttenuation can occur" either (i) "when the causal connection is remote," *Hudson*, 547 U.S. at 593 (citing *Nardone* v. *United States*, 308 U.S. 338, 341 (1939)), or (ii) "when, even given a direct causal connection, the interest

protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained," *ibid.*

An example of the latter type of attenuation is *New York* v. *Harris*, 495 U.S. 14 (1990). See *Hudson*, 547 U.S. at 593. In *Harris*, law-enforcement officers arrested the defendant in his home without complying with the rule of *Payton* v. *New York*, 445 U.S. 573 (1980), which generally requires a warrant to enter a person's home to arrest him. The Court held that the defendant's subsequent incriminating statement at the stationhouse was attenuated from the illegal arrest because "suppressing the statement taken outside the house would not serve the purpose of the rule that made [the defendant's] in-house arrest illegal": "to protect the home, and anything incriminating the police gathered from arresting [him] in his home, rather than elsewhere." *Harris*, 495 U.S. at 20.

The Court applied a similar analysis in *Hudson* in holding that a violation of the knock-and-announce requirement for the execution of a warrant to search a home does not require suppression of the evidence discovered during the search. 547 U.S. at 593-594. The Court explained that "the knock-and-announce rule has never protected * * * one's interest in preventing the government from seeing or taking evidence described in a warrant." *Id.* at 594. "Since the interests that were violated in this case have nothing to do with the seizure of the evidence," the Court held, "the exclusionary rule is inapplicable." *Ibid.* (emphasis omitted).[1]

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[1] To the extent that dissipation-of-the-"taint" analysis is "akin to proximate causation analysis" in tort law, *United States* v. *Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998) (O'Scannlain, J.), cert. denied,

4. In several of this Court's attenuation cases, the question was whether a Fourth Amendment violation tainted a post-arrest statement by the defendant (rather than, as here, whether the violation tainted subsequently discovered tangible evidence). See *Kaupp* v. *Texas*, 538 U.S. 626, 632-633 (2003) (per curiam); *Harris*, 495 U.S. at 18-21; *Taylor* v. *Alabama*, 457 U.S. 687, 689-694 (1982); *Dunaway* v. *New York*, 442 U.S. 200, 216-219 (1979); *Brown*, 422 U.S. at 604-605; see also *Wong Sun*, 371 U.S. at 477, 484-487, 491. In *Brown*, the Court rejected the argument that *Miranda* warnings invariably dissipate the taint from an unconstitutional arrest. See 422 U.S. at 591-592, 603-604. The Court held instead that a post-illegal-arrest statement is admissible if it "is the product of a free will," a question that depends on "the facts of each case." *Id.* at 603. The Court explained that "[t]he *Miranda* warnings are an important factor" in that analysis, but that other factors are also "relevant," including "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, * * * and, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-604 (footnote and citation omitted).

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525 U.S. 1071 (1999), the requirement that suppression of particular evidence serve the purpose of the applicable Fourth Amendment rule accords with traditional principles of proximate cause, which "limit[s] the defendant's liability to the kinds of harms he risked by his [wrongful] conduct." Dan B. Dobbs et al., *The Law of Torts* § 198, at 681 (2d ed. 2011) (Dobbs). Imposing liability on the government through suppression of evidence—with its high societal costs—is inappropriate where the government has not discovered evidence "by exploitation of th[e] illegality," *Wong Sun*, 371 U.S. at 488, but has instead relied on means distinguishable from that primary violation.

Brown did not purport to enumerate an exhaustive list of factors relevant to whether a post-illegal-arrest confession was "the product of a free will," let alone an exhaustive list of factors for all attenuation questions. Indeed, contrary to respondent's contention at the certiorari stage (see Br. in Opp. 17-18), this Court has considered attenuation questions involving the suppression of physical evidence rather than confessions, and in those cases the Court has not invoked the *Brown* factors. See *Hudson*, 547 U.S. at 592-594; *Segura* v. *United States*, 468 U.S. 796, 813-816 (1984); *Wong Sun*, 371 U.S. at 487-488. The Court has also concluded that a Fourth Amendment violation did not taint a *witness's* subsequent statement without applying the *Brown* factors. See *Ceccolini*, 435 U.S. at 279-280; see also *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972) (pre-*Brown* decision involving lineup identification); cf. *United States* v. *Crews*, 445 U.S. 463, 470-474 (1980). Although some or all of the *Brown* factors are often relevant in particular categories of cases, the overarching attenuation analysis turns on the strength of the causal connection between the Fourth Amendment violation and the evidence acquired, in light of "the interest protected by the constitutional guarantee," *Hudson*, 547 U.S. at 593, and the deterrent purpose and considerable costs of the exclusionary rule.[2]

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[2] The ultimate inquiry in attenuation cases into deterrent effect weighed against the cost of suppression parallels the ultimate inquiry in cases decided under the good-faith exception to the exclusionary rule. See, *e.g.*, *Herring*, 555 U.S. at 141-142 (discussing balance of deterrence and costs). There, the absence of flagrant or culpable conduct means that the deterrent purpose of the exclusionary rule will not be served. See *id.* at 144 ("exclusionary

B. Evidence Discovered In Executing A Valid Arrest Warrant Is Attenuated From An Illegal Stop During Which An Officer Learns The Identity Of The Arrestee

In this case, Officer Fackrell learned during the unlawful *Terry* stop that respondent was the subject of an outstanding arrest warrant and then discovered contraband incident to arresting him. See *Terry* v. *Ohio*, 392 U.S. 1 (1968). The most immediate cause of the discovery of the contraband was not the illegal *Terry* stop, but rather the "subsequent search pursuant to a lawful [arrest] warrant," *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment), which was issued before the *Terry* stop based on a judge's finding of probable cause. Nevertheless, the *Terry* stop may have been a "but-for" cause of the discovery of the evidence. Because Officer Fackrell did not recognize respondent on sight, he would not have learned of the warrant but for the *Terry* stop. And if the arrest warrant had been executed by a different officer at a later time, respondent might not have been carrying the contraband. Pet. App. 32-33.

But while the *Terry* stop may have borne a basic causal connection to the discovery of the evidence, the discovery was sufficiently attenuated from the *Terry* stop to dissipate the taint. That follows for two related but independently sufficient reasons. First, the possibility that an officer will execute a valid, preexisting arrest warrant and conduct a search incident to

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rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence"). In attenuation cases, the existence of a weak causal connection between a violation and evidence produces the same conclusion. Both inquiries must be satisfied to justify suppression.

arrest is not within the scope of the constitutional harms that the *Terry* rule is designed to prevent. Second, the only relevant information that Officer Fackrell obtained from the *Terry* stop was respondent's identity, and it has long been established that a person's identity and information derived from his identity are not suppressible.

1. Suppression is unnecessary to vindicate the purpose of the* Terry *rule

Under the attenuation principles outlined above, even if a Fourth Amendment violation bears "a direct causal connection" to the discovery of evidence, "[a]ttenuation * * * occurs when * * * the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson*, 547 U.S. at 593. That is the case here.

a. *Terry* permits an officer to briefly detain a person for questioning without probable cause "when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense" and to frisk the person for weapons when the officer "reasonably suspect[s] that the person stopped is armed and dangerous." *Arizona* v. *Johnson*, 555 U.S. 323, 326-327 (2009). *Terry* strikes a balance between officers' investigative and safety needs and the interests of citizens in avoiding a brief detention and a frisk. See *Dunaway*, 442 U.S. at 209-210. The basic premise of *Terry* is that a citizen should be free "to ignore the police and go about his business" unless officers have at least an objectively reasonable suspicion that he is involved in criminal activity. *Illinois* v. *Wardlow*, 528 U.S. 119, 125 (2000).

It follows that where an officer does not have reasonable suspicion yet detains a citizen who should have been free to "go about his business," any evidence discovered in the course of the detention—for example, during a frisk—is suppressible (absent an applicable exception to the exclusionary rule). Such evidence is exposed to the government only because the officer conducted a search that the Fourth Amendment forbids. Application of the exclusionary rule in that circumstance therefore aligns suppression with the basic purpose of the *Terry* doctrine: to prevent the police from stopping and frisking citizens based only on unsupported hunches or unreasonable assumptions.

Once it is determined that a person has an outstanding arrest warrant, however, the calculus changes and *Terry*'s basic purposes are no longer implicated. *Terry* is not designed to prevent officers from making valid arrests on outstanding warrants issued because of independent probable cause. Nor is it designed to limit post-arrest searches to ensure officer safety and preserve evidence. See *Hudson*, 547 U.S. at 593 (once "a valid warrant has issued," the subject of the warrant is no longer "entitled to shield [his] person[] * * * from the government's scrutiny") (citation and internal quotation marks omitted); see also *Virginia* v. *Moore*, 553 U.S. 164, 176-177 (2008) ("The interests justifying search are present whenever an officer makes an arrest.").

