No. 14-1373

In the Supreme Court of the United States

STATE OF UTAH, PETITIONER,

v.

EDWARD JOSEPH STRIEFF, JR., RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND TEN OTHER STATES FOR PETITIONER

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 241-8403

Kathryn M. Dalzell
Assistant Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

QUESTION PRESENTED

Whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later held to be unlawful.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTEREST OF *AMICI CURIAE*[1]

In its decision below, the Utah Supreme Court excluded evidence seized in a search incident to a lawful arrest, made pursuant to a valid arrest warrant. At no point did the Utah courts question the good faith of the arresting officer. But because the officer discovered the outstanding arrest warrant during a stop that the courts later held lacked probable cause, the state's highest court held that the evidence must be suppressed. This decision contravenes this Court's exclusionary rule jurisprudence because it ignores the fact that the officer acted in good faith and had no control over the intervening circumstance (the existence of a valid arrest warrant). And the decision widens a pre-existing split among the federal circuit courts and state courts regarding the admissibility of such evidence in criminal trials.

As the chief law enforcement officers of their respective states, the State Attorneys General have a vital interest in ensuring that evidence obtained in good faith and pursuant to a valid arrest warrant is admissible. *Amici* states also have an important interest in the consistent application of federal law, including within their individual state borders. In Michigan, for example, identically situated defendants are subject to conflicting laws, depending on whether the trial occurs in state or federal court. Clarity is needed on this issue of great importance.

---

[1] Consistent with Rule 37.2(a), the amici States provided notice to the parties' attorneys more than ten days in advance of filing.

ARGUMENT

I. The circuits are split on the admissibility of evidence seized incident to a lawful arrest on an outstanding arrest warrant when the warrant is discovered during a stop later held to be unlawful.

As detailed more fully in the State of Utah's petition for certiorari, the circuits and highest state courts are split on the admissibility of evidence seized incident to a lawful arrest on an outstanding arrest warrant when the warrant is discovered during a stop later held to be unsupported by reasonable suspicion or probable cause. In its decision below, the Utah Supreme Court highlighted the "disarray in [the lower courts'] application of the attenuation doctrine to the outstanding warrant scenario," a "gap of substantial significance" in this Court's exclusionary-rule jurisprudence, and struggled openly to read the "tea leaves" in the absence of guidance from this Court. Pet. App. at 2, 35.

A. The majority rule: Evidence comes in if the initial stop's illegality was not flagrant or if it was made in good faith.

A majority of jurisdictions have held that evidence seized pursuant to a valid arrest warrant is admissible, even if the initial stop is later held to be unlawful, as long as the illegality of the initial stop was not flagrant. See Pet. at 8–12 (collecting cases). These jurisdictions have recognized that police lack control over the intervening circumstance in question (whether an outstanding warrant exists) and that the exclusionary rule's deterrent purpose is not

furthered by excluding such evidence in the absence of bad faith. Some jurisdictions have even held such evidence admissible regardless of the flagrancy of the initial stop. See *id*. at 15–17 (same).

B. The minority rule: Evidence is suppressed, even if the initial stop was made in good faith.

In contrast, a minority of jurisdictions, including the Utah Supreme Court below, have refused to admit such evidence. See Pet. at 12–15. While many of these jurisdictions purport to use the balancing test that this Court articulated in *Brown* v. *Illinois*, 422 U.S. 590 (1975), they give little to no weight to the discovery of a valid arrest warrant or to the good faith of the police officer, resulting in a functionally *per se* rule of suppression. The Utah Supreme Court adopted a slightly different approach—also resulting in suppression in the outstanding warrant scenario—holding that this Court's attenuation doctrine is limited to voluntary acts of a defendant's free will. Pet. App. at 3.

C. In between: Defendants in some states are subject to conflicting state and federal rules.

Of particular interest to *amici* States, conflicting rules sometimes apply within the same state, depending on whether the trial occurs in state or federal court. In Michigan, for example, the state Court of Appeals has held that "where the police only discover the defendant's identity as a result of the initial illegal stop or arrest, and the police misconduct was not particularly egregious or the result of bad faith, the discovery of a preexisting

arrest warrant will constitute an intervening circumstance that dissipates the taint of the initial illegal stop or arrest." *People* v. *Reese*, 761 N.W.2d 405, 413 (Mich. App. 2008). But in trials that occur in Michigan's federal courts, a conflicting rule will apply, because the Sixth Circuit has accorded an intervening warrant very little weight in the attenuation analysis. *United States* v. *Gross*, 662 F.3d 393, 404–06 (6th Cir. 2011).

The same is true in Kentucky, where the state Court of Appeals has adopted the majority rule, but the Sixth Circuit has applied the attenuation doctrine in a way that forecloses its application to the outstanding warrant scenario. Compare *Hardy* v. *Commonwealth*, 149 S.W.3d 433, 435–36 (Ky. App. 2004) with *Gross*, 662 F.3d at 404–06.

The federal and state courts need this Court's guidance on this issue.

II. The minority rule, including the decision below, is inconsistent with this Court's exclusionary-rule jurisprudence.

By discounting a police officer's good faith and inability to control the intervening circumstance (*i.e.*, whether an individual has an outstanding arrest warrant), the decision below contravenes both this Court's attenuation jurisprudence and its exclusionary-rule jurisprudence more generally.

A. This Court's attenuation jurisprudence focuses on (1) the police officer's control over the intervening circumstance and (2) the officer's good faith.

This Court's seminal cases on the attenuation exception to the exclusionary rule focus on (1) the police officer's ability to control the intervening circumstance; and (2) the officer's good faith. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Brown*, 422 U.S. 590.

In *Wong Sun* v. *United States*, this Court addressed the admissibility of statements by a defendant, James Wah Toy, after police illegally entered his apartment, chased him into his bedroom, and failed to provide any *Miranda*-style warnings (the case pre-dated *Miranda*). The government had argued that Toy's ensuing statements were intervening acts of Toy's free will that broke the chain of causation from the officers' initial illegal entry. But the Court rejected that argument, explaining that it was "unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." 371 U.S. at 486. After all, "[s]ix or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping," and "[h]e had been almost immediately handcuffed and arrested." *Id*. The Court noted that "[i]t is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." *Id*. at 486 n.12.

In contrast, the Court held that the confession of another defendant in that same case, Wong Sun, *was* admissible under the attenuation exception to the exclusionary rule. The Court first agreed with the lower courts that Sun's initial arrest had been made without probable cause or reasonable grounds. *Id.* at 491. But the Court held that the confession was admissible because the connection between his arrest and later confession "had become so attenuated as to dissipate the taint." *Id.* That is because Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make his statement. *Id.*

Twelve years later, the Court again addressed the attenuation exception in *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, police officers broke into Brown's apartment without a warrant or probable cause and searched it. *Id.* at 592. When Brown later returned home and "was climbing the last of the stairs leading to the rear entrance of his [] apartment," "he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment." *Id.* The stranger said, "Don't move, you are under arrest," and another man with a gun came up behind him. *Id.* The strangers took him to the police station, questioning him along the way. *Id.* at 592–94. When they arrived at the station, they informed Brown of his *Miranda* rights. *Id.* at 594.

The state argued that Brown's subsequent statements were admissible because the intervening *Miranda* warnings broke the chain of causation and sufficiently dissipated the taint of the initial

unlawful entry and arrest. *Id.* at 597–600. But the Court rejected the state's argument, highlighting the possibility that the statement could have been "induced by the continuing effects of unconstitutional custody." *Id*. at 597. Indeed, the Court noted that the illegality "had a quality of purposefulness": "The imp[ro]priety of the arrest was obvious"; "awareness of that fact was virtually conceded by the two detectives"; and "[t]he manner in which Brown's arrest was [e]ffected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.* at 605.

This Court made clear in *Brown* and *Wong Sun* that it was concerned with: (1) the police officer's ability to control the alleged intervening circumstances (i.e., the giving of *Miranda* warnings, and the degree to which police behavior induced the defendant's incