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 OF MASSACHUSETTS, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, LOUISIANA, MARYLAND, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the exclusionary rule requires the suppression of State records consulted by law enforcement officials following a putatively unlawful automobile stop, where the records were in the government's possession prior to the stop and reflected decrees by a State regulatory body that had the force of law.

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INTEREST OF AMICI CURIAE

Amici Curiae are twenty-six States of the Union. They are thus among those that "possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). To that end, they seek to deter and punish criminal activity meaningfully, to administer justice efficiently, and generally to ensure that their communities are safe and their laws and justice systems are respected. They also desire to see the conduct of their law enforcement officials evaluated in a fair and accurate manner.

The States additionally have an interest in maintaining the proper functioning of the federal system and their own sovereign status and role therein. At the same time, the States are committed to seeing the rights of their citizens respected and are ever aware that they "hold the initial responsibility for vindicating constitutional rights" in criminal adjudications. *Id.*

Amici offer their perspectives in an effort to ensure that all the above interests are justly and sensibly balanced as the law is clarified and refined.

SUMMARY OF ARGUMENT

Petitioner asks that records maintained by the New York State Department of Motor Vehicles ("DMV") concerning the suspension of his driver's license be excluded from his State trial for driving with a suspended license. He argues that police consulted the DMV records and learned of his numerous license suspensions as a result of a

putatively unlawful stop of the car that he was driving. The New York Court of Appeals held that the evidence challenged by Petitioner should not be suppressed because "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. 106a. That conclusion was correct for the reasons outlined by Respondent, which need not be repeated here. Amici thus focus on additional reasons to affirm.

I. Petitioner seeks an unprecedented extension of the exclusionary rule. It is established that 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). Petitioner argues that the DMV records are nevertheless suppressible because officials were directed to the records and assigned meaning to them as a result of the stop.

But Petitioner fails to recognize that this Court found the exclusionary rule inapplicable in such circumstances in *United States v. Crews*, 445 U.S. 463 (1980). There, an unlawful seizure of a defendant led officials to turn their attention to evidence previously in their possession. The Court still found that the consequent in-court identification of the defendant was admissible. It concluded that the identification was not the product of the seizure, as it was based on evidence that was in the government's possession beforehand.

II. This Court has maintained that the exclusionary rule should not be extended unless its

costs are outweighed by an appreciable and substantial deterrent effect. Extending the rule to evidence that was already in the government's possession would result in substantial social costs. It would interfere with the truth-finding process of criminal trials, often lead to the release of guilty and even dangerous criminals, and may generate disrespect for the justice system. When the rule is applied in State prosecutions, an added cost is potential federal-State friction. Moreover, because Petitioner's extended rule could be applied to other types of evidence, these costs would be incurred in situations beyond those involving driving records.

Meanwhile, extending the rule would not have an appreciable deterrence effect. Officers now are deterred from misconduct by the prospect of internal discipline, citizen review, and civil liability. They also know that any newly-acquired evidence would normally be suppressible. And they confront a risk of personal harm each time they engage in contact with a citizen. The chance of being led to information already in government files is not significant enough to offset these disincentives.

An additional reason not to extend the rule is that the government's introduction of its own information does not involve either exploitation or coercion, two concerns that have been found to warrant the rule's application.

III. Even if this Court wishes to leave the door open for a future extension of the exclusionary rule to certain types of evidence previously in the government's possession, it should lock the door shut with respect to one type: evidence of governmental

decrees.[1] The statutorily-authorized license suspensions issued by the DMV Commissioner fall squarely within that category. This Court has held that the exclusionary rule should not apply in situations where there would be extraordinary injury to our system of government. Such injury would result if federal law were to compel State courts to exclude State governmental decrees. Specifically, State sovereignty would be offended, and comity and federalism would be undermined, in ways additional to those involved when other types of evidence are excluded. Moreover, the costs are especially high because evidence far beyond driving records would be implicated by an extension of the exclusionary rule.