The *Terry* doctrine, in other words, does not protect against the possibility that an officer without reasonable suspicion will come across an individual who, unbeknownst to the officer, is already subject to a judicial command that he be apprehended and a

corresponding authorization for his person to be searched. Rather, *Terry* protects liberty and privacy interests that the government has no constitutional authority to disturb without reasonable suspicion or consent. See *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). But the existing warrant already provides a valid basis for intruding on a person's liberty and privacy interests. Accordingly, suppressing evidence acquired in a post-arrest search incident to a valid warrant-authorized arrest, simply because the particular officer did not know of the warrant beforehand but learned of it only by virtue of the stop, would far outstrip the purpose of *Terry*'s rule.[3]

Thus, as in *Harris* and *Hudson*, this is a circumstance in which "the interest protected by the constitutional guarantee" of *Terry* "would not be served by suppression of the evidence obtained." *Hudson*, 547 U.S. at 593. The purpose of the *Terry* rule is to protect ordinary citizens from brief detentions and frisks,

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[3] The government cannot be said to have "exploit[ed]" the stop to justify the arrest, *Wong Sun*, 371 U.S. at 488; the outstanding warrant justified the arrest. The connection between the two in this situation resembles hornbook tort cases in which a violation of a legal duty is causally connected to a resulting harm purely by happenstance, such as where "the defendant is negligent in driving a vehicle at high speed and because of the speed arrives at a spot just in time to be struck by a large tree that falls or an airplane that crashes." Dobbs § 205, at 710 (citing *Berry* v. *Sugar Notch Borough*, 43 A. 240 (Pa. 1899); and *Doss* v. *Town of Big Stone Gap*, 134 S.E. 563 (Va. 1926)). In such cases, the traditional rule is that "the defendant is not liable for injuries resulting in this manner" because "it is not a risk enhanced or created by the defendant's conduct." *Id.* at 710-711. The same holds true here: The risk of arrest, and discovery of evidence, was not enhanced by the unlawful *Terry* stop. The same arrest and discovery of evidence could have occurred in any other execution of the warrant.

and the rule is fully vindicated by suppressing evidence discovered in the course of those activities. Suppressing evidence found in lawful searches incident to arrests on preexisting warrants, by contrast, would impose substantial societal costs without any real connection to the purpose of the *Terry* rule.

b. Some lower courts that have found attenuation in similar circumstances have relied on the second "*Brown* factor" (see pp. 12-13, *supra*), holding that a lawful arrest under an outstanding arrest warrant "constitute[s] an intervening circumstance sufficient to dissipate any taint caused by the illegal * * * stop." *United States* v. *Green*, 111 F.3d 515, 521-522 (7th Cir.), cert. denied, 522 U.S. 973 (1997); see, *e.g.*, *United States* v. *Simpson*, 439 F.3d 490, 495-497 (8th Cir. 2006). Those conclusions comport with the analysis set forth above: Once it is determined during a *Terry* stop that independent, preexisting legal authority exists to arrest and search the defendant, suppression would no longer serve *Terry*'s purposes.

That conclusion is also consistent with this Court's attenuation determinations in analogous circumstances. For example, in *Segura*, law-enforcement officers illegally entered an apartment and waited there for 19 hours while a search warrant was obtained. 468 U.S. at 800-801, 814-815. The Court held that the evidence discovered in executing the warrant was not suppressible because the warrant was based on information known to the officers before the entry. *Id.* at 801, 814. The dissent argued that "the initial entry and securing of the premises [were] the 'but for' causes of the discovery of the evidence in that, had the agents not entered the apartment, but instead secured the premises from the outside, [the occupants,] if alerted, could

have removed or destroyed the evidence before the warrant issued." *Id.* at 815; see *id.* at 831-836 (Stevens, J., dissenting). In response, the Court agreed that "the agents' actions could be considered the 'but for' cause for discovery of the evidence," but rejected that causal connection as a sufficient basis to invoke the exclusionary rule. *Id.* at 816. The Court invoked "Justice Frankfurter's warning" that although "'[s]ophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof,' * * * courts should consider whether '[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint.'" *Ibid.* (brackets in original) (quoting *Nardone*, 308 U.S. at 341).

Segura supports an attenuation finding here. As in *Segura*, although the Fourth Amendment violation may have been a but-for cause of the discovery of the evidence, the search that ultimately uncovered the evidence was supported by a warrant based on independent probable cause. Indeed, the case for attenuation is stronger in this case, because in *Segura* the seizure of the apartment was objectively designed to prevent the destruction of evidence pending execution of the warrant, whereas here the *Terry* stop was not objectively designed to ensure that any search incident to the execution of the then-unknown arrest warrant would turn up contraband. And in this case, unlike in *Segura*, the warrant providing legal authority for the search *predated* the Fourth Amendment violation, further diluting the connection between the violation and the evidence. See *Hudson*, 547 U.S. at 600-601 (opinion of Scalia, J.).

The Court's decisions in *Hudson* and *Johnson* v. *Louisiana* similarly held that superseding legal authority dissipates the taint from a Fourth Amendment violation. In *Hudson*, the knock-and-announce violation preceded the search and thus could have prevented the defendants from destroying the drug evidence ultimately seized. See U.S. Amicus Br. at 14 n.5, *Hudson*, *supra* (No. 04-1360). But the Court nevertheless concluded that, for the purposes of the exclusionary rule, the "evidence was discovered not because of a failure to knock and announce, but because of a subsequent search pursuant to a lawful warrant." 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment); see *id.* at 590-594 (majority opinion).

Likewise, in *Johnson* v. *Louisiana*, the Court rejected the defendant's argument that his in-home warrantless arrest tainted a witness's subsequent identification of him in a lineup, relying on the fact that before the lineup the defendant had been "brought before a committing magistrate to advise him of his rights and set bail." 406 U.S. at 365; see *id.* at 358. As a result, the Court held, his detention "[a]t the time of the lineup * * * was under the authority of this commitment" and, therefore, not "the fruit of [the] illegal entry and arrest." *Id.* at 365. The lineup thus "was conducted not by 'exploitation' of the challenged arrest but 'by means sufficiently distinguishable to be purged of the primary taint.'" *Ibid.* (quoting *Wong Sun*, 371 U.S. at 488).

Like *Segura*, both *Hudson* and *Johnson* v. *Louisiana* support the view that an officer's acquisition or recognition of independent, valid legal authority to conduct a search or seizure vitiates the connection

between a preceding Fourth Amendment violation and any subsequently obtained evidence. And that conclusion is consistent with the basic purposes of the *Terry* rule, which are no longer served once an officer begins acting pursuant to separate, valid legal authority to conduct an arrest and search.

c. The Utah Supreme Court rested its contrary decision on the view that "attenuation should be limited to cases involving intervening acts of a defendant's free will." Pet. App. 35. That holding was clearly wrong. As discussed (see pp. 18-21, *supra*), in *Johnson* v. *Louisiana*, *Segura*, and *Hudson*, the discovery of the evidence was held attenuated because of the acquisition or execution of superseding legal authority permitting a search, not because of any act of free will by the defendant. And in *Ceccolini*, where the Court held that a witness's testimony was sufficiently attenuated from the Fourth Amendment violation that led police to the witness, no intervening change in free will occurred, nor any change by the defendant. Rather, the Court relied on the proposition that the witness's testimony "was an act of her own free will in no way coerced or even induced by official authority." 435 U.S. at 279.

Nor does it make practical sense to limit attenuation to intervening acts of a defendant's free will. Given that causal relationships can, domino-like, extend far beyond the initial event, it would be extraordinarily harmful to society if a Fourth Amendment violation tainted the discovery of any evidence causally related to the violation unless the defendant committed an act of intervening free will.

The Utah Supreme Court also feared that application of the attenuation doctrine in this case would

render the inevitable-discovery exception irrelevant. Pet. App. 31-34. That concern was misplaced. The inevitable-discovery doctrine is one application of the threshold suppression requirement that the Fourth Amendment violation be a "but for" cause of the discovery of the evidence. See p. 9, *supra*. But once a court finds that evidence might not have been discovered absent the illegal action, it must conduct the further attenuation inquiry. *Wong Sun*, 371 U.S. at 487-488. That sequence presupposes that certain evidence that would *not* inevitably have been discovered nevertheless will be found attenuated from the Fourth Amendment violation.

Moreover, applying the attenuation doctrine in the circumstances of this case does not render the inevitable-discovery doctrine irrelevant, even in the context of *Terry* violations. For example, suppose that Officer Fackrell had frisked respondent and found an illegal firearm, but that another officer had been on his way to arrest respondent on an outstanding warrant. In that circumstance, the discovery of the evidence would not be attenuated from the illegal frisk, but the government could argue that the firearm would inevitably have been discovered by the other officer during a search incident to arrest. The question would thus be resolved under the inevitable-discovery doctrine, not the attenuation doctrine.

2. A defendant's identity and evidence derived from his identity are not suppressible

The contraband that Officer Fackrell discovered in the search incident to arrest was attenuated from the unlawful *Terry* stop for another reason: The only information that he obtained from the stop was respondent's identity, which then led Officer Fackrell to

the preexisting arrest warrant in the police department's records. Unlike, for example, a firearm found during an illegal frisk, respondent's identity was not itself suppressible. As this Court and lower courts have long recognized, a suspect's identity is so fundamental to all criminal investigation and prosecution, and so readily obtainable through lawful means, that the deterrence benefits from applying the exclusionary rule to suppress identity information that happens to be discovered in an unlawful search or seizure is not justified in light of its tremendous costs. And it is an inherent precept of attenuation doctrine that evidence derived exclusively from untainted evidence, such as identity information, is not tainted either. Accordingly, because the only link between the illegal *Terry* stop and the discovery of the drug evidence was respondent's identity, the drug evidence is not suppressible.

a. A person's identity is a crucial part of any encounter he has with the criminal-justice system. When police suspect someone of criminal activity, they are likely to pose "questions concerning [the] suspect's identity [as] a routine and accepted part" of any investigatory stop. *Hiibel* v *Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). Even absent suspicious criminal activity, officers may still ask individuals about their identity or for identification without implicating the Fourth Amendment. See *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). At the initial investigatory stage, the officers' knowledge of the individual's identity serves critical interests. Knowing that "a suspect is wanted for another offense, or has a record of violence or mental disorder," for example, can alert

the officer to the need to call for backup or to take additional safety measures. *Hiibel*, 542 U.S. at 186.

When the interaction with law-enforcement officers results in arrest and criminal prosecution, the suspect's identity becomes a foundational element of the judicial proceedings. "In every criminal case," the Court has explained, "it is known and must be known who has been arrested and who is being tried." *Hiibel*, 542 U.S. at 191. That is true regardless of whether the initial arrest that resulted in bringing the suspect before the court conformed to the requirements of the Fourth Amendment. See *Crews*, 445 U.S. at 474.

In light of the importance of a suspect's identity for criminal investigations and prosecutions, this Court has long held that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." *Lopez-Mendoza*, 468 U.S. at 1039; see *Crews*, 445 U.S. at 479 (White, J., concurring in the result) ("[A] majority of the Court agrees that the rationale of *Frisbie* [v. *Collins*, 342 U.S. 519 (1952),] forecloses the claim that respondent's face can be suppressible as a fruit of the unlawful arrest."). That principle has two components. First, a court may exercise *jurisdiction* over a person who has been unlawfully arrested. See *Lopez-Mendoza*, 468 U.S. at 1039-1040. Second, *evidence* of a person's identity is not suppressible.

The Court made the latter point clear in *Lopez-Mendoza*, which held that the exclusionary rule does not apply to evidence introduced in civil-deportation proceedings. See 468 U.S. at 1040-1050. In reaching that conclusion, the Court determined that applying the exclusionary rule in those proceedings would have

little deterrence benefit. As relevant here, the Court explained that in many deportation proceedings "the sole matters necessary for the Government to establish are the respondent's identity and alienage," and "*the person and identity of the respondent are not themselves suppressible*." *Id.* at 1043 (emphasis added; citation omitted). Although some lower courts have understood that statement to refer only to a court's jurisdiction over a defendant, *e.g.*, *United States* v. *Rodriguez-Arreola*, 270 F.3d 611, 617-619 (8th Cir. 2001), that is incorrect. In the passage containing the quoted statement, this Court rejected a request by an alien to suppress evidence at his deportation proceeding, 468 U.S. at 1040, and it reasoned that even if the exclusionary rule applied, only limited forms of evidence could be suppressed as a consequence of an unlawful arrest, identity evidence not being among them, *id.* at 1043. The nonsuppressibility of identity evidence was thus integral to the Court's holding.

It follows that any evidence that law-enforcement officers derive from the bare fact of a suspect's identity is not suppressible either. To the government's knowledge, this Court has never required the suppression of evidence found solely through the otherwise lawful use of information or material that is not itself suppressible. That makes sense: Logic suggests that the lawful use of admissible evidence to procure further admissible evidence is permissible. The fruit-of-the-poisonous-tree doctrine requires a tainted branch, and if a branch is not tainted, its fruit is not forbidden.

