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

REPLY BRIEF

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Respondent argues that the exclusionary rule should not apply to DMV records discovered by police as the direct result of an unlawful seizure. The "independent source" doctrine precludes suppression, respondent claims, solely because the computer data containing the information that a driver's license has been suspended is available to law enforcement, even when the police have no knowledge of its existence until their unlawful stop. (RB-13-27). This argument is inconsistent with decisional law and with common sense. The purpose of the independent source rule is to guarantee that evidence that has been acquired independently of an illegal search or seizure will not be excluded, because its exclusion would, without justification, put the prosecution in a worse position than it would have been in if no misconduct had occurred. *Murray v. United States*, 487 U.S. 533, 537 (1988). In this case, if the police had not unlawfully stopped his vehicle at 7:40 p.m. on January 1, 2005, they would have been entirely unaware that the driver, petitioner, had no valid license. Depriving them of the fruits of that misconduct would place them in the same, not a worse, position, and, since there is no other justification for declining to apply the exclusionary rule, the records should be subject to suppression.

Wrenching language out of context from exclusionary rule cases, and relying on dictionary definitions, respondent urges that the rule applies only to evidence "acquired" or "obtained" independently. Something that is "already in one's possession" cannot be "obtained" or "acquired," respondent asserts; "evidence that is in government hands *before* purportedly illegal police behavior cannot logically be considered to have been obtained by that *later* -in-time illegality." (RB-14-15). This Court, however, has squarely contradicted respondent's semantic viewpoint. In *Murray*, the Court rejected the defendant's view that the doctrine applies only to "evidence *obtained for the first time* during an independent lawful search." 487 U.S. at 537. Instead, it accepted the government's argument that the doctrine legitimized the seizure of evidence "*later* obtained independently" as the result of untainted police conduct. *Id.* Thus, for purposes of this doctrine, the same evidence can be "obtained" twice.

Going beyond semantics, the Court, in discussing the applicability of the independent-source rule, has consistently described the pertinent issue not as whether law enforcement theoretically had access to the evidence independent of any illegality, but whether it had legitimately acquired *actual knowledge* of its existence and value. *See Murray*, 487 U.S. at 541 ("*Knowledge that the marijuana was in the warehouse* was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant") (emphasis supplied); *Segura v. United States*, 468 U.S. 796, 814 (1984) (rule applied where police executed a search warrant based on information "*known to the agents* well before the illegal entry") (emphasis added); *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (doctrine

applies if government "*learned of*" the evidence from an independent source) (emphasis supplied). And, in the first case to recognize the doctrine, the Court described it as applying "[i]f *knowledge of* [facts obtained illegally] is gained from an independent source" (emphasis added). *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

The Court's focus on police awareness, rather than unknowing acquisition, of evidence is supported by sound policy. More is needed to foreclose the salutary operation of the exclusionary rule than that the government happens to have unknowing dominion over evidence. A rule effectively enforcing Fourth Amendment rights needs to operate when police learn of the existence of evidence and ascertain its value through exploitation of an illegal search or seizure. Respondent's position would deny exclusionary rule protection simply because government files, unknown to the police prior to the illegality, were later discovered to contain useful evidence -- only by capitalizing on that illegality.

For the same reasons, respondent's reliance on *United States v. Crews*, 445 U.S. 463 (1980), *Maryland v. Macon,* 472 U.S. 463 (1985), and *Segura* is misguided. In *Crews*, the Court permitted the introduction of the victim's in-court identification notwithstanding the defendant's unlawful arrest, because that identification was the product of an independent source: the victim had conveyed her independent memory of the robber's appearance to police, and the police "both knew [Crews'] identity and had some basis to suspect his involvement in the very crimes with which he was charged." *Crews*, 445 U.S. at 475. Similarly, in *Macon*, the police legally obtained

possession of obscene magazines by purchasing them before their unlawful arrest of the bookstore clerk. And in *Segura*, the police executed a search warrant based on information "*known to the agents* well before the illegal entry," obtained from "sources wholly unconnected with the entry." 468 U.S. at 814. Here, in contrast, it was their presumptively unlawful acquisition of DMV records that informed the police about petitioner's driving record; police had no knowledge of or information about this before petitioner's arrest. Moreover, the DMV records had no evidentiary significance independent of police knowledge of the driver's identity – information obtained directly as a result of the illegality.

