No. 09-11556

IN THE

# Supreme Court of the United States

JOSE TOLENTINO,

*Petitioner,*

*v.*

STATE OF NEW YORK,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

Whether pre-existing identity-related governmental documents, such as motor vehicle records, obtained as the direct result of police action violative of the Fourth Amendment, are subject to the exclusionary rule?

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## OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 14 N.Y.3d 382, 926 N.E.2d 1212. J.A. 98a-111a. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 59 A.D.3d 298, 873 N.Y.S.2d 602. J.A. 95a-97a. The opinion of the Supreme Court of the State of New York, New York County, is unreported. J.A. 76-78a.

## JURISDICTION

The New York Court of Appeals rendered its decision on March 30, 2010. The petition for a writ of certiorari was filed on June 23, 2010, and granted on November 15, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The Fourteenth Amendment to the United States Constitution provides, in relevant part: ". . . nor shall any State deprive any person . . . of liberty . . . without due process of law."

Section 511(3)(a)(ii) of the New York Vehicle and Traffic Law provides:

> A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the

> first degree when such person . . . commits the offense of aggravated unlicensed operation of a motor vehicle in the third degree as defined in subdivision one of this section; and is operating a motor vehicle while such person has in effect ten or more suspensions, imposed on at least ten separate dates for failure to answer, appear or pay a fine, pursuant to subdivision three of section two hundred twenty-six of this chapter or subdivision four-a of section five hundred ten of this article.

Section 511(1)(a) of the New York Vehicle and Traffic Law provides:

> A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the third degree when such person operates a motor vehicle upon a public highway while knowing or having reason to know that such person's license or privilege of operating such motor vehicle in this state or privilege of obtaining a license to operate such motor vehicle is suspended, revoked or otherwise withdrawn by the commissioner.

## STATEMENT

1. On January 1, 2005, New York City police officers stopped petitioner while he was driving his car in Manhattan. J.A. 3a-4a, 7a-8a. Upon learning petitioner's name, the officers ran a routine computer check of Department of Motor Vehicles ("DMV") records maintained by New York State and made available to the

police. J.A. 4a, 28a, 31a-32a. Those records revealed that petitioner's driver's license had been suspended and had not been reinstated, and that petitioner had at least ten suspensions on at least ten different dates for failure to answer a summons or pay a fine, all of which were in effect at the time of the stop. J.A. 4a. On April 19, 2005, a New York County grand jury indicted petitioner on one count of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, in violation of New York Vehicle and Traffic Law § 511(3)(a)(ii).[1] J.A. 6a.

2. After his arraignment, petitioner moved to suppress the DMV records, as well as a statement he made to the police at the time of the stop that he did not have a valid New York State driver's license, as the fruits of an unlawful stop of his car. Alternatively, petitioner requested that the court hold a hearing on his motions. J.A. 16a-17a. In his accompanying affirmation, petitioner noted that an officer had conducted a computer check of his DMV records, which revealed that his license had been suspended. J.A. 28a. Petitioner alleged as a general matter that "[t]he steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number." J.A. 28a. While acknowledging that DMV records are "public records"

1. New York Vehicle and Traffic Law § 511(3)(a)(ii) provides that a person who operates a car on a public highway while knowing his license has been suspended or revoked, and has in effect ten or more suspensions imposed on ten separate dates for failure to answer, appear or pay a fine, is guilty of the felony of Unlicensed Operation of a Motor Vehicle in the First Degree. N.Y. Veh. & Traffic L. §§ 511(1); 511(3)(a)(ii), (b). A license or registration may be suspended for a number of reasons set forth in the Vehicle and Traffic Law. *See* N.Y. Veh. & Traffic L. § 510.

and "were in existence in computerized form prior to [petitioner's] arrest," J.A. 31a, petitioner claimed that the police would not have "obtained" his DMV records "[b]ut for [his] unlawful seizure by the police . . . and they are therefore the fruit of the police illegality." J.A. 28a. With regard to the stop itself, petitioner alleged only that he was driving his car on a public road, that there was nothing unlawful in either the condition or manner of operation of the car, and that he "was not playing his radio at an unlawfully high volume." J.A. 25a-26a, 34a.

The People opposed petitioner's motion on two grounds: first, that the officers' stop of petitioner was lawful, and second, that even if petitioner had been stopped illegally, the exclusionary rule had no application to the DMV records. J.A. 69a-74a. The trial court ordered a hearing on petitioner's motion to suppress his statement, but denied petitioner's request to suppress the DMV records.[2] It concluded that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the [DMV] and such records do not constitute evidence which is subject to suppression under a fruit of the poisonous tree analysis." J.A. 77a-78a.

On August 3, 2005, petitioner pled guilty to Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, the sole count in the indictment. J.A. 79a-90a. Because petitioner entered a guilty plea before any hearing could be held on his motion to suppress his

2. Under New York's criminal procedure law, a court may deny a suppression motion without a hearing if the motion papers do not allege a legal basis for suppression. *See* N.Y. Crim. Proc. Law § 710.60(3)(a).

statement, the trial court never adjudicated the legality of the car stop. On September 28, 2005, petitioner was sentenced to five years of probation and a $500 fine. J.A. 91a-94a.

3. On appeal to New York's Appellate Division, First Department,[3] petitioner claimed, among other things, that the trial court had erred in holding that the exclusionary rule did not apply to the DMV records, and he sought a remand for a hearing on his motion to suppress the records. The Appellate Division unanimously affirmed the trial court. The court recognized that "a defendant need not establish a privacy interest in an alleged fruit of [a Fourth Amendment violation]." J.A. 96a. With respect to the applicability of the exclusionary rule, the Appellate Division held that "DMV records are not suppressible fruits." *Id.* The court relied on *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), in which this Court held that "[t]he . . . identity of a defendant . . . is never itself suppressible as a fruit of an unlawful arrest." The court reasoned that in light of *Lopez-Mendoza*, "'there is no sanction to be applied when an illegal arrest only leads to discovery of [a person's] identity and that merely leads to the official file.'" *Id.* (quoting *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994) (internal citations omitted)). The court also found it significant that the government had compiled petitioner's DMV records independent of his arrest. *Id.*

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3. Under New York law, a defendant may appeal a final order denying a motion to suppress evidence, "notwithstanding the fact that such judgment is entered upon a plea of guilty." N.Y. Crim. Proc. Law § 710.70(2).

The New York Court of Appeals affirmed the decison of the intermediate appellate court. J.A. 98a-111a. The state high court noted that petitioner had not contended that his name or identity could be suppressed as the fruit of an allegedly unlawful stop. Rather, he claimed that the DMV records could be suppressed because absent an illegal stop, the police would not have learned his name and would not have been able to obtain the records. J.A. 101a.

The New York Court of Appeals examined federal circuit court decisions holding that the exclusionary rule has no application when the police unlawfully stop someone, learn his name, and use that name to check pre-existing government immigration records. *Id.* (citing *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir. 2009); *United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir. 2006); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *Hoonsilapa v. INS*, 575 F.2d 735, 737 (9th Cir. 1978)). Relying on those decisions, as well as on this Court's decision in *Lopez-Mendoza*, the New York high court held that petitioner's DMV records were not subject to suppression as fruits of a purportedly unlawful stop. J.A. 100a-104a.[4]

The New York Court of Appeals found further support for its conclusion in *United States v. Crews*, 445 U.S. 463 (1980). J.A. 102a. In *Crews*, a plurality of this

4. Contrary to petitioner's characterization, *see* Pet. Br. at 24, the New York Court of Appeals did not categorically exempt all "identity-related evidence" from the reach of the exclusionary rule. It held only that "a defendant may not invoke the fruit-of-the-poisonous-tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name." J.A. 105a.