For example, no one would reasonably contend that evidence derived from other evidence acquired under

a search warrant after a knock-and-announce violation is suppressible. Because the initially acquired evidence is not itself suppressible under *Hudson*, any further evidence derived from the evidence is also untainted. Likewise, because a stationhouse confession following a *Payton* violation is not itself tainted under *Harris*, any evidence that law-enforcement officers derive from the confession—for example, by securing a warrant to search the home—is not suppressible either. Under the same principle, when officers use the knowledge of an individual's identity, which cannot be suppressed, to discover additional evidence, that evidence is not tainted.

b. The conclusion that neither a defendant's identity, nor evidence derived from his identity, is suppressible is supported by the cost-benefit analysis that this Court's exclusionary-rule precedents mandate. Suppressing evidence derived from illegally obtained identity information is unlikely to have appreciable deterrence benefits. Once law-enforcement officers ascertain a suspect's identity, they typically must engage in substantial further investigative work to discover inculpatory evidence. See *Hiibel*, 542 U.S. at 191. For that reason, in most cases, the "causal connection" between a suspect's identity and the evidence sought to be suppressed will be too "remote" to warrant suppression. *Hudson*, 547 U.S. at 593. Moreover, officers have many lawful ways to determine a person's identity, such as asking neighbors or landlords. See p. 30, *infra*. It is therefore not plausible that suppression of identity evidence that happens to be discovered during a Fourth Amendment violation, like the illegal *Terry* stop here, or evidence derived

from such identity evidence, will materially increase deterrence.

That minimal deterrence benefit is vastly outweighed by the societal costs of holding that illegally acquired identity information taints evidence discovered in a subsequent investigation. Courts of appeals have consistently held that the fact that an individual's identity was learned during an unlawful search did not taint evidence discovered during the investigation of that individual. See *United States* v. *Smith*, 155 F.3d 1051, 1062-1063 (9th Cir. 1998), cert. denied, 525 U.S. 1071 (1999); *United States* v. *Watson*, 950 F.2d 505, 507-508 (8th Cir. 1991); *United States* v. *Friedland*, 441 F.2d 855, 859-861 (2d Cir.), cert. denied, 404 U.S. 867, and 404 U.S. 914 (1971). Indeed, even when police have discovered both an individual's identity and links to criminal activity in an illegal search, courts have declined to suppress the fruits of later investigation. As Judge Friendly explained in the seminal Second Circuit decision addressing that issue, it "would stretch the exclusionary rule beyond tolerable bounds" to "grant life-long immunity from investigation and prosecution simply because a violation of the Fourth Amendment first indicated to the police that a man was not the law-abiding citizen he purported to be." *Friedland*, 441 F.2d at 861.

That analysis applies with special force in the situation here. The only relevant fact that the police obtained in the stop leading to respondent's arrest was his identity; law-enforcement officers had already developed probable cause against respondent before Officer Fackrell learned his identity. The illegal stop thus did not even lead to the investigation justifying respondent's arrest. Rather, it merely provided a

means of determining that he was subject to being arrested and searched under the preexisting warrant. It would not serve the purposes of the exclusionary rule to hold that a search incident to an arrest that culminated from a lawful, prior investigation is tainted merely because the arresting officer learned the suspect's identity during an unlawful *Terry* stop.

c. In *Davis* v. *Mississippi*, 394 U.S. 721 (1969), and *Hayes* v. *Florida*, 470 U.S. 811 (1985), the police, after interviewing dozens of other young males in connection with suspected sexual assaults, detained the defendants without a warrant or probable cause for the purpose of fingerprinting them and linking them to a specific crime by comparing their fingerprints to those found at the crime scene. See *Davis* v. *Mississippi*, 394 U.S. at 722-723; *Hayes*, 470 U.S. at 812-813. This Court held that the detentions violated the Fourth Amendment and that the fingerprints were suppressible fruits of that violation. *Davis* v. *Mississippi*, 394 U.S. at 723-728; *Hayes*, 470 U.S. at 813-818.