It is also difficult to defend the notion that the police, or, more broadly, law enforcement, already "possessed" the information contained in DMV files even in the most literal linguistic sense. Notably, respondent does not claim otherwise; it asserts that the records were "compiled and maintained by the state, and in the lawful possession of the government," and are "freely available" to police (RB-15). But neither respondent nor the United States (see *amicus* brief for United States at 20-21) claim that DMV is a branch of law enforcement, nor could they. In the context of the applicability of a statute requiring prosecutorial disclosure of witness statements that are in the possession of law enforcement agencies, the New York Court of Appeals has held that statements in the custody of DMV do not qualify because DMV is an administrative, rather than law enforcement, entity. *See People v. Washington*, 86 N.Y.2d 189, 192 (1993); *People v. Flynn*, 79 N.Y.2d 879, 892 (1992). Moreover, the Driver's Privacy Protection Act of 1994, although it permits the dissemination to a "law enforcement agency" of personal driving-record

information in the records of state departments of motor vehicles, clearly treats such departments as independent of law enforcement. *See* 18 U.S.C. §2721.

The United States insists that such a distinction is inconsequential (*amicus* brief for United States at 21), but it is wrong. In the scenario presented here, since DMV, the custodian of these records, is not a branch of law enforcement, law enforcement obtained this information, even in a technical sense, only by exploiting the unlawful vehicle stop. Thus, the entire premise underlying the independent source doctrine -- that law enforcement acquired the evidence independent of the unlawful search or seizure -- does not apply.[1]

Respondent also argues that because these records are already in "the government's" possession, petitioner has no legitimate "privacy or possessory interest of any kind" in their remaining unknown to police, and hence could not reasonably expect that his license suspensions would not be discovered by the authorities (RB-17-18). This contention is irrelevant. Respondent earlier conceded that, as petitioner argued in his opening brief (PB-23), a defendant challenging an unlawful search or seizure need not demonstrate a reasonable expectation of privacy in the fruits of that Fourth Amendment violation to justify suppression (RB-17-18). Respondent's subsequent contention merely represents an effort to

1. The United States argues that litigating whether the custodial agency is part of law enforcement would create "difficult line-drawing problems," positing as an example whether the database is a "joint NYPD-DMV project." (*amicus* brief for United States at 21). But there is no reason to believe that establishing such a link, if one exists, would be anything other than routine.

resurrect an argument that respondent had previously, and appropriately, jettisoned.

Pointing out that an officer's independent knowledge of a suspect's license suspension would preclude suppression, respondent further asserts that a suppression hearing in this situation would lead to "time-consuming, fact-intensive litigation into the mind of police officers." (RB-23). That is demonstrably false. If the prosecution wishes to argue that the arresting officer knew of the status of a driver's DMV records independently of his/her unlawful acquisition of the computer data, all it would have to do is ask the officer that question. If the prosecution does not ask, or if the officer responds negatively, the court would have no basis to conclude that the state had met its burden of establishing an independent source.[2] Unlike the scenario presented in *Whren v. United States*, 517 U.S. 806 (1996), cited by respondent (RB-18), the court need not perform the difficult task of ascertaining the motivation of the arresting officer, merely whether the officer knew or did not know about the driver's suspensions.