Court concluded that "'[t]he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.'" J.A. 102a (quoting *Crews*, 445 U.S. at 475). Like other pre-existing records already in possession of the government, DMV records are not subject to suppression, the New York high court concluded. J.A. 102a-103a.

In addition, the Court of Appeals distinguished the case before it from *Davis v. Mississippi*, 394 U.S. 721 (1969), and *Hayes v. Florida*, 470 U.S. 811 (1985), on two distinct grounds. First, the defendants in those cases, unlike petitioner, were illegally stopped for the very purpose of obtaining their fingerprints, which the government did not have in its possession, to connect them to crimes under investigation. Second, those fingerprints were used to establish that the defendants were the perpetrators of the crime, not to establish the identities of the individuals who had been stopped by the police. J.A. 105a.

Lastly, the court declared that its ruling would not give the police an incentive to illegally stop, detain, and search individuals. Because evidence recovered in the course of such a stop is still subject to the exclusionary rule, the court explained, the police would be sufficiently deterred from conducting illegal car stops. J.A. 104a.

Two judges dissented, asserting that DMV "records are subject to suppression if obtained by the police through the exploitation of a Fourth Amendment violation." J.A. 105a.

## SUMMARY OF ARGUMENT

At issue in this case is whether the exclusionary rule applies to state DMV records showing that petitioner's New York State driver's license had been repeatedly suspended, which the police reviewed when they stopped petitioner's car. As petitioner has conceded from the outset, state DMV records are public records that existed prior to his arrest. J.A. 31a. He has also acknowledged that the officers who arrested him were authorized to examine the records and were able to do so simply by running a computer check from their patrol car. J.A. 28a, 31a-32a. Nonetheless, petitioner claims that his DMV records are subject to suppression as the fruit of the allegedly unlawful stop of the car, arguing that but for the stop, the police would not have learned his name, which they used to run the computer check that revealed his record of multiple suspensions.

This Court should decline to expand the exclusionary rule in the manner petitioner seeks, for three independent reasons. First, the exclusionary rule has never been applied to information that the government lawfully possesses prior to unconstitutional police conduct, and with good reason: the exclusionary rule reaches only evidence that has been improperly "obtained" as a result of a purported illegality. As this Court has already determined, the exclusionary rule "'does not reach backward to taint information that was in official hands prior to any illegality.'" *Maryland v. Macon*, 472 U.S. 463, 471 (1985) (quoting *Crews*, 445 U.S. at 475 (plurality)). Here, the police indisputably acquired petitioner's DMV records before the stop of his car even took place. Police officers had lawful access to the pre-existing public

records all along, and the authority and ability to examine them at any time. Suppressing those records on the theory that the officers who stopped petitioner did not know the contents of his specific DMV records until after the stop would stretch the exclusionary rule beyond any reasonable bounds. That interpretation has no grounding in the text of the Fourth Amendment or the interests the exclusionary rule seeks to protect.

Second, the sole piece of information that the police obtained from petitioner in the course of the car stop – petitioner's identity – cannot be suppressed. A defendant's name is the most basic and obvious component of his identity, and this Court has already recognized that a person's identity is not subject to exclusion. *See Lopez-Mendoza*, 468 U.S. at 1039, 1043; *Crews*, 445 U.S. at 477 (Powell, J., concurring), 478-79 (White, J., concurring). That conclusion is a logical and necessary corollary of the well-established principle that a defendant's person cannot constitute suppressible fruit under the exclusionary rule, lest he receive immunity from prosecution. *See Frisbie v. Collins*, 342 U.S. 519, 522 (1952). Suppressing a defendant's identity would be tantamount to suppressing his person; once the police learn who the defendant is during an unlawful search or seizure, any ensuing effort to investigate and prosecute him could be deemed the tainted fruit of the discovery of his identity.

Third, the exclusionary rule should not be applied here because any incremental deterrence benefit that suppression of DMV records might yield is far outweighed by the social costs of excluding that evidence. As this Court recognized in *Delaware v. Prouse*, 440 U.S. 648 (1979), the police have several lawful alternatives for discovering

license and registration violations. Thus, they would be especially disinclined to resort to random, suspicionless car stops, which are in any event a highly inefficient means of achieving the same goals. *Id.* at 659. Such an enforcement strategy would also entail the suppression of contraband or other incriminating evidence found in the course of an invalid stop, an outcome which provides an independent deterrent against systemic misconduct. Police training initiatives, internal disciplinary mechanisms, and the risk of civil liability serve as additional checks on invalid stops. On the other hand, enforcing the exclusionary rule in this context would impose exorbitant costs, perhaps even requiring the effective immunization of defendants for both past and future instances of unlicensed driving.

## ARGUMENT

This Court has "repeatedly emphasized that the [exclusionary] rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (quoting *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 364-65 (1998)). As a result, the Court has deemed application of the rule "our last resort, not our first impulse," and has been "'cautio[us] against expanding it.'" *Hudson*, 547 U.S. at 591 (quoting *Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986)).

The exclusionary rule is "a judicially created remedy." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Thus, "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by

police conduct.'" *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)). Exclusion is intended to "deter" violations of the Fourth Amendment "by removing the incentive to disregard it." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). It is "not calculated to redress the injury to the privacy of the victim of the search or seizure . . . ." *Stone v. Powell,* 428 U.S. 465, 486 (1976).

The exclusionary rule, for nearly a century, has consistently been limited to two related categories of evidence: *first*, evidence "obtained" by a search or seizure conducted in violation of the Fourth Amendment, *Mapp*, 367 U.S. at 655; and, *second*, certain "derivative evidence" that is the "product" of the primary evidence obtained during the unlawful search, *Murray v. United States*, 487 U.S. 533, 536-37 (1988). Thus, "cases implementing the exclusionary rule 'begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity.'" *Nix v. Williams*, 467 U.S. 431, 444 (1984) (quoting *Crews*, 445 U.S. at 471 (emphasis added in *Nix*)).

Even where the exclusionary rule is properly applied, it only excludes evidence whose discovery was closely connected to the unconstitutional conduct. "[E]xclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson*, 547 U.S. at 591-92. "[B]ut-for causality is only a necessary, not a sufficient, condition for suppression." *Id.* at 592; *see Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Thus, evidence is suppressible only if it has "been come at by exploitation of th[e] illegality," rather

than "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 488; *see Hudson*, 547 U.S. at 592.

As this Court has acknowledged, the exclusion of evidence from a criminal proceeding imposes "substantial social costs." *Hudson*, 547 U.S. at 591; *Illinois v. Krull*, 480 U.S. 340, 352 (1987); *Leon*, 468 U.S. at 907. Suppression often diverts attention from "the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding," for it excludes evidence that "typically" is "reliable" and "often the most probative information bearing on the guilt or innocence of the defendant." *Stone v. Powell*, 428 U.S. at 489-90. And "because the [exclusionary] rule is prudential rather than constitutionally mandated," it is "applicable only where its deterrence benefits outweigh its 'substantial social costs.'" *Scott*, 524 U.S. at 363 (quoting *Leon*, 468 U.S. at 907); *see, e.g.*, *Herring v. United States*, 555 U.S. 135, __, 129 S.Ct. 695, 700-01 (2009); *Hudson*, 547 U.S. at 591, 594-95; *Stone v. Powell*, 428 U.S. at 488-89; *see also Calandra*, 414 U.S. at 348 ("As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served").