Although a person's fingerprints are a form of identity evidence, *Davis* and *Hayes* do not undercut the principle that identity information, and evidence derived from identity information, is generally not suppressible. In *Davis* and *Hayes*, the identities of the defendants were already known to the authorities. The fingerprints therefore were not being used to identify the defendants, but rather as inculpatory evidence to link the defendants to a crime scene. That presents an entirely different question than cases in which officers use fingerprints to identify a suspect, where the fingerprints may have been taken during an unlawful arrest or detention. In such cases, under this Court's post-*Davis* decision in *Lopez-Mendoza*,

the suspect's identity is not suppressible merely because it was derived from fingerprinting that took place during an illegal detention.[4]

C. The Societal Costs Of Suppression In This Context Far Outweigh Any Deterrence Benefits

A pragmatic analysis of the costs and benefits of suppressing evidence further confirms that "the extreme sanction of exclusion," *Herring*, 555 U.S. at 140 (quoting *Leon*, 468 U.S. at 916), is not warranted here.

1. Suppressing evidence from a search incident to a warrant-authorized arrest would not result in appreciable marginal deterrence of *Terry* violations. Law-enforcement officers already face a substantial deterrent to unlawful *Terry* stops: Absent some other exception to the exclusionary rule, statements made during an unlawful stop and evidence discovered through an unlawful frisk are suppressible. As with the *Payton* rule in *Harris*, "the principal incentive to obey [*Terry*] still obtains," *Harris*, 495 U.S. at 20,

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[4] *Davis* v. *Mississippi* involved "dragnet" arrests of multiple individuals without any objective basis for individualized suspicion, 394 U.S. at 728 (Harlan, J., concurring); see *United States* v. *Dionisio*, 410 U.S. 1, 5 (1973), and *Hayes* involved a wholly unjustified arrest and transportation of a suspect to the stationhouse for the sole purpose of taking an investigatory set of fingerprints, 470 U.S. at 812. The flagrancy of that conduct further distinguishes it from a case like this, involving an officer's misjudgment about the existence of reasonable suspicion on a particular set of facts. See *Herring*, 555 U.S. at 143 ("[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule.") (citation and internal quotation marks omitted); see also pp. 32-33, *infra*. The Court therefore need not consider whether the holdings of *Davis* and *Hayes* should be reassessed or limited in light of the principles of its more recent exclusionary-rule precedents.

even if evidence discovered incident to valid warrant-based arrests is not suppressible. In most cases, an officer's reason for detaining a citizen is to ask questions about potential criminal activity, or possibly to perform a frisk that might turn up weapons or contraband. Suppressing that evidence directly deters unfounded stops. It is not plausible that officers will, nonetheless, frequently conduct such stops on the off-chance that a warrant might turn up and permit a search incident to arrest.

An officer bent on learning whether an individual has an outstanding warrant has easier options at her disposal. She could ask the person his name without requiring him to stop. See *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991). She could follow the individual to his home, place of employment, or car, record the address or license plate, and check that information against a warrant database. She could ask neighbors, a landlord, or coworkers. None of those strategies violates the Fourth Amendment. See *United States* v. *Diaz-Castaneda*, 494 F.3d 1146, 1150-1152 (9th Cir.) (collecting cases holding that database check of license plate is not a search under the Fourth Amendment), cert. denied, 552 U.S. 1031 (2007).

Other factors also deter officers from conducting random, arbitrary stops. *Terry* stops can be dangerous for officers, which is why they may perform a frisk if they have reasonable suspicion that someone is armed. In addition, officers who detain citizens without justification face civil liability through Section 1983 or *Bivens* suits, which this Court has found to have emerged recently as "an effective deterrent." *Hudson*, 547 U.S. at 598. As with the knock-and-announce suits that this Court pointed to in *Hudson*,

see *ibid.*, lowers courts have entertained a number of suits based on alleged *Terry* violations. See, *e.g.*, *Family Serv. Ass'n ex rel. Coil* v. *Wells Twp.*, 783 F.3d 600, 603-605 (6th Cir. 2015); *Jones* v. *Clark*, 630 F.3d 677, 682-684 (7th Cir. 2011); *Flores* v. *JC Penney Corp.*, 256 Fed. Appx. 979, 980-981 (9th Cir. 2007); *Turmon* v. *Jordan*, 405 F.3d 202, 205-206 (4th Cir. 2005); *Goodson* v. *City of Corpus Christi*, 202 F.3d 730, 739-740 (5th Cir. 2000). The Department of Justice also has authority to conduct investigations of unlawful patterns or practices by police departments of conducting stops without reasonable suspicion, and its actions can lead to institutional reform and monitoring. See 42 U.S.C. 14141.