Finally, respondent analogizes this case to *New York v. Harris*, 495 U.S. 14 (1990), in which the Court held that when police, in violation of *Payton v. New York*, 445 U.S. 573 (1980), enter a suspect's home to arrest him without a

2. Courts have uniformly recognized that if the defendant demonstrates an unlawful search or seizure, the prosecution has the burden to establish an independent source. *E.g.*, *United States v. Siciliano*, 578 F.3d 61, 68 (1st Cir. 2009); *United States v. Forbes*, 528 F.3d 1273, 1279 (10th Cir. 2008); *United States v. Leake*, 96 F.3d 409, 417 (6th Cir. 1996); *State v. Cardenas*, 155 P.3d 704, 709-710 (Idaho 2006); *State v. Johnson*, 73 P.3d 282, 287-288 (Ore. 2003); *see Murray,* 487 U.S. at 539-540.

warrant, evidence obtained outside the home is not subject to suppression. But *Harris* is a classic case in which the fruits sought to be suppressed bore no relationship to the purpose underlying the Fourth Amendment rule at issue -- to protect the physical integrity of the home. In stark contrast, the rule recognized in *Delaware v. Prouse,* 440 U.S. 648 (1979), prohibiting suspicionless vehicle stops to acquire identifying information about the driver, aims to prevent police from stopping individuals to obtain precisely the sort of evidence that we seek to suppress here. *Harris* itself recognizes that if the interest violated bears "a sufficiently close relationship to the underlying illegality," even "the indirect fruits of an illegal search or arrest should be suppressed." 495 U.S. at 19.

II. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO ERECT AN ACROSS-THE-BOARD EXCEPTION TO THE FRUIT-OF-THE-POISONOUS-TREE DOCTRINE FOR CASES LIKE PETITIONER'S IN WHICH IDENTITY-RELATED EVIDENCE, INCLUDING A SUSPECT'S NAME, OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, LEADS DIRECTLY TO OTHER EVIDENTIARY FRUITS, SUCH AS THE DMV RECORDS AT ISSUE HERE.

Respondent takes no issue with the bedrock propositions that the exclusionary rule extends "to indirect as [well as] direct products" of Fourth Amendment violations, *Wong Sun*, 371 U.S. at 484, and that excludible Fourth Amendment fruits can encompass anything of "evidentiary value" in a particular case. *Davis v. Mississippi*, 394 U.S. 721, 724 (1969). Respondent also plainly recognizes the

evidentiary value of the DMV records in its prosecution of petitioner (RB-19) ("evidentiary significance . . . inherent in the records themselves"). Nonetheless, respondent would have this Court draw the brightest of lines, prohibiting application of the fruit-of-the-poisonous-tree doctrine to the DMV records in petitioner's case and to evidentiary fruits generally "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" (RB-28). Respondent's argument fails, both as a factual matter here and because it finds no support in this Court's Fourth Amendment jurisprudence.

Preliminarily, respondent is mistaken when it contends that the "sole link" (RB-28) between the Fourth Amendment violation and the DMV records was the police acquisition of petitioner's name. In fact, as respondent's own Voluntary Disclosure Form makes clear, the police, in addition to eliciting petitioner's name, also elicited, in the immediate wake of the automobile stop, his statement that he did not possess a New York driver's license. J.A.-8a. That statement plainly fell within the exclusionary rule's ambit; respondent cannot credibly contend otherwise. As much as the acquisition of petitioner's name, this statement may have prompted the authorities to run the DMV check and discover the DMV records. Thus, the entire factual premise of respondent's argument collapses.

Even if the police had elicited only petitioner's name before running the DMV check, respondent's argument would miss the mark. Contrary to respondent's claim, evidence that police elicited petitioner's name as the driver of the vehicle at the time of the unlawful stop would itself be subject to suppression as a fruit under

the exclusionary rule. This Court has defined a Fourth Amendment fruit as "something of evidentiary value which the public authorities have caused an arrested person to yield to them during an illegal detention." *Davis*, 394 U.S. at 724. Plainly, evidence that police elicited petitioner's name from him in the immediate aftermath of the unlawful car stop meets this definition and, thus, should be subject to the exclusionary rule. Respondent's concern notwithstanding, this conclusion would not have "the practical effect of immunizing the defendant from prosecution" in contravention of the *Ker-Frisbie* doctrine (RB-29). If the police had other evidence, obtained independently of the Fourth Amendment violation, that petitioner was driving on the occasion in question, then the State could prosecute him, adduce that proof at trial and introduce the DMV records, which would now derive from an independent source. Only evidence that police acquired petitioner's name at the time of the unlawful stop would fall to the exclusionary rule and, for that reason, *Ker-Frisbie* concerns simply do not arise. To be sure, in particular cases, suppression of unlawfully obtained identity-related evidence may make prosecution difficult or impossible, but that is a "contemplated cost" of the exclusionary rule and "not the result of a complete bar to prosecution." *Crews*, 445 U.S. at 474 n. 20.

Moreover, even if the acquisition of petitioner's name during the unlawful traffic stop somehow fell outside the exclusionary rule's ambit, respondent would not benefit because this police conduct nevertheless violated the Fourth Amendment. *See United States v. Leon*, 468 U.S. 897, 906 (1984) (recognizing that questions regarding the applicability of the exclusionary sanction are distinct from questions of whether the Fourth Amendment has been

violated). In *Prouse*, 440 U.S. at 663, this Court held that suspicionless automobile stops to ascertain the validity of a motorist's license violated the Fourth Amendment. Similarly, in *Brown v. Texas*, 443 U.S. 47, 52 (1979), this Court held that a stop "to ascertain [an individual's] identity" "without any specific basis for believing he is involved in criminal activity" transgressed Fourth Amendment guarantees. *Id.*

Respondent relies on this Court's discussion in *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 185-86, 191 (2004), about the crucial role of a suspect's name in administering the justice system (RB-32-33). Critically, however, respondent fails to acknowledge *Hiibel*'s holding that a state law requiring a suspect to disclose his name passes Fourth Amendment muster if it occurs "in the course of a valid *Terry* stop . . . ." *Id.* at 188. Under *Hiibel*, as under *Prouse* and *Brown*, police violate the Fourth Amendment when they acquire identification-related information during an unlawful government intrusion.

Because the police acquisition of petitioner's name plainly transgressed Fourth Amendment requirements, respondent's plea for a blanket exception to the fruit-of-the-poisonous-tree doctrine falls flat. Even if the evidence that the police elicited petitioner's name were subject to an exclusionary rule exemption, that evidence was still obtained unlawfully, in violation of the Fourth Amendment. Accordingly, evidence flowing directly from it, such as the DMV records, would nonetheless be suppressible as fruit. *Wong Sun*, 371 U.S. at 487-88 (given the existence of a Fourth Amendment illegality, fruit-of-the-poisonous-tree doctrine extends to all evidence "come at by exploitation of that illegality").

Respondent cites this Court's statement in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984), that the "'body' or identity of a defendant" "is never itself suppressible as a fruit of an unlawful arrest. . . ." (RB-30). Respondent acknowledges, however, that Lopez-Mendoza did not seek suppression of evidence, only dismissal of proceedings against him because of his unlawful arrest, and that the Court made the above-quoted statement in disposing of this claim (RB-30). *Lopez-Mendoza*, 468 U.S. at 1040. That, along with the Court's citation to, *inter alia*, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975), and *Frisbie v. Collins*, 342 U.S. 519, 522 (1952), establish that the Court intended only to restate the familiar *Ker-Frisbie* principle that the exclusionary rule may not be invoked to defeat a court's jurisdiction. That principle does not assist respondent, as petitioner seeks only to suppress specific evidence, the DMV records, not to defeat the court's jurisdiction to prosecute him entirely.