In circumstances where the incremental deterrent value of suppression does not outweigh its societal cost, this Court has declined to apply the exclusionary rule. Thus, entire categories of proceedings are exempt from application of the exclusionary rule, including parole revocation hearings, *see Scott*, 524 U.S. at 359, civil deportation proceedings, *see Lopez-Mendoza*, 468 U.S. at 1050, grand jury proceedings, *see Calandra*, 414 U.S. at 350, and federal habeas corpus proceedings, *see Stone v. Powell*, 428 U.S. at 494.

## I. The exclusionary rule does not apply to records independently compiled by the government and already in its possession before an unlawful search or seizure.

Petitioner asks this Court to extend the exclusionary rule to a circumstance where it has never been applied before: to cover records that were in the government's hands and fully accessible to the police prior to their purportedly illegal stop of petitioner's car. Pre-existing, independently compiled data of this sort cannot be deemed a "fruit" of police illegality, because the Fourth Amendment applies only to evidence that was improperly obtained by the police after an unlawful act. This Court's precedents regarding the causal connection that must exist between challenged evidence and unlawful police conduct confirm that point.

The ruling petitioner seeks could have broad consequences for public safety, and raises questions about whether law enforcement officials can follow up on a host of government records they might review after an unlawful stop. Petitioner's expansive understanding of the exclusionary rule has no basis in the text or purpose of the Fourth Amendment, and should be rejected.

### A. The exclusionary rule applies only to evidence "improperly obtained" by the police, not to pre-existing data already in the government's hands.

The Fourth Amendment, on its face, provides no protection against the government's use of its own pre-existing records, regardless of whether the link between those records and a particular individual is ascertained

through an unlawful police act. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects." U.S. Const. amend. IV. Its "purpose" is to "prevent unreasonable governmental intrusions into the privacy of one's person, house, papers or effects." *Calandra*, 414 U.S. at 354. The government does not intrude into someone's privacy by accessing a public record not owned or held by that person, and the Fourth Amendment confers no right against such access, whether or not it occurs after an unlawful stop.[5]

The exclusionary rule can reach not only evidence obtained during unlawful police activity, but also the products of that evidence. However, excluding either type of evidence would be wholly incompatible with this Court's repeated declarations that the exclusionary rule applies only to evidence that is improperly "obtained," *Herring*, 129 S.Ct. at 699; *Lopez-Mendoza*, 468 U.S. at 1040-41; *Calandra*, 414 U.S. at 347; *Mapp*, 367 U.S. at 655, or "acquired," *Murray*, 487 U.S. at 536-37; *Crews*, 445 U.S. at 471. The words "obtained" and "acquired" plainly exclude something that is already in one's possession. *See* Webster's New World Dictionary, 3d College Edition, 1988, at 936 (defining "obtain" as "to get possession of" or "procure"), 12 (defining "acquire" as "to get or gain by one's own actions" or "get possession of").

This Court has declared the exclusionary rule inapplicable to evidence "already in the lawful possession of the police," *Macon*, 472 U.S. at 471, or "in official hands

5. As noted above, *supra* at pp. 4-5, the legality of the stop at issue here has not been adjudicated. Nothing in Respondent's brief should be construed as a concession regarding the purported illegality of that stop.

prior to any illegality," *Crews*, 445 U.S. at 475 (plurality). Any other result would be illogical. Given that exclusion applies only to evidence acquired by "exploitation" of an illegality, *see Wong Sun*, 371 U.S. at 488, evidence that is in government hands *before* purportedly illegal police behavior cannot logically be considered to have been acquired by that *later*-in-time illegality.

In this case, there is no doubt that petitioner's DMV records were independently compiled and maintained by the state, and in the lawful possession of the government, long before the allegedly illegal stop. Petitioner does not allege (nor could he) that there were any legal constraints on the DMV's power to make driving records available to the police, or on the authority of the police to examine those pre-existing records in the course of a car stop. Across New York State, and no doubt many other jurisdictions, DMV records are freely available to officers in patrol cars. Those officers can easily access a driver's record at the scene, either by looking it up on a computer terminal available in their car, or by requesting that a central dispatcher run a computer check. Such computer checks are a routine part of a car stop, and are essential to officer and public safety, since the check may reveal, for instance, the existence of an outstanding arrest warrant. Because the government had lawfully compiled the information regarding petitioner's repeated suspensions prior to the stop in question, they could not have "obtained" it for purposes of the Fourth Amendment - improperly or otherwise - at the time of the stop.

Petitioner observes that a criminal defendant can seek suppression of evidence that is the fruit of unlawful police activity even if he does not have a reasonable expectation

of privacy in the item, *see* Pet. Br. at 23. But that point provides no basis for applying the exclusionary rule to evidence in the government's lawful possession prior to an invalid stop. Even though a defendant need not establish a reasonable expectation of privacy, he must still establish that the police obtained that evidence by exploiting an unreasonable intrusion on that defendant's person, home, papers or effects. *See Wong Sun*, 371 U.S. at 473-74, 479 (evidence admissible against defendant where police "invaded no right of privacy" against that defendant, but excluded as to another defendant where evidence was "come at by exploitation of [an illegal arrest]").

Petitioner suggests that what matters is not when his DMV records were compiled or when the police had them in their possession, but rather the moment at which the police knew that the driver in front of them had an extensive history of license suspensions. The government, petitioner claims, did not "possess" his DMV records "in any meaningful sense" until after the challenged stop. Pet. Br. at 30. Petitioner attaches special significance to his view that the officers who made the stop lacked any knowledge of the specific contents of his particular DMV records prior to the stop, and could not associate those records with petitioner until they elicited his name following the stop. *Id.* at 13, 17.

That point is a red herring. "[This] Court has never held that evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police." *Segura v. United States*, 468 U.S. 796, 815 (1984) (internal marks omitted); *see Wong Sun*, 371 U.S. at 487-88. Because only evidence that has been improperly "obtained" can be subject to the

exclusionary rule, all that matters for purposes of the Fourth Amendment is that police access to the records was unquestionably authorized all along.[6] *See Segura,* 468 U.S. at 833 n.27 (Stevens, J., dissenting) ("suppression is the consequence not of a lack of information, but of the fact that the authorities' access to the evidence in question was not properly authorized and hence was unconstitutional").

Indeed, the interests of the Fourth Amendment are not even at play where the police access records that were in the government's lawful possession prior to an illegal stop, regardless of whether officers link those records to a defendant during the stop. Since such records were already in the government's domain, the officers' examination of them cannot remotely implicate a privacy or possessory interest of any kind, even in the most general sense. At most, examination of these records might implicate a defendant's "mere expectation" that his repeated license suspensions detailed in those records would "not come to the attention of the authorities." *Macon*, 472 U.S. at 469. That interest, however, is neither protected by the Fourth Amendment, nor one that society would consider reasonable. *Id.*; s*ee generally Segura*, 468 U.S. at 815-16 (fruits doctrine not implicated where police awaiting a search warrant unlawfully secured an apartment to

6. Petitioner states that the police had to use his identity to "gain access" to his DMV records. Pet. Br. at 11. Presumably, he is referring to the fact that, in order to perform a computer check, the officers who stopped him needed to input either his name or his driver's license number. J.A. 28a, 32a. Petitioner's contention goes only to the practical question of how the officers could effectively examine the records in their possession, not the legal question as to whether their possession of or access to the records was permissible.

preserve evidence, since the "right" to destroy evidence is not an interest that society would deem reasonable). For these reasons, the fruits doctrine should not be extended to reach such evidence.

Moreover, because petitioner seeks to tether application of the exclusionary rule to the knowledge of the individual officers who conducted the stop, the likely result will be time-consuming, fact-intensive litigation into the state of mind of police officers. *Cf.* Pet. Br. at 50 (envisioning a "straightforward and objective inquiry"). Such inquiries fly in the face of the Court's repeated insistence that Fourth Amendment issues ordinarily be resolved based on objective, rather than subjective, criteria. *See, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) (this Court has been "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers").

Neither *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), nor *Wong Sun*, *see* Pet. Br. at 12, 22, 30-31, support petitioner's argument that evidence already in the hands of the government may be suppressed if police do not appreciate its relevance until after an illegal stop. In *Silverthorne*, law enforcement authorities improperly seized documents, but then, based on what they learned during the improper seizure, tried to obtain a subpoena for the exact same material. This Court rejected that effort, declaring that "[t]he essence of a provision forbidding the *acquisition* of evidence in a certain way is that not merely evidence *so acquired* shall not be used before the Court but that it shall not be used at all." 251 U.S. at 392 (emphasis added). The Court went on to observe that "knowledge" of the same facts gained from an "independent source"

could still be proved, "but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.* Rather than helping petitioner, *Silverthorne* confirms that suppression must be premised on the unlawful acquisition of evidence. It simply adds that, if suppression is warranted, ordinarily the tangible evidence itself must be excluded and the police cannot use their knowledge of that evidence to reacquire it by another method. As for *Wong Sun*, the police did not obtain the evidence challenged in that case until after their illegal behavior. In the passage relied upon by petitioners, the Court did nothing more than reiterate *Silverthorne*'s reference to the possibility of avoiding suppression if the government "learned of" the evidence from an independent source. 371 U.S. at 487.

Nor is it correct to conclude that the DMV records were of "absolutely no evidentiary significance until and apart from" the stop of petitioner's car and the discovery of his identity. Pet. Br. at 14; *see id.* at 17-18, 30, 35. One hypothetical suffices to make that clear: if a civilian witness familiar with petitioner had seen him driving moments before the officers stopped him, the DMV records and that civilian's testimony would suffice for a conviction without any reference at all to the stop or its aftermath. Plainly, then, the evidentiary significance was inherent in the records themselves, and did not vary depending on whether an officer examined them or the timing of any such examination. In any case, the relevant inquiry for Fourth Amendment purposes is whether a particular piece of evidence was obtained illegally, not how the evidence would combine with other proof at trial to establish the defendant's guilt. *See Crews*, 445 U.S. at 471 ("fruit of the poisonous tree" analysis ordinarily begins

"with the premise that the *challenged evidence* is in some sense the product of illegal governmental activity") (emphasis added).

### B. This Court's precedents confirm that the exclusionary rule does not apply to evidence in the government's possession prior to an unlawful stop.

This Court's precedents regarding the requisite causal connection between evidence sought to be suppressed and unlawful police conduct confirm that the exclusionary rule has no application to evidence that was in the hands of the government and accessible to the police prior to any illegality. Two lines of cases are relevant here. First, this Court has held that once police obtain evidence, any later illegality cannot retroactively "taint" that evidence so as to render the exclusionary rule applicable. *See Macon*, 472 U.S. at 468, 471; *Crews*, 445 U.S. at 471-72. Second, this Court has stressed that, even when the police obtain evidence after they engage in unlawful behavior, suppression is warranted only if there was some sort of tight causal nexus between the illegality and police acquisition of the evidence. *See Hudson*, 547 U.S. at 591-94; *New York v. Harris*, 495 U.S. 14, 19 (1990); *Segura*, 468 U.S. at 813-16.

In *Crews*, a robbery suspect was arrested without probable cause, and the victim then identified the suspect at both a lineup and trial. The court of appeals concluded that the in-court identification, as well as the lineup identification, should have been suppressed as the fruit of the unlawful arrest. 445 U.S. at 467-69. This Court reversed, pointing out that in the "typical 'fruit of the poisonous tree'

case," the challenged evidence was "acquired by the police *after* some initial Fourth Amendment violation," and the question to be resolved in such cases is whether the chain of causation has been interrupted by an intervening event or otherwise become attenuated. *Id.* at 471 (emphasis in original). "Thus most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity." *Id.*; *see Harris*, 495 U.S. at 19 (quoting *Crews* for the proposition that "attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity'"). But the Court found it "erroneous" to apply that same mode of analysis to the victim's in-court identification of the defendant. *Crews*, 445 U.S. at 471. Since the victim in *Crews* had been cooperating with the police *before* the defendant's unlawful arrest, the Court unanimously concluded that her presence at trial was "not traceable to any Fourth Amendment violation." *Id.* at 472.

The same logic applies here. Just as the police in *Crews* had the victim available to them for their use before the unlawful detention, here the police had the DMV records available for their use before the stop of petitioner's car. And, just as the victim's presence at trial could not be traced to Crews' subsequent unlawful arrest, use of the DMV records here cannot be considered traceable to the later stop of petitioner's car.

The plurality opinion in *Crews* provides additional support for this conclusion. Three Justices of the Court deemed suppression of the victim's in-court identification improper since "the Fourth Amendment violation . . . yielded nothing of evidentiary value that the police did

not already have in their grasp." *Crews*, 445 U.S. at 475. "[B]efore they approached" Crews, the plurality noted, the police "had already obtained access to the 'evidence' that implicated him in the robberies," in particular the victim's independent memory of the robber and her description of him to the police. *Id.* Because the police had access to the relevant evidence before their misconduct, that evidence could not be viewed as the fruit of that misconduct: "The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality." *Id.*

Again, the same principle applies here. The DMV records unquestionably constituted "information that was in official hands prior to any illegality." The stop of petitioner's car "yielded nothing" that "the police did not already have in their grasp," and any subsequent Fourth Amendment violation cannot reach backward to taint the DMV records.

Notably, the *Crews* plurality relied on *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958), *later appeal*, 274 F.2d 767 (D.C. Cir. 1960), for its conclusion. *Crews*, 445 U.S. at 476; *see also Davis*, 394 U.S. at 725-26 & n.4 (citing *Bynum*); *Wong Sun*, 371 U.S. at 486 n.12 (same). The police arrested Bynum for robbery and then took his fingerprints, which were successfully compared to prints found at the crime scene and ultimately introduced at trial. On appeal from Bynum's first conviction, the circuit court remanded for a new trial, at which the court could decide whether the arrest had been illegal. It instructed that if Bynum's arrest had not been supported by probable cause, the post-arrest fingerprints should be suppressed

as the fruit of an unlawful arrest, and the prosecution would have to proceed without them. The circuit court further acknowledged the government's contention that the FBI had in its files a previously-taken set of Bynum's fingerprints that could have been used to make the comparison, but found that irrelevant to Bynum's request for suppression, since those prior prints had not in fact been used. 262 F.2d at 468-69.

Upon retrial, the government introduced into evidence Bynum's fingerprints from the FBI file, rather than those taken post-arrest, and on a second appeal, the circuit court upheld the conviction. The previously-taken set of prints, the court noted, were "in no way connected with the unlawful arrest . . . ." 274 F.2d at 767. Likewise, DMV records in the government's possession before unlawful police behavior are "in no way connected" to that unlawful act, and cannot be viewed as a suppressible fruit.