ARGUMENT

I. Petitioner seeks an unprecedented extension of the exclusionary rule.

What Petitioner seeks is not a mere application of existing exclusionary rule jurisprudence, but an extension of the rule beyond its current reach.

This Court's case law establishes that 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 *United States v. Crews*, 445 U.S. 463,

[1] Amici use the term "governmental decree" broadly to mean any order, ruling, determination or other official decision issued by a branch of the government with the authority to issue it. *See also infra* Part III.

475 (1980) (Brennan, J., joined by Stewart & Stevens, JJ.)). Petitioner argues that the DMV records are nevertheless suppressible because they came to the attention of, and became meaningful to, officials as a consequence of the stop. Pet. Br. 35. He contends that these factors make his case distinguishable from *Crews*. *Id.*

Petitioner fails to appreciate, however, that the *Crews* Court refused to extend the exclusionary rule in just such a situation. In that case, the unlawful arrest and photographing of the defendant caused the police to turn their attention back to the victim of a robbery, and to definitively connect the defendant to the crime. 445 U.S. at 467. Nevertheless, the Court still unanimously concluded that the victim's in-court identification of the defendant did not need to be suppressed. *Id.* at 471-74. It recited the proposition in the seminal *Wong Sun* case that evidence is not necessarily "'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Id.* at 469 n.9 (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). Rather, the question is whether the evidence "'has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun*, 371 U.S. at 487-88). As the *Crews* Court explained, "[i]n the typical 'fruit of the poisonous tree' case, . . . the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation," and is thus "in some sense the product of illegal government activity." *Id.* at 471 (emphasis in original).

The in-court identification at issue, the Court determined, was not "the product of" or "come at by exploitation of" the police misconduct. *Id.* at 471-74. Rather, the identification was based on evidence and information that was in the government's possession before the unlawful arrest. *Id.*; *see also id.* at 474-77 (Brennan, J., joined by Stewart & Stevens, JJ.). That is, even before the arrest, the victim had a memory of her assailant and the ability to recognize him, and the police knew the victim's identity. *Id.* at 471-73. Also in advance of the misconduct, the police had obtained information from the victim regarding the assailant's appearance, learned the defendant's identity, and "had some basis to suspect his involvement" in the robbery. *Id.* at 474-77 (Brennan, J., joined by Stewart & Stevens, JJ.). Although the police turned their attention back to this evidence because of the illegal arrest, the identification nevertheless was not "traceable to any Fourth Amendment violation." *Id.* at 472. It thus was not suppressible. *Id.* at 471-74.

Contrary to Petitioner's claims, therefore, *Crews* forecloses his argument. While Petitioner's driving records may have "come to light" as a result of the putatively illegal stop, they were not the "product of" the stop, because they were in the government's possession beforehand. While a branch of the poisonous tree may have pointed officials back toward those records (as happened in *Crews*), it did not spawn them as fruit. Thus, under *Crews*, suppression of Petitioner's driving records is not warranted.

II. This Court should not extend the exclusionary rule to previously-possessed evidence that came to officials' attention through an unlawful search or seizure.

This Court should not extend the exclusionary rule to evidence previously possessed by the government merely because it became the focus of officials' attention as a consequence of an unlawful search or seizure. As the Court has made clear, the "last resort" of exclusion is unwarranted unless it would result in an appreciable and substantial deterrence of police illegality that outweighs the rule's "substantial social costs." *Herring v. United States*, 129 S. Ct. 695, 700-04 (2009). Here, it would not. Further, the government's use of its own information does not involve either exploitation or coercion, two concerns that have been found to warrant application of the rule.

A. Excluding previously-possessed evidence would impose substantial costs.

As an initial matter, the costs of extending the exclusionary rule to evidence in the government's possession prior to the unlawful search or seizure include those attendant to any application of the rule. Such an extension would deprive factfinders of reliable and probative evidence, allow guilty and even dangerous criminals to go free, and contribute to public cynicism concerning the justice system. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 906-08 (1984).