Respondent notes that the Court reiterated this principle in the case of Sandoval-Sanchez, Lopez-Mendoza's co-respondent, who had, in fact, moved to suppress evidence at his deportation hearing (RB-30-31). Specifically, the Court explained that, in a civil deportation proceeding, the government need only establish a person's "identity and alienage" and "[s]ince the person and identity of the respondent are not themselves suppressible, the INS must prove only alienage. . . ." *Lopez-Mendoza*, 468 U.S. at 1043. Respondent suggests that this pronouncement broadly establishes a rule that identity-related evidence is never subject to suppression "no matter what the context," (RB-31), but respondent goes too far. In fact, the Court's statement, which expressly cites back to its earlier iteration of the rule in resolving Lopez-Mendoza's case,

does no more than restate the *Ker-Frisbie* maxim that an individual may not deploy the fact of an illegal arrest to defeat a court's jurisdiction over him. At no point, did the Court tie the pronouncement to the particular evidentiary item that Sandoval-Sanchez had sought to suppress – a statement relating not to his identity, but to his avowed unlawful re-entry. *Id.* at 1037. Accordingly, nothing that the Court said remotely suggests that it sought to address the issue of whether derivative evidence obtained by direct exploitation of a Fourth Amendment violation involving acquisition of a person's name was subject to suppression nor whether evidence of the elicitation of the name itself could be suppressed.

After all, Sandoval-Sanchez's very presence in the United States constituted both a ground for his deportation and a continuing crime. *Id.* at 1047. Allowing him to invoke the exclusionary rule to suppress his "person" or "identity," as opposed to specified evidentiary fruits, would entirely defeat the jurisdiction of the immigration and the criminal courts. This is precisely the vice that the *Ker-Frisbie* rule seeks to prevent and the *Lopez-Mendoza* Court refused to countenance it: "When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free in this country." *Id.*

Petitioner is not similarly situated. He is charged with a single-act offense, not a continuing crime, and he contends only that discrete pieces of evidence – the police elicitation of his name to establish that he was driving at the time of the unlawful stop and the DMV records – were obtained in violation of the Fourth Amendment. He does not seek to suppress his "identity" to defeat

the jurisdiction of the court, but only the DMV records discovered as a direct fruit of the unconstitutional intrusion. If the State can demonstrate an independent source for the DMV records through evidence, not derived from the unlawful stop, establishing that petitioner was driving on the night in question, then the prosecution against him could proceed unimpaired. For that reason, *Lopez-Mendoza*'s invocations of the *Ker-Frisbie* doctrine do not aid respondent.

Respondent also relies on *Crews* (RB-29-30), but its purpose in doing so is not clear. To the extent that respondent invokes *Crews* simply to reiterate the familiar *Ker-Frisbie* principle that a defendant may not employ his illegal arrest to suppress his "face" or body for purposes of defeating a court's jurisdiction, petitioner has no quarrel with that. But respondent appears to go considerably farther. Indeed, respondent suggests that *Ker-Frisbie*, as interpreted in *Crews*, sweeps so broadly that it precludes suppression of in-court identification evidence as the tainted fruit of a Fourth Amendment violation. *See* RB-29 ("the Court [in *Crews*] viewed [the defendant's] efforts to suppress the victim's in-court identification as akin to challenging his own presence at trial.")

In fact, *Crews* did nothing of the sort. In Part 2B of its opinion, the Court squarely held that photographic and lineup identifications obtained in violation of the Fourth Amendment could "under some circumstances affect the reliability of the in-court identification and render it inadmissible as well." *Id.* at 472-73 & n.17, 18. In so stating, the Court noted the relevance of *Wong Sun* fruit analysis in making this determination. *Id.* at 473 n. 19. Justice Powell, writing for himself and Justice Blackmun, fully

concurred in this portion of the Court's opinion, agreeing that "the only evidence in issue in this case is the robbery victims' identification testimony" and that, on the facts presented, that testimony was not "tainted" by the Fourth Amendment violation. *Id.* at 477.[3] Thus, five justices plainly accepted the premise that, in the appropriate case, *Wong Sun* taint analysis could require suppression of in-court identification evidence as fruit of an illegal arrest.[4]

Respondent again invokes *Crews* in arguing that the exclusionary rule is not triggered when a suspect "comes to the attention" of police through an unlawful seizure and the police then exploit that knowledge to obtain additional evidence. Specifically, respondent asserts that, since the investigation in *Crews* "might never have progressed to trial" but for the unlawful photo identification, this Court's refusal to suppress the in-court identification necessarily heralded a rejection of traditional fruits analysis when the original Fourth Amendment violation yields evidence of a defendant's identity (RB-33-34). Respondent's argument ignores that this Court deemed the in-court identification admissible only after performing fruits analysis and finding no taint. *Crews*, 445 U.S. at 472-73 & n.19. This conclusion, which affirmed the express finding of the trial

3. Justice Powell declined only to join in Part 2-D of the Court's opinion because it left open the possibility that a defendant himself – his "face" – could be a suppressible fruit of an illegal arrest, concluding that such suppression would violate *Ker-Frisbie*. *Id.* at 477.

4. Only Justice White, in a separate concurrence on behalf of himself, Justice Rehnquist and the Chief Justice, accepted respondent's proposition that a courtroom identification could never be suppressed even if it "resulted from exploitation of the defendant's Fourth Amendment rights." *Id.* at 479 n.*.

court, had strong record support because, before police had even obtained the improper photo identification, they knew that Crews matched the description of the assailant provided by the victims, a security guard had identified Crews as being present at one of the robbery scenes, and the police had obtained Crews' name during an encounter that did not violate the Fourth Amendment. *Id.* at 465-66. Respondent thus does not demonstrate that *Crews* did not engage in fruit analysis, it merely manifests its disagreement with the decision to do so.[5]

5. Respondent's argument regarding *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958), *later appeal* 274 F.2d 767 (D.C. Cir. 1960), suffers from a similar infirmity. Specifically, respondent suggests that the police would never have matched the untainted set of Bynum's fingerprints to those left at the crime scene, but for the initial match to Bynum's improperly obtained prints (RB-34-35). This claim ignores that, wholly apart from the improper fingerprint match, the police had knowledge that Bynum had initially injected himself into the robbery investigation by going to the precinct following his brother's arrest and had admitted that he owned the car sought in connection with the robbery. *Bynum*, 262 F.2d at 467, *as cited in Crews*, 445 U.S. at 476. As in *Crews*, there was ample basis to conclude that the second fingerprint match in *Bynum* was untainted by the earlier violation.

III. CAR STOPS THAT VIOLATE *DELAWARE V. PROUSE* FALL WITHIN THE CATEGORY OF DELIBERATE POLICE MISCONDUCT THAT THE EXCLUSIONARY RULE MOST EFFECTIVELY DETERS AND THE SOCIAL COSTS OF APPLYING THE EXCLUSIONARY RULE HERE ARE NO DIFFERENT FROM THOSE ASSOCIATED WITH THE CLASSIC APPLICATION OF THE RULE.

A. Application of the Exclusionary Rule to DMV Records is Necessary to Deter Violations of *Prouse*.

Respondent advances several arguments to support the position that application of the exclusionary rule to DMV records "would yield negligible, if any, deterrence benefits" (RB-39), but none withstands scrutiny.[6]

First, respondent argues that police would not evade the protections announced in *Prouse* to check the status of drivers' licenses because other lawful methods of accomplishing this goal exist. Specifically, respondent points to two alternatives – roadblocks and stops based on observed violations – that it claims obviate the police incentive to violate *Prouse*.

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6. In framing the cost-benefit analysis, respondent asserts that the "specter" of flagrant Fourth Amendment violations should have no bearing on this Court's determination (RB-37). But that specter is unavoidably implicated because the New York state courts concluded, and respondent here advocates, that DMV records can never be the fruit of the poisonous tree. If DMV records are never subject to the exclusionary rule, flagrant violations of *Prouse* will be undeterred.

The implementation of roadblocks require police resources well beyond impromptu suspicionless stops. Not only do roadblocks involve many more police officers than patrol car stops, but they require advanced planning and coordination. In this regard, roadblocks (1) need to be implemented pursuant to a *pre-determined, programmatic* objective and (2) that objective cannot be "to detect evidence of ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000). Thus, it is far easier for officers in the field to conduct an impromptu car stop than to use the legally and logistically demanding roadblock.