This Court's decision in *Macon* confirms this point. In *Macon*, an undercover officer entered a bookstore, bought magazines, determined they were obscene, and arrested the bookstore clerk. The state court concluded that the Fourth Amendment had required the police to procure a warrant to buy the magazines and to arrest the clerk, and that the proper remedy for both Fourth Amendment violations was to suppress the magazines. *Macon*, 472 U.S. at 466. This Court reversed, citing *Crews* for the proposition that if "the evidence is not traceable to any Fourth Amendment violation, exclusion is unwarranted." *Id.* at 468. Because the police "did not obtain possession" of the magazines "by means of an unreasonable search or seizure" and the magazines "were not the fruit of an arrest, lawful or otherwise," they were not subject

to suppression. *Id.* at 471. Moreover, the warrantless arrest could not lead to suppression, because "it yielded nothing of evidentiary value that was not already in the lawful possession of the police." *Id.* The Court reiterated that the exclusionary rule "'does not reach backward to taint information that was in official hands prior to any illegality.'" [7] *Id.* (quoting *Crews*, 445 U.S. at 475).

Since the DMV records here, like the evidence targeted by the defendants in *Crews*, *Bynum*, and *Macon*, were in the possession of the police before the challenged police conduct, they cannot be considered fruit of that conduct. Indeed, the argument for treating pre-existing government records as "fruit" is even weaker than in those cases. Unlike a person's identification testimony, fingerprints, or commercial publications, no private party ever played any role in generating the DMV records or providing them to the police. Instead, a state agency created those public records and shared them with the police department, also a government actor.

The conclusion that evidence already properly in police hands at the time of a Fourth Amendment violation cannot be deemed the fruit of that violation is further confirmed by precedents holding that suppression is

7. Citing *Crews*, the dissenting Justices in *Macon* agreed that "precedents, applicable to the run of cases, hold[] that the illegality of an arrest in itself will not suffice to prevent the introduction of evidence lawfully obtained prior to the arrest . . . ." *Macon*, 472 U.S. at 475 (Brennan, J., dissenting). The dissent, however, thought that "[w]hen First Amendment values are at stake" it is "inappropriate" to apply that precedent. *Id.* Since First Amendment values are not implicated here, even the dissenters in *Macon* would presumably have found the exclusionary rule inapplicable.

available only if the violation bears a relationship to the acquisition of the challenged evidence. For example, in *Hudson*, the police entered a house in an unlawful manner - in violation of the knock-and-announce rule - but had a warrant that authorized them to search the premises and seize evidence. The Court declined to treat the evidence seized as the suppressible fruit of the unlawful entry, since the Fourth Amendment violation was not related to the seizure of the evidence. *Hudson*, 547 U.S. at 591-94.

In the same vein, this Court ruled in *Harris* that where the police had probable cause to arrest the defendant, but arrested him in his home without a warrant in violation of *Payton v. New York*, 445 U.S. 573 (1980), the exclusionary rule did not bar use of a statement the defendant later made to the police outside his home.[8] The Court reasoned that such a statement was neither the "product" of a *Payton* violation nor the "fruit" of the defendant having been arrested in his home, rather than someplace else. Since the police had justification to question the defendant prior to the arrest, the Court explained, the subsequent statement could not have been come at by an exploitation of the *Payton* violation. *Harris*, 495 U.S. at 19. The Court analogized the facts to those presented in *Crews*, noting that in both cases, it was not necessary to determine whether the evidence acquired was attenuated from the taint of a Fourth Amendment violation, precisely because "attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense

8. In *Payton*, the Court held that even when the police have probable cause for an arrest, they cannot arrest a suspect in his home without a warrant. 445 U.S. at 576.

the product of illegal governmental activity.'" *Id.* (quoting *Crews*, 445 U.S. at 471).

Likewise, in *Segura*, the police unlawfully entered an apartment and remained there to secure it, but did not search the apartment until they obtained a search warrant that was based on information obtained before the illegal entry. 468 U.S. at 800-01. The Court held that, regardless of the illegality of the initial entry, evidence seized under the warrant was admissible because it was derived from an independent source: the information the police had before the entry, which they used to obtain the warrant. *Id.* at 813-14. Since the illegal entry into the apartment did not contribute in any way to discovery of the evidence seized under the warrant, the Court reasoned that "not even the threshold 'but for' requirement" for deeming evidence the fruit of the poisonous tree had been established. *Id.* at 815.

Petitioner's bid for suppression founders on the reasoning of *Hudson*, *Segura*, and *Harris*. As in those cases, the purported police illegality here had nothing to do with the officers' authority to obtain possession of the evidence in question. The police had lawful possession of public records reflecting petitioner's repeated suspensions because the DMV had given them access to those records, not because of anything that occurred during or after the stop of petitioner's car. In fact, the challenged police conduct is even further divorced from the evidence challenged here than it was in *Hudson*, *Segura*, and *Harris*; in this case, the police acquired the evidence before the challenged conduct even took place. On these facts, then, it is even clearer that the DMV records cannot be deemed the fruit of the stop and thus subject to suppression.

Finally, both the independent source and inevitable discovery doctrines are also consistent with the conclusion that the exclusionary rule cannot be applied to pre-existing DMV records. Under the independent source rule, a Fourth Amendment violation does not warrant suppression of evidence, provided that the evidence was discovered by "means wholly independent of any constitutional violation." *Nix*, 467 U.S. at 443. Under the inevitable discovery rule, the exclusionary rule is inapplicable even if the discovery of the evidence was "'*in some sense*'" a product of governmental activity, provided that the evidence "would have been obtained inevitably" by lawful means. *Id.* at 444, 447 (quoting *Crews*, 445 U.S. at 471). The rationale for these doctrines is that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred." *Nix*, 467 U.S. at 443; *see Murray*, 487 U.S. at 537, 542. Since the DMV records here were already in the hands of the police prior to the alleged Fourth Amendment violation, suppressing them certainly would leave the police in a far worse position than they would have been in if no violation had occurred.

## II. Where the only link between an illegal stop and disputed evidence is that the police learned the defendant's name during the stop, the evidence is not subject to suppression.

Even if this Court were to conclude that the exclusionary rule could be applied to evidence lawfully acquired by the police prior to a Fourth Amendment violation, the DMV records at issue here still would not be subject to suppression. This Court has never applied the fruit-of-the-poisonous-tree doctrine where the sole link between the disputed evidence and the Fourth Amendment violation is that the police learned the suspect's name in the course of the unlawful act.[9] A person's name constitutes only evidence of who the suspect is and, taken alone, is not subject to suppression. Nor are any pre-existing records reviewed after learning a name suppressible, either. To hold otherwise would effectively immunize a defendant from prosecution on account of a Fourth Amendment violation - an outcome this Court has squarely rejected.

This Court has long recognized 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, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *Lopez-Mendoza*, 486 U.S. at 1039. This principle has its roots in the *Ker-Frisbie* doctrine, under which there can "be no valid claim" that a defendant is "immune from

9. Petitioner claims that the issue before this Court is whether "identity-related evidence" is subject to suppression. *See* Pet. Br. at 17-29. Petitioner does not explain what he means by "identity-related evidence," but in any event, all that the police learned here was petitioner's name.

prosecution because his person was the fruit of an illegal arrest." *Harris*, 495 U.S. at 18; *see Frisbie*, 342 U.S. at 522; *Ker* v. *Illinois*, 119 U.S. 436 (1886). The *Ker-Frisbie* rule prevents a defendant from thwarting a court's jurisdiction by having his identity suppressed as the product of an illegal arrest. For the same reason, this Court should not allow a defendant to have his identity suppressed as an evidentiary matter. As with the suppression of the "body" of the defendant, suppression of his identity would have the practical effect of immunizing the defendant from prosecution, which is the very result that the *Ker-Frisbie* rule sought to prevent.

In *Crews*, five Justices of this Court recognized that "the rationale of *Frisbie* forecloses the claim that respondent's face can be suppressible as a fruit of the unlawful arrest." 445 U.S. at 479 (White, J., concurring); *see id.* at 477 (Powell, J., concurring). There, the Court upheld the admission of an in-court identification by a witness whose out-of-court photographic and lineup identifications had been suppressed as the fruits of an illegal arrest. Even though the defendant, Crews, had been unlawfully arrested and photographed, and the photograph led to both a photographic and a corporeal identification, the Court viewed his effort to suppress the victim's in-court identification as akin to challenging his own presence at trial. *Id.* at 474. As Justice White explained in his concurrence:

> A holding that a defendant's face can be considered evidence suppressible for no reason other than that the defendant's presence in the courtroom is the fruit of an illegal arrest would be tantamount to holding that an illegal arrest effectively insulates one from conviction for

> any crime where an in-court identification is essential. Such a holding would be inconsistent with the underlying rationale of *Frisbie* from which we have not retreated.

*Id.* at 478 (White, J., concurring); *see id.* at 477 (Powell, J., concurring).

This Court's decision in *Lopez-Mendoza* is consistent with the conclusion that a person's body and identity are not subject to suppression as an evidentiary matter. In *Lopez-Mendoza*, the Court considered suppression motions brought by two different persons in the course of civil deportation proceedings. One individual, Adan Lopez-Mendoza, did not object to any of the evidence introduced against him, but contended that his compelled presence at the deportation proceeding was unlawful because he had been illegally arrested. 468 U.S. at 1040. In rejecting that claim, the Court 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, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *Id.* at 1039.

The second individual, Elias Sandoval-Sanchez, presented a different claim: he "objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding," specifically, his oral admission of illegal entry into the country, which he made after a purportedly illegal arrest. *Id.* at 1037, 1041. The Court rejected Sandoval-Sanchez's evidentiary objection on the ground that the exclusionary rule did not apply to civil deportation proceedings. *Id.* at 1050. In analyzing this issue, the Court considered how the exclusionary

rule might affect the admissibility of evidence offered at a deportation proceeding, so it could weigh the "likely social benefits of excluding unlawfully seized evidence against the likely costs." *Id.* at 1041.

The Court's examination of the deterrence benefits that might come from applying the exclusionary rule in this context leaves no doubt that it believed a person's identity is never suppressible as evidence, no matter what the context. In a civil deportation proceeding, the Court explained, the government usually need establish only a person's "identity and alienage." *Id.* at 1043. "Since the person and identity of the respondent are not themselves suppressible, the INS must prove only alienage," which it might be able to do with evidence gathered independent of an illegal arrest. *Id.* In short, the Court recognized in *Lopez-Mendoza* that a person's identity cannot be suppressed either to keep a trial from going forward, or as an evidentiary matter.[10]

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10. A majority of the circuit courts that have addressed the issue read *Lopez-Mendoza* in the same way. *See Navarro-Chalan* v. *Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004); *Bowley*, 435 F.3d at 430-31; *Roque-Villanueva*, 175 F.3d at 346; *United States* v. *Navarro-Diaz*, 420 F.3d 581, 588 (6th Cir. 2005); *United States* v. *Garcia-Beltran*, 443 F.3d 1126, 1131-35 (9th Cir. 2006); *Guzman-Bruno*, 27 F.3d at 421-22. The Eleventh Circuit has held on grounds other than *Lopez-Mendoza* that "the exclusionary rule does not apply to evidence to establish the defendant's identity in a criminal prosecution . . . ." *Farias-Gonzales*, 556 F.3d at 1189.

Even the three circuits that read *Lopez-Mendoza* as merely restating the *Ker-Frisbie* doctrine recognize that not all evidence of identity obtained as a result of police misconduct is subject to the exclusionary rule. For instance, those cases draw a distinction between fingerprints taken from a defendant for investigatory purposes during an unlawful detention, which are suppressible

To the extent that a person's name can even be distinguished from his identity, it is no more subject to suppression than identity would be. As this Court has recognized, a name is both "unique" and "universal," and plays a crucial role in the criminal justice context. *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 185-86, 191 (2004). It differentiates one person from another, is public in nature, and is commonly provided to strangers, commercial establishments, and, of course, government agencies. "In every criminal case, it is known and must be known who has been arrested and who is being tried."[11] *Id*. at 191. After all, police officers and courts must have knowledge of the defendant's identity to determine whether the defendant is a wanted suspect, to ascertain whether he has a criminal history relevant

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under *Hayes* and *Davis*, and fingerprints taken after an illegal arrest as part of a routine booking process for purposes of ascertaining the identity of the arrestee, which those courts have indicated are not suppressible. *See United States* v. *Oscar-Torres*, 507 F.3d 224, 230-32 (4th Cir. 2007); *United States* v. *Olivares-Rangel*, 458 F.3d 1104, 1113-16 (10th Cir. 2006); *United States* v. *Guevara-Martinez*, 262 F.3d 751, 756 (8th Cir. 2001). To the extent that the Fourth and Tenth Circuits indicate that mere identity could ever be subject to suppression, or that pre-existing government files could ever be suppressed where the sole link to the files is mere identity, they are simply incorrect, for reasons discussed in the text.

11. As petitioner observes, *see* Pet. Br. at 19-20, this Court has held that a state cannot criminally prosecute a person for refusing to identify himself when stopped by police if the stop violated the Fourth Amendment. *Brown v. Texas*, 443 U.S. 47 (1979). But the Court has never indicated that suppression of a name yielded during an unlawful stop would be required under the fruit-of-the-poisonous-tree doctrine.

to the issues on trial or at sentence, and to aid in his apprehension if he absconds. *Id.* at 186; *see United States v. Farias-Gonzalez*, 556 F.3d at 1187-88; *United States v. Olivares-Rangel*, 458 F.3d 1104, 113 (10th Cir. 2006). Law enforcement officers, in particular, need to know the identity of the person with whom they are dealing, since identity can yield information as to whether that person is a threat to them or the general public; on the other hand, the information might help exonerate that person. *See Hiibel*, 542 U.S. at 186; *see also Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) (principal opinion of Brennan, J.) (routine booking inquiry seeking "biographical data necessary to complete booking or pretrial services" is exempted from *Miranda* rule).

Rather than asking the Court to suppress his name, petitioner instead seeks to suppress his DMV records. As explained in Point I, *supra*, pre-existing records that the government has compiled prior to an unlawful police act are not subject to suppression under any circumstance. But, in any event, they cannot be suppressed here, where the police learned only a driver's name in the course of an allegedly illegal car stop, and then linked him to the records of his repeated license suspensions. If the sole piece of information that the police learn through an illegal act - here, petitioner's name - is not itself subject to suppression, records linked to that name cannot be suppressible fruit either.

*Crews* confirms that the exclusionary rule is not triggered where a defendant comes to the attention of police officers as a result of an illegal search or seizure, and the officers then use their knowledge of the defendant's

identity to investigate him and obtain additional evidence.[12] The police had regarded the defendant in *Crews* as a possible suspect in a crime, and had interviewed the victim prior to Crews' illegal detention. 445 U.S. at 475 (plurality). But the police lacked sufficient evidence to connect Crews firmly to that crime until the victim identified him based on a photograph taken of Crews during his illegal detention.[13] Had the identification not been made, the investigation might never have progressed to trial. Nevertheless, this Court held that the victim's in-court identification was not the suppressible fruit of the illegal detention. Applying that reasoning here, the DMV records are not a fruit of the allegedly illegal stop, even though the police would not have reviewed those records had they not made the stop and learned petitioner's name.