There are added costs whenever the federal exclusionary rule is applied in State cases. Any federal intrusion into State criminal prosecutions may create "friction between States and Nation." *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). But there is a higher potential for friction associated with the exclusionary rule, given that it is not constitutionally mandated, but a vehicle the Court adopted to impel State law enforcement officers to conform their conduct to federal law. *Cf. United States v. Janis*, 428 U.S. 433, 459 (1976) (describing application of rule as "the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches").

Here, all the above costs are compounded by the potential reach of an extension of the rule to previously-possessed evidence. Courts could apply a ruling in Petitioner's favor to exclude a wide range of previously-possessed items. The rationale would merely be that officials were prompted to consult them as a consequence of an unlawful search or seizure. Such items could include witness statements, evidence found at crime scenes, audio or video recordings, filings made with state agencies, or other documentation obtained through investigation. A court might even view an officer's own memory as suppressible, if it was "consulted" as a result of unlawful conduct.

A few scenarios are illustrative. Suppose, for example, an officer sees a man talking to a boy in a public playground. He detains the man in what is found to be an unlawful stop. Upon questioning, the man reveals certain personal information. Using that, the officer consults a state sex offender registry

and learns that the man is a registered child sex offender. He then realizes that that status made his fraternizing with the boy unlawful.[2] With a ruling in Petitioner's favor, a court might exclude evidence of the man's sex offender status because the registry was consulted as a result of the unlawful stop. A prosecution might be precluded even though the officer had seen the criminal activity occurring in plain view and the sex offender information was in the possession of state officials long before the illegal stop.

As another example, consider an officer in a government building who unlawfully seizes a bag from a man, looks inside, and finds drugs (or, for that matter, a cash bribe, or prohibited explosives). He then checks the building's video surveillance system and finds that it recorded the man putting the incriminating items into the bag. The evidence seized by the officer would likely be suppressible under existing law. But with a decision for Petitioner here, a court might also order suppression of the videotape, even though the man's conduct had been captured on the government's video system before any police misconduct.

A third scenario is as follows. An officer seeks to compare a suspect's DNA to as-yet untested biological evidence taken from a rape victim. Without probable cause, he obtains the DNA sample

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[2] *Cf., e.g.*, Ill. Comp. Stat., ch. 720, § 5/11-9.4 (establishing felony of "[a]pproaching, contacting, residing, or communicating with a child within certain places by child sex offenders"); Fla. Stat. § 856.022 (establishing offense of "[l]oitering or prowling by certain offenders in close proximity to children").

and, upon testing, finds that the evidence from the victim matches the sample that he obtained. The officer then discovers that it also matches a sample taken from the same man that, unbeknownst to the officer, was already in the State's DNA database. The seized DNA sample would probably be found suppressible under current law. But a ruling for Petitioner might lead a court also to exclude the sample from the State's database. The man might not be held accountable, even though the State had a sample of his DNA prior to the illegal seizure. *Compare Bynum v. United States*, 274 F.2d 767, 767 (D.C. Cir. 1960), *discussed with approval in Crews*, 445 U.S. at 476.

B. The benefits are marginal and speculative at best.

While extending the rule would be costly, it would have little, if any, deterrent effect. "[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson v. Michigan*, 547 U.S. 586, 596 (2006).

This Court has well noted the existing reasons not to conduct unlawful searches and seizures. They include "the increasing professionalism of police forces," "various forms of citizen review," and the prospect of civil liability for individual officers or their departments. *Id.* at 596-99. Another disincentive is that any *newly-acquired* evidence would be suppressed (provided no existing exception to the exclusionary rule applies). *Cf. New York v. Harris*, 495 U.S. 14, 20 (1990) ("[T]he principal incentive to obey [the rule at issue] still obtains: the

police know that a [violation] will lead to the suppression of any evidence found.").

Added to the above is the unfortunate reality that any traffic stop or other contact with a suspect involves a significant risk of harm to a law enforcement officer. In the most recent year for which figures are available, it was estimated that police-citizen contact resulted in an actual or threatened use of force close to 1.14 million times. Matthew R. Durose et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Contacts Between Police and the Public, 2005* 1, 2, 7, 8 (2007). Traffic stops in particular led to such consequences an estimated 270,000 times. *Id.* at 1, 2, 7, 8, 9.[3]

Furthermore, between 2000 and 2009, traffic stops and related conduct led to nearly 6.5% of accidental and nearly 19% of felonious killings of law enforcement officers in the line of duty. Criminal Justice Info. Servs. Div., Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted, 2009* tbls. 19, 20, 61 (2010) (omitting fatalities from attacks of September 11, 2001). They led to nearly 9.6% of assaults on officers in the last of those years. *Id.* tbl. 73. Other law enforcement activity involving direct citizen contact led to over 57.3% of all

[3] The 1.14 million figure was calculated by multiplying the total number of annual police-citizen contacts, and the percentage of times that a citizen's most recent contact with police involved a use or threat of force. The 270,000 figure was arrived at by multiplying the estimated number of annual police-citizen contacts involving a use or threat of force, and the percentage of contacts involving a use or threat of force that arose from traffic stops.

felonious killings during that same decade, *id.* tbl. 19; and it led to over 63.3%, or 36,281, of the 57,268 assaults upon officers in the decade's last year, *id.* tbls. 70, 73.[4] The threat of personal harm provides yet another reason for officers to avoid improper searches and seizures.

The prospect that officers might be directed to evidence already in the government's possession does not change the equation. First, officers will not expect to be routinely led to evidence already in the government's possession. Moreover, as Petitioner himself explains, catching unlicensed drivers can be accomplished through other methods that are lawful and effective. Pet. Br. 52-53.

In short, the risk-to-reward ratio is already high enough to prevent officers from having an incentive to violate rights simply because evidence that the government already possesses may be admitted. Any "incremental deterrent effect which might be achieved by extending the rule" to such evidence is "speculative," "uncertain at best," and "undoubtedly minimal." *United States v. Calandra*, 414 U.S. 338, 351-52 (1974). Such "'marginal or nonexistent benefits . . . cannot justify the substantial costs of exclusion.'" *Herring*, 129 S. Ct. at 703.

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[4] The "other law enforcement activity" that led to felonious killings between 2000 and 2009 included that associated with non-traffic arrest situations, disturbance calls, civil disorder, investigation, handling of persons with mental illness, and tactical situations. The "activity of that type" that led to assaults in 2009 included all of the foregoing, except tactical situations.

C. The introduction of previously-possessed evidence involves no exploitation or coercion.

An additional reason not to exclude evidence already in the State's possession is that its admission does not raise concerns about exploitation or coercion. As noted above, the Court applies the exclusionary rule to prevent the introduction of evidence obtained "by exploitation" of illegality. *Wong Sun*, 371 U.S. at 487-88. Similarly, this Court extended the rule to the States in part because the "unconstitutional seizure of goods, papers, effect, documents, etc." is "tantamount to coerced testimony." *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961) (explaining that, without the rule, "the freedom from state invasions of privacy would be . . . severed from its conceptual nexus with the freedom from all brutish means of coercing evidence"); *accord Stone v. Powell*, 428 U.S. 465, 484 & n.21 (1976).

However, when the evidence that the government seeks to introduce consists of its own preexisting records – or other evidence previously in its possession – there is no such exploitation or coercion. The police did not acquire the evidence through an illegal search or any other form of coercion. *Cf. United States v. Edmons*, 432 F.2d 577, 584 (2d Cir. 1970) (Friendly, J.) (explaining that "[t]he Government 'exploits' an unlawful arrest when it obtains a conviction on the basis of the very evidence, not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act"); *United States v. Carson*, 793 F.2d 1141, 1148-49 (10th Cir. 1986) (concluding that "exploitation" within meaning of *Wong Sun* includes

coercing defendant into giving consent to search using fruits of primary illegality, but does not include requesting and receiving voluntary consent to search based on such fruits).