2. It might be argued that that without suppression in this context, law-enforcement officers would be encouraged to conduct random, dragnet *Terry* stops in neighborhoods where a large number of citizens are subject to outstanding arrest warrants. This Court, however, has rejected the argument that refraining from suppressing evidence when it is attenuated will encourage blatantly lawless conduct. See *Hudson*, 547 U.S. at 597-599. And in *Segura*, Chief Justice Burger, joined by Justice O'Connor, rebuffed a claim that refusing to suppress evidence when officers unlawfully secure a home from the inside would "heighten the possibility of illegal entries," noting that "[w]e are unwilling to believe that officers will routinely and purposely violate the law as a matter of course." 468 U.S. at 811-812 (opinion of Burger, C.J.). Moreover, such flagrantly unlawful actions can only engender "community hostility" and thus undermine efforts to prevent and solve crimes. *Illinois* v. *Lidster*, 540 U.S. 419, 426 (2004).

Even if a "widespread pattern" of blatantly unconstitutional tactics were to emerge, *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment), the civil-rights laws would likely provide effective remedies against egregious policies or practices, see *id.* at 597-598 (majority opinion). While the Fourth Amendment, and the exclusionary rule adopted under it, turn on objective factors, and not on an officer's subjective state of mind, see *Whren* v. *United States*, 517 U.S. 806, 813 (1996); see also *Herring*, 555 U.S. at 143, the Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race" and provides a "constitutional basis for objecting to intentionally discriminatory application of laws," *Whren*, 517 U.S. at 813. The lower courts did not find that such conduct occurred in this case. But if law-enforcement officers were to engage in pretextual or intentional errors, the Department of Justice would have the authority under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C 14141, to address such impermissible or discriminatory tactics. Indeed, the Department has negotiated consent decrees with police departments to ensure that *Terry* and similar stops of individuals are not undertaken for intentionally impermissible reasons. See, *e.g.*, Consent Decree Regarding the New Orleans Police Dep't, Docket entry No. 2-1, at 38, *United States* v. *City of New Orleans*, No. 2:12-cv-01924 (E.D. La. July 24, 2012).

In any event, the concern that officers might conduct blatantly unconstitutional stops in the hope of discovering outstanding arrest warrants would at most justify reserving the question whether suppression would be warranted if the discovery of an out-

standing warrant were the result of a flagrant violation of *Terry*, a factor that this Court has cited in some attenuation contexts. See *Leon*, 468 U.S. at 911 (citing *Brown*, 422 U.S. at 603-604; and *Dunaway*, 442 U.S. at 218). Here, the trial court and the court of appeals correctly found that Officer Fackrell did not commit "a flagrant violation of the Fourth Amendment." Pet. App. 102; see Pet. Br. 29-32. As the court of appeals explained, Officer Fackrell relied on an "anonymous tip about drug activity [that] had been corroborated to some extent by [his] personal observations" of the house from which respondent emerged, and his purpose in stopping respondent was to "further investigate what was going on inside the house." Pet. App. 69-70. His actions "amounted to a misjudgment" about whether the reasonable-suspicion standard was met, not a "knowing or obvious disregard of constitutional limitations." *Id.* at 70-71. This case thus does not provide an occasion to consider whether suppression would be appropriate for a flagrant *Terry* violation. Cf. *Lopez-Mendoza*, 468 U.S. at 1050-1051 (opinion of O'Connor, J.).

3. The "marginal or nonexistent benefits produced by suppressing evidence" in this context "cannot justify the substantial costs of exclusion." *Evans*, 514 U.S. at 12 (quoting *Leon*, 468 U.S. at 922). This Court has long recognized "the grave adverse consequence that exclusion of relevant incriminating evidence always entails." *Hudson*, 547 U.S. at 595. Excluding evidence "detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions," *Scott*, 524 U.S. at 364, with the "risk of releasing dangerous criminals into society," *Hudson*, 547 U.S. at 595.

Respondent's proposed rule would not distinguish an individual with an outstanding warrant for a traffic violation from an individual with an outstanding warrant for armed robbery, and it would exclude even especially critical evidence found during a search incident to arrest, such as a firearm or drug ledger. Particularly given that exclusion of evidence "has always been [this Court's] last resort, not [its] first impulse," *id.* at 591, applying the exclusionary rule to evidence discovered in a lawful search incident to arrest to remedy an antecedent *Terry* violation is not warranted. In that circumstance, "the rule's costly toll upon truth-seeking and law enforcement objectives" overwhelm whatever marginal deterrent value would be achieved. *Scott*, 524 U.S. at 364-365 (citation and internal quotation marks omitted).

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted.

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