*Bynum*, like *Crews*, also rejects the view that evidence can become fruit of the poisonous tree simply because it is linked to a particular defendant whose identity the government has learned through an illegal act. As explained above, *see supra* at pp. 22-23, the defendant in *Bynum* was granted a retrial after fingerprints taken in the course of an illegal arrest were matched to prints that

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12. Several courts of appeals have reached the same conclusion. *See, e.g., United States v. Carter*, 573 F.3d 418, 423 (7th Cir. 2009); *United States v. Watson*, 950 F.2d 505, 507 (8th Cir. 1991); *United States v. Sand*, 541 F.2d 1370, 1375-76 (9th Cir. 1976); *Hoonsilapa*, 575 F.2d at 738.

13. That the authorities had not yet firmly connected Crews to the crimes until after they took the photograph (*cf.* Pet. Br. at 14) is borne out by the fact that, promptly after taking the photograph of Crews, the authorities released him. Only after obtaining the photographic identification did they take him back into custody and conduct a lineup. *Crews*, 445 U.S. at 467.

had been found at a crime scene. *Bynum*, 262 F.2d at 466-67, 469. In the second trial, the government compared the crime scene prints to a set of Bynum's fingerprints that had been taken before the illegal arrest, and the court of appeals upheld the conviction. 274 F.2d at 767. But the government would not have known that Bynum's prints matched the crime scene prints if it had never obtained the post-arrest prints in the first place. *See Payne v. United States*, 294 F.2d 723, 726 (D.C. Cir. 1961) (concluding that *Bynum* mandates rejection of a claim that an identification is fruit of the poisonous tree because, "but for [the defendant's unlawful] detention he 'would have blended back into the mass of the population', and would have remained at large"); *see also United States v. Nardone*, 127 F.2d 521, 523 (2d Cir. 1942) (L. Hand, J.) (reviewing claim that evidence was fruit of illegal wiretapping under federal statute; "[t]he question therefore comes down to this: whether a prosecution must show, not only that it has not used any information illicitly obtained, either as evidence, or as the means of procuring evidence; but that the information has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry.").

A rule permitting suppression of evidence that came to the attention of the police merely because they learned the defendant's identity could have the effect of immunizing the defendant from investigation and prosecution - the precise result that this Court rejected in *Crews* and the *Ker-Frisbie* line of cases. After all, a police officer who cannot use his knowledge linking a person in front of him to a pre-existing record of that person's

criminal activities could presumably be barred from even attempting to investigate the defendant and gather other evidence of his guilt. That result imposes far more significant social costs than the suppression of particular items of evidence (*cf.* Pet. Br. at 48), even considering that exclusion of a particular piece of evidence might make a successful prosecution impractical. *See United States v. Friedland*, 441 F.2d 855, 861 (2d Cir. 1971) ("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 would stretch the exclusionary rule beyond tolerable bounds").

Finally, *Davis* and *Hayes* do not remotely support an extension of the exclusionary rule to the DMV records in this case. *Cf.* Pet. Br. at 24-25. In both cases, the fingerprint evidence that was suppressed came into existence only *after* the defendant had been illegally detained, and the prints were unquestionably a product of that detention. In neither case did the police take the fingerprints to ascertain the identity of the person whom they had detained. Indeed, the only reason that the police took the fingerprints in those cases was for investigative purposes: to compare them to prints found at the scene and thereby determine whether the defendant was the perpetrator of an unsolved crime under investigation. *Davis*, 394 U.S. at 722-23; *Hayes*, 470 U.S. at 812-13. Here, by contrast, the police learned only petitioner's name, which bears no resemblance to the tangible, newly-created physical fingerprints. There is no doubt that the police asked petitioner for his license solely to ascertain the identity of the person whom they had stopped, and their computer check of petitioner's DMV records was

not conducted to create evidence or to connect petitioner to an unsolved crime under investigation.

## III. Because exclusion of DMV records would yield minimal incremental deterrence and impose substantial costs, that remedy is not available here.

As this Court has repeatedly cautioned, "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Hudson*, 547 U.S. at 591-92 (quoting *Leon*, 468 U.S. at 906). The rule applies "only . . . 'where its deterrence benefits outweigh its substantial social costs.'" *Hudson*, 547 U.S. at 591 (quoting *Scott*, 524 U.S. at 363). This burden is a substantial one; exclusion is not permissible if it "does not result in appreciable deterrence." *United States v. Janis*, 428 U.S. 433, 454 (1976). In other words, the "incremental deterrent" benefit resulting from application of the rule must outweigh its likely costs. *Krull*, 480 U.S. at 352-53 (internal quotation marks omitted).

While petitioner raises the specter of "flagrant," "avowedly deliberate, systemic violations of the Fourth Amendment," Pet. Br. at 41, 44, these claims lack any basis in fact or logic, and should not color the Court's analysis of the deterrence benefits and costs presented here.[14] Respondent fully accepts this Court's ruling in *Prouse*, 440 U.S. at 663, that the police may not make arbitrary,

14. Where the exclusionary rule is otherwise inapplicable, which it is here, *see* Points I and II, *supra*, the Court has refused to permit its use to counter even willful misconduct. *See Nix*, 467 U.S.

suspicionless car stops in order to check a driver's license and registration. Petitioner did not allege in his suppression motion that the police had conducted a random car stop, or that the New York City Police Department had any systemic practice of making such stops. *See* J.A. 25a-35a. Nor has petitioner even established that the stop of his car was unlawful, and should he prevail on the question presented to this Court, the People anticipate that they would vigorously defend the legality of that stop.[15]

### A. The incremental deterrence benefits yielded by excluding DMV records would be negligible, at best.

Petitioner acknowledges that the traditional application of the exclusionary rule to evidence obtained as a result of an illegal car stop provides a strong incentive for the police to forgo such stops. Pet. Br. at 39. Nonetheless, he asks the Court to extend the rule to cover the pre-existing DMV records at issue here because to do otherwise would leave the police "substantially undeterred" from engaging in illegal car stops for the purpose of checking licenses. *Id*. at 40. In fact, excluding DMV records in the

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at 445 (in order to invoke the inevitable discovery doctrine, the government need not prove the absence of bad faith on the part of law enforcement); *United States v. Payner*, 447 U.S. 727, 733-34, 736-37 (1980) (even if the police acted in bad faith and in a "possibly criminal" manner in seizing evidence, a federal court cannot employ the exclusionary rule when the defendant does not have standing to contest the seizure).

15. In its response to petitioner's suppression motion, the People explained that petitioner had been stopped for playing his radio at an unlawfully high volume. *See* J.A. 69a.

circumstances presented here would yield only negligible, if any, deterrence benefits.

First, law enforcement officers have legal alternatives if they want to check the status of licenses and registrations. Police could implement a roadblock. *See Prouse*, 440 U.S. at 663 (suggesting that a lawful means of spot-checking licenses and registrations would be "[q]uestioning of all oncoming traffic at roadblock-type stops"); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000).

Law enforcement officers could also stop any car following the observation of a traffic infraction. As this Court has observed:

> The foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained.

*Prouse*, 440 U.S. at 659. Indeed, lawful car stops based upon observed traffic violations are likely to uncover drivers with license violations even more effectively than unlawful arbitrary car stops:

> [D]rivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves. Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event

> than finding an unlicensed driver by choosing randomly from the entire universe of drivers.

*Id.*[16]

In light of the efficacy of these lawful alternatives, it is highly unlikely that the police would deliberately employ constitutionally invalid car stops as part of an effort to enforce licensing and safety regulations. As this Court recognized in *Hudson*, "the value of deterrence depends upon the strength of the incentive to commit the forbidden act." 547 U.S. at 596; s*ee Harris*, 495 U.S. at 20-21 ("Given that the police have probable cause to arrest a suspect in Harris' position, they need not violate *Payton* in order to interrogate the suspect. It is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate the police to violate *Payton*."). Thus, there is no basis for presuming that, absent application of the exclusionary rule, the police will engage in "wholesale evasion of the protections announced in *Prouse*" for the purpose of checking the status of drivers' licenses or enforcing other highway safety regulations. Pet. Br. at 40. *See also Segura*, 468 U.S. at 812 (opinion of Burger, C.J., and O'Connor, J.) ("We are unwilling to believe that officers will routinely and purposely violate the law as a matter of course.").

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16. Even without resorting to a car stop, the police could legally access a driver's DMV record, where the driver is also the registered owner of the car. By entering the car's license plate number into a computer terminal, the police can ascertain the name of the registered owner and retrieve the owner's DMV record, including the owner's descriptive information contained on his license.

Second, the police well know that an invalid car stop will result in the suppression of any contraband and other incriminating evidence that is found during the course of that stop. Such items may implicate the driver in far more serious crimes than license violations. *See Prouse*, 440 U.S. at 650-51, 663 (affirming state court decision suppressing marijuana recovered from floor of car during unlawful stop). The knowledge that any tangible evidence or statements obtained in an illegal stop will be suppressed leaves in place "the principal incentive to obey" the constitutional rule. *Harris*, 495 U.S. at 20 (while declining to suppress statements made outside a home after a *Payton* violation, noting that "the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home").

There are several other meaningful "extant deterrences against [police misconduct]." *Hudson*, 547 U.S. at 599. In *Hudson*, the Court noted that police departments are increasingly engaging in "wide-ranging reforms in the education, training, and supervision of police officers," and many have internal disciplinary mechanisms to address any systemic misconduct by an officer. *Id.* at 598-99; *see Nix*, 467 U.S. at 446; *United States v. Payner*, 447 U.S. 727, 733-34 n.5 (1980). That holds true here; for example, police officers in New York City and around the state receive specific training on car stops as new recruits and throughout their careers.

Police officers who make illegal seizures also expose themselves to potential civil liability under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983, which further deters unconstitutional conduct. *See Hudson*, 547 U.S. at 597-98;

*Segura*, 468 U.S. at 812; *Calandra*, 414 U.S. at 354 n.10. Egregious police misconduct may also warrant relief under other constitutional provisions. *See Whren*, 517 U.S. at 813 ("selective enforcement of the law based on considerations such as race" presents an Equal Protection Clause violation); *Rochin v. California*, 342 U.S. 165, 172 (1952) (evidence derived from gross invasions of privacy can be suppressible under the Due Process Clause); *see also Gates*, 462 U.S. at 259 n.14 (White, J., concurring) (if an invasion of a defendant's Fourth Amendment rights is so egregious as to "shock the conscience," the evidence should be suppressed "as a matter of due process, entirely aside from the Fourth Amendment").

### B. The social costs of excluding DMV records are substantial and far outweigh any purported deterrence benefits.

The costs of applying the exclusionary rule to exclude DMV records would far outweigh any incremental deterrent effect. Of course, certain costs attend every application of the exclusionary rule. *See Hudson*, 547 U.S. at 595. That price would be especially high, though, where someone is driving with a suspended license. While petitioner correctly notes that the crime of operating a motor vehicle without a license is technically a single-act offense, *see* Pet. Br. 46, it is akin to a continuing offense. An unlicensed driver commits a crime each and every time he gets behind the wheel. Not only is driving a routine, and often essential, activity that people perform on a recurring and even daily basis, but when a police officer stops an unlicensed driver in his car and detains him upon learning of that crime, the crime ends only because the police officer has made the stop. It would have continued

if the stop had not occurred, and it would immediately resume if the officer were to release the driver. As this Court observed in *Lopez-Mendoza*, "[t]he constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime." 468 U.S. at 1047.

Nor is this cost any less on the theory that an unlicensed driver who secures suppression of his DMV records and, consequently, his release in one case can still be prosecuted successfully if a police officer lawfully stops him while he is driving without a valid license on another occasion. *See* Pet. Br. at 48. There is no telling when such a stop will occur, and, in the interim, the defendant will be effectively free to continue using the public highways without state authorization. Therefore, the practical effect of applying the exclusionary rule will be that courts will have "to close their eyes to ongoing violations of the law." *Lopez-Mendoza*, 468 U.S. at 1046.

Indeed, the rule proposed by petitioner - that state motor vehicle records previously in the hands of law enforcement are retroactively tainted by illegal police conduct that yields only petitioner's name - may exact even stiffer costs, in the form of effectively immunizing defendants from future illegal conduct. Although petitioner claims that a driver with a suspended license could be prosecuted for future violations, *see* Pet. Br. at 36, the logic of his position threatens the opposite result. If the police learn the name of a defendant following an unlawful stop, and DMV records indicate that the person's license has been suspended, what use can the police make of that knowledge? If knowledge that a particular individual was driving with a suspended license was truly subject to

suppression, a defendant might argue that the police could make no future use of the link between the defendant and his DMV record. The ensuing consequences could be very broad: Could the police, knowing the driver's license had been suspended, stop him once he drove away? Could they stop him the next day? If they shared their knowledge with others at the police stationhouse, would those officers be barred from arresting the individual for unlicensed driving as well? These issues, as well as fact-intensive questions about the subjective knowledge of individual officers, would doubtless serve as fodder for extensive litigation. *See Hudson*, 547 U.S. at 595 (one cost of the exclusionary rule is that it "'frequently requires extensive litigation to determine whether particular evidence must be excluded'") (quoting *Scott*, 524 U.S. at 366).

Finally, to the extent there are any privacy concerns implicated here, *see* Pet. Br. at 44, they are not substantial. Certainly "a motorist's privacy interest in his vehicle" is "important and deserving of constitutional protection." *Arizona v. Gant*, __ U.S. __, 129 S.Ct. 1710, 1720 (2009). That interest is not terribly strong, though; an individual has a "reduced expectation of privacy in an automobile, owing to its pervasive regulation." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). And even an individual's privacy interest in his home may be violated in certain circumstances without triggering application of the exclusionary rule. *See Hudson*, 547 U.S. at 594 ("the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance"). State and federal governments can establish a privacy interest in DMV records if they deem it appropriate, *see, e.g.*, Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (regulating disclosure of

personal information contained in state DMV records), and in any event, information contained in DMV records can be disclosed for use by any law enforcement agency in carrying out its functions, *see* 18 U.S.C. § 2721(b)(1).[17]

17. While *amicus curiae* Electronic Privacy Information Center ("EPIC") addresses the Driver's Privacy Protection Act at length, neither EPIC nor petitioner claim that the police or the New York Department of Motor Vehicles violated that statute. EPIC's concerns about database and biometric searches that, according to them, might be conducted from a patrol car, *see* EPIC Amicus at 4-17, are not relevant to this case; there is no allegation by EPIC or petitioner that these officers had the capacity to conduct any of these inquiries, much less that they actually did conduct them. While EPIC also suggests that various databases may contain incorrect information, *id.* at 16, 18-26, it does not identify any errors in DMV records, and petitioner's guilty plea demonstrates that the license suspension information upon which the officers relied was indeed correct.

## CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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