III. At the very least, the rule should not be extended to governmental decrees.

Even if this Court wishes to leave the door open for a future extension of the exclusionary rule to certain types of previously-possessed evidence, it should lock the door shut with respect to one type: governmental decrees. Amici use the term "governmental decree" to mean any order, ruling, determination, or other official decision issued by a branch of the government with the authority to issue it. It is legally binding and has the force of law. It may require or prohibit conduct, such as an environmental remediation order in the former circumstance, or a restraining order in the latter. A governmental decree is documented, typically in writing, and the government maintains a record of it. When used in court, it commonly is self-authenticating; a judge may even take judicial notice of a decree.[5] As discussed below, such decrees are fundamentally different than other types of evidence – different in significant ways that should be considered before the exclusionary rule is extended to encompass them.

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[5] *See, e.g.*, Uniform Rules of Evidence 901-02 (amended 1986), 13F U.L.A. 680-81, 790-92 (2004) (providing for authentication of public records through evidence of recordation, and self-authentication of public records in certain circumstances); 2 Clifford S. Fishman, *Jones on Evidence: Civil and Criminal* §§ 2:108-2:112, at 211-24 (7th ed. 1992 & Supp. 2010) (explaining that courts take judicial notice of various forms of official acts by and records of public officers and agencies).

Subsection A, *infra*, demonstrates that the challenged evidence constitutes a governmental decree. Subsection B explains how the costs of requiring exclusion are especially high because evidence far beyond driving records would be implicated by an extension of the exclusionary rule. And Subsection C shows that (1) this Court has held that the exclusionary rule should not apply to situations that would impose extraordinary injury to our system of government and (2) compelling the exclusion of State governmental decrees would result in such injury. Specifically, State sovereignty would be offended, and comity and federalism would be undermined, in ways additional to those involved when other types of evidence are excluded.

A. The challenged evidence is a governmental decree.

Petitioner seeks to suppress "the information in DMV files *that his license had been suspended*." Pet. Br. 18 (emphasis added). Those suspensions constitute governmental decrees.

The Commissioner who issued them is an official of the State government with the charge of the DMV. *See* N.Y. Veh. & Traf. Law § 200. By State law, he is specifically authorized to issue license suspensions. *E.g.*, N.Y. Veh. & Traf. Law §§ 226(3), 510(1); *Barnes v. Tofany*, 261 N.E.2d 617, 618-20 (N.Y. 1970) (recognizing Legislature's intent to give DMV Commissioner "power" and "authority" "to impose sanction[]" of "suspension or revocation of the privilege of operating a motor vehicle").

Additionally, the Commissioner's suspension orders were binding on Petitioner. That is, upon their issuance, Petitioner's license was in fact suspended and he was prohibited from driving in the State of New York. *See People v. Rosenheimer*, 102 N.E. 530, 532 (N.Y. 1913) (stating that a driver "exercises a privilege which might be denied him, and not a right," and "the Legislature may prescribe on what conditions it shall be exercised").[6] And, of course, his failure to comply with those binding orders was a crime. N.Y. Veh. & Traf. Law § 511(1)(a), (3)(a)(ii). Thus, there is no doubt that the suspensions constitute governmental decrees that "ha[d] all the force of law." *People v. Teuscher*, 221 N.Y.S. 20, 24-25 (N.Y. Sup. Ct.) (referring to order by agency official, where statutes empowered him to issue orders and made violation of his orders criminal), *aff'd*, 226 N.Y.S. 881 (N.Y. App. Div. 1927), *and aff'd*, 162 N.E. 484 (N.Y. 1928) (Cardozo, C.J.).

B. Applying the exclusionary rule to governmental decrees would lead to the suppression of far more than driving records.

A ruling in Petitioner's favor is likely to lead to the exclusion of a wide range of governmental decrees. Such decrees might include firearm

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[6] Indeed, the records are relevant precisely because they reflect a current license suspension and a set of past license suspensions ordered by the DMV Commissioner. After all, Petitioner was charged with driving with a suspended license. J.A. 7a (reflecting that Petitioner charged with "[a]ggravated unlicensed operation of a motor vehicle in the first degree" under N.Y. Veh. & Traf. Law § 511(3)(a)(ii)).

licensing decisions, professional licensing decisions, and executive and regulatory orders that make statutory provisions operative. Perhaps even evidence of regulations, prior criminal judgments, or court orders would be implicated.

One illustration is provided by the scenario involving the sex offender discussed in Part II.B, *supra*. Another is as follows. Suppose a Boston police officer witnesses a man arguing with a woman in a way that does not give rise to probable cause. The officer nevertheless detains and secures certain information from the man in what amounts to an unlawful arrest. Upon further investigation, the officer learns that the man is subject to a restraining order prohibiting him from approaching the woman. *See generally* Mass. Gen. Laws, ch. 209A, §§ 3, 7. His approaching her was thus a crime. *Id.* § 7. Should Petitioner prevail, a court might suppress the restraining order despite the fact that the officer witnessed the violator's conduct in the open, the order was in the government's possession previously, and it had all the solemnity and force of a court order.

C. Compelling the exclusion of State governmental decrees would offend State sovereignty and be injurious to federalism.

A governmental decree, such as the suspension order here, is different in kind than evidence traditionally found suppressible. It is nothing like a gun, drugs, a financial record, or a witness statement. A governmental decree does not tend to prove that a defendant engaged in certain

conduct. Instead, it reflects a legal, binding order issued by the State. It has the force of law before any misconduct by police, and it is issued by officials unconnected to the offending officers.

To be sure, exclusion of governmental decrees would result in the same substantial social costs associated with suppressing other evidence. *See supra* Part II.A. But their exclusion would result in unique, and significant, additional costs.

1. This Court has long recognized that the exclusionary rule should not be extended where it would be harmful to the administration of justice or our system of government. For example, the Court has concluded that a defendant himself is not to be suppressed as the fruit of an unlawful seizure, in which case a prosecution against him would be foreclosed entirely. *Crews*, 445 U.S. at 474 & n.20; *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The '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."). As it has observed, the "drastic" step of "barring the prosecution altogether" "might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.'" *Crews*, 445 U.S. at 474 n.20.

Similarly, this Court refused to extend the exclusionary rule to grand jury proceedings in light of the "injury to the historic role and functions of the

grand jury," the "undu[e] interfere[nce] with the effective and expeditious discharge of [its] duties," and the "undu[e] prejudice[]" to "important and historic values" that would result. *Calandra*, 414 U.S. at 349-55 & n.11. Further, this Court's decision that evidence need not be excluded because of a knock-and-announce rule violation was based in part on concerns about the flood of difficult litigation that would be visited upon courts. *See Hudson*, 547 U.S. at 595.

Added to the above, this Court has found that the "costs to . . . values vital to a rational system of criminal justice" outweigh the benefits of allowing federal habeas corpus relief based on a claim that the exclusionary rule was violated in a State prosecution, where the offender had a full and fair opportunity to litigate the claim in State courts. *Stone*, 428 U.S. at 489-95. It suggested that those costs included the "serious intrusions on values important to our system of government" associated with "[r]esort to habeas corpus." *Id.* at 491 n.31. Those values, it observed, include "'(i) the most effective utilization of limited judicial resources, . . . (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.'" *Id.* (explaining that intrusions on such values are generally thought outweighed by the interest in not imprisoning the innocent, but that that interest is usually not implicated with Fourth Amendment claims).

2. Extending the rule as Petitioner seeks would require a State court to exclude evidence of a

valid State governmental decree in a prosecution for violating it. That would effectively render the decree nugatory, at least as to the conduct at issue in the State's prosecution. As in *Stone*, there would be harm to our system of federalism beyond that which arises when other types of evidence are excluded. The harm would occur in two ways.

First, since the Nation's founding, it has been recognized that a State's sovereignty is offended, and comity and federalism are undermined, when a federal court gives no effect to a State's public acts.[7] As this Court has affirmed, "governmental stability depends upon the giving of full faith and credit in form, substance and spirit to public acts [and] records . . . between [the] State and Federal Governments." *Bute v. Illinois*, 333 U.S. 640, 672 (1948). It would thus be especially offensive to State sovereignty, and injurious to comity and federalism, for this Court to order a State court to give no effect to the State's own public acts and orders.