Respondent's other option – waiting for drivers to violate traffic laws – will also not be as attractive as sidestepping *Prouse*. Obviously, the suspicionless stop casts a far broader net than the observed offense approach. Also, the most common illegal stop is not completely random but based on an officer's "hunch" that falls short of reasonable suspicion. As to the hunch-based stop, the observed offense approach is typically useless. As respondent acknowledges in discussing the prospect of waiting for an individual to commit a traffic offense, "there is no telling when such a stop will occur" (RB-43).

Because respondent's alternatives are not nearly as easy and attractive as the impromptu stop, they do not minimize the strong incentive that would exist for the police to violate *Prouse*.

Second, respondent argues that forgoing application of the exclusionary rule to DMV records will not tempt the police to violate *Prouse* because, in its view, police do not purposely violate the constitution. This position is at

odds with the very premise of the exclusionary rule – that officers in the field have a strong incentive to "ferret[] out crime..." *Johnson v. United States,* 333 U.S. 10, 14 (1948). Notably, this Court recently reiterated its view that police will be encouraged to violate the constitution if their actions will yield some benefit. *See Brendlin v. California,* 551 U.S. 249, 263 (2007) ("Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal."). The effectiveness of the remedy explains this Court's continued allegiance to the rule where, as here, there is a strong causal relationship between the unlawful conduct and the discovery of evidence. *See Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in judgment).

Third, respondent argues that because an invalid car stop results in the suppression of any contraband found in the car, "the principal incentive to obey" the law will remain in effect (RB-41). But this argument is flawed. Leaving DMV records out of the equation, police currently have no incentive to stop drivers that appear to be obeying the law because these stops will yield no admissible evidence. Suspending application of the exclusionary rule to DMV records creates a *fresh* incentive to stop cars because police can gain access to evidence not subject to suppression. That the police would not be able to use other fruit discovered during the stop does not dull this fresh incentive because that other fruit would have been otherwise unobtainable. *See Brendlin,* 551 U.S. at 263 (allowing access to passenger in illegal car

stop would encourage police to stop cars without suspicion although fruits connected to the driver would be subject to exclusion).[7]

Moreover, suspension of the exclusionary rule's application to DMV records will almost certainly result in an end-run around the exclusion of other fruits obtained in the course of an unlawful car stop. If police, after an invalid stop, check DMV records and arrest a driver for driving without a license, a subsequent, properly conducted inventory search that yields physical contraband would likely be viewed as attenuated from the original illegality.

Furthermore, police have additional incentives to access a driver's DMV records because these records are increasingly linked to a sea of data that will be of high interest to police. *See* Brief of *amicus* Electronic Privacy Information Center (EPIC)-5 ("police officers can search from their squad cars an increasingly sophisticated network of government data systems, and obtain personal information once scattered across municipal, state, and federal criminal databases that would never have been available in the context of a routine stop."). With the

7. The *amicus* New York State Association of Chiefs of Police, Inc. (NYSACP) argues that police have little interest in stopping drivers to ascertain whether they are properly licensed. *See* NYSACP Brief-7-8. But that position is at odds with this Court's recognition that "the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles." *Prouse,* 440 U.S. at 658. Surely, one of the primary obligations of state highway patrol officers, who are responsible for highway safety, is to identify those drivers who do not have a license.

primary means of deterring these checks removed, police will be tempted to access the wealth of information that such checks reveal. Because this data is often *private, personal* information (*See* Driver's Privacy Protection Act *(*DPPA*),* 18 U.S.C. §2721; EPIC Brief-10 (National Crime Information Center profiles, which are accessible by squad cars around the country, "contain a vast array of personal data")), the end result will be the proliferation of illegal stops that give police unfettered access to private matters. Disturbingly, these databases are often rife with inaccuracies and so the police will increasingly act on erroneous information. EPIC Brief-19.

Finally, respondent contends that other methods of regulating police behavior – namely, training and potential civil liability – adequately ensure that police will not purposely violate the constitution (RB-41-42). But where, as here, there exists a "sufficient causal relationship" between the unlawful conduct and the discovery of evidence, *United States v. Ramirez,* 523 U.S. 65, 72 n.3 (1998), this Court has already made the judgment that the exclusionary remedy is far more effective at deterring misconduct than these alternatives. Moreover, if respondent prevails here, improved police training would likely have a perverse effect because police would surely learn that DMV records are insulated from the exclusionary rule. And, as noted, this Court has recognized that police will have a strong incentive to take advantage of such loopholes. *Brendlin,* 551 U.S. at 263.

B. The Social Costs of Applying the Exclusionary Rule to DMV Records do not Differ from the Rule's Traditional Application.

Respondent argues that if DMV records are suppressed, the practical effect will be that defendants will be effectively immunized "from future illegal conduct" (RB-43). Respondent's position rests on two premises – one, that operating a motor vehicle without a license is "akin to a continuing offense" and two, that after release from illegal arrest a defendant could commit the same driving offense with impunity. Both premises are untrue.

Respondent correctly acknowledges that unlicensed operation of a motor vehicle is "technically a single-act offense," but it argues that driving is different from other crimes because it "often" recurs (RB-42-43). That driving without a license is capable of repetition does not distinguish it from a host of other offenses to which the exclusionary rule traditionally applies. Drugs illegally recovered from a drug addict are subject to suppression although the offender's addiction is much more likely to compel him to reoffend than any compulsion the unlicensed driver may have to resume driving.

Moreover, the addict will more easily locate new drugs to purchase than an unlicensed driver will regain access to an automobile. In the short run, the car driven by the offender will typically be impounded. *See* N.Y. Veh. & Traf. Law (V.T.L.) §511-b (car to be impounded upon arrest for V.T.L. §511(3)(a) if, *inter alia,* operator is owner or if owner or another properly licensed person, authorized to operate and possess vehicle, is not present). Ultimately,

if and when the car is released to its registered owner,[8] the owner will be unlikely to permit the offender to use his car again. Thus, there is nothing about the offense of driving without a license that makes recurrence *more* likely than other offenses.

Additionally, an unlicensed driver who is released following an unlawful arrest will not be immunized from future illegal conduct. If the police who originally stopped the unlicensed driver subsequently observe the person driving, they would be authorized to arrest the driver because committing a new crime attenuates the illegality and thus precludes application of the exclusionary rule. *See United States v. Garcia-Jordan,* 860 F.2d 159 (5th Cir. 1988) (commission of crime following unlawful arrest attenuates original illegality); *accord United States v. Awadallah,* 349 F.3d 42, 81 & n.8 (2d Cir. 2003)(Straub, J., concurring) (it has long been recognized that it would be "an unwarranted extension of [the fruit of the poisonous tree] doctrine to apply it . . . to a new wrong committed by the defendant.") (citation omitted); *United States v. Pryor,* 32 F.3d 1192, 1195-96 (7th Cir. 1994); *United States v. King,* 724 F.2d 253, 256 (1st Cir. 1984); *United States v. Bailey,* 691 F.2d 1009 (11th Cir. 1982).[9]

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8. A vehicle will not be released to the individual who was driving without a license unless that person has in the meantime secured a valid license. *See* V.T.L.§511-b(2).

9. The United States's concern that application of the exclusionary rule to government records would immunize from prosecution aliens who have illegally reentered the country is similarly unfounded (*amicus* brief for United States at 28-29). This Court could reasonably determine that the cost of applying the exclusionary rule to alien files would be unacceptably high because illegal reentry is, unlike unlicensed driving, a continuing crime. In

CONCLUSION

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

Respectfully submitted,

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any event, because aliens illegally reentering the country continue to offend even after release from an unconstitutional arrest, their post-release re-offense vitiates application of the exclusionary rule. *See Garcia-Jordan,*860 F.2d 159.