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[7] *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 35 (1993) (stating that 28 U.S.C. § 1738, which in large part can be traced back to an act of the First Congress and requires federal courts to give full faith and credit to State legislative acts and judicial records and proceedings, embodies "the elementary principles of federalism and comity"); *University of Tenn. v. Elliott*, 478 U.S. 788, 795, 798-99 (1986) (concluding that "the value of federalism" and unifying purposes would be served by "[h]aving federal courts give preclusive effect to the factfinding of state administrative tribunals" as a matter of federal common law; and noting that § 1738 does not reflect determination to the contrary because it "antedates the development of administrative agencies").

The point is well illustrated by the situation here. Pursuant to its powers to oversee the State's roads and protect the public, the New York State Legislature has enacted certain statutes regulating driving. Those statutes vest the DMV Commissioner with authority to issue binding license suspensions, and they provide penalties for violating his suspension orders. In an exercise of his statutory authority, the Commissioner suspended Petitioner's license, thus prohibiting him from driving. After officers observed Petitioner driving and ascertained that he was thus in violation of the Commissioner's directive, a criminal prosecution was commenced. Evidence of the suspension orders was necessary to that prosecution, not to prove that Petitioner had engaged in certain conduct (i.e., operating a vehicle), but that the State had prohibited him from doing so. Yet with a ruling for Petitioner, federal law would require a State court presiding over his prosecution to treat the Commissioner's suspension orders as though the Commissioner never issued them. That requirement would not even be constitutionally mandated, but based on a Court-created prophylactic rule.[8] Compelling a State to invalidate its own official acts hardly shows respect for its role as a sovereign entity in a system of dual federalism.

Second, a decision in Petitioner's favor likely would force State courts to violate their own separation-of-powers principles. "Separation of

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[8] *See, e.g.*, *Leon*, 468 U.S. at 906 (explaining that "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong'" and exclusion is not a "personal constitutional right of the party aggrieved" (alteration in original)).

powers is a bedrock principle to the constitutions of each of the fifty states." Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1190-91 (1999).

The States' adoption of such a principle is entitled to the respect of this Court. It is in part "[t]hrough the structure of its government" that "a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). And "[w]hether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate . . . is for the determination of the state." *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

Moreover, the value of maintaining separation of powers at both the federal and state levels has long been appreciated. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 756 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny."); *The Federalist* Nos. 47 to 51, at 323-29 (J. Cooke ed. 1961) (J. Madison) ("[T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."). Indeed, generally speaking, separation of powers is intended to advance the same interests that federalism protects. *See Gregory*, 501 U.S. at 458-59 (explaining that both prevent excesses of power).

Ordinarily, the principle of separation of powers precludes a State court from rendering an

agency decree nugatory where it was not in some way improper. *See, e.g.*, 73 C.J.S. *Public Administrative Law & Procedure* §§ 42, 46-51, at 130-32, 135-41 (2004). Yet that is exactly what this Court would be compelling State courts to do if it rules that evidence of governmental decrees must be excluded.[9] As described above, a State judge would be forbidden from recognizing a valid, legally-binding suspension order issued by the State's executive branch. A sovereign State entitled to govern itself within a federal system should not be forced to act contrary to its own chosen structure of government.

Thus, this Court should at least refrain from requiring the exclusion of evidence of State governmental decrees where they would be rendered partly or entirely nugatory, as here.

CONCLUSION

For the reasons set forth above, the judgment of the New York Court of Appeals should be affirmed.

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[9] Similarly, if a decision for Petitioner were applied by federal courts to exclude federal regulatory decrees, questions could be raised based on federal separation-of-powers principles. Moreover, State-court suppression of federal decrees might raise issues concerning the supremacy of federal law, *see* U.S. Const. art. VI, § 2. And if State courts were to suppress decrees of other States, questions could be raised concerning the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, in addition to principles of federalism.

Respectfully submitted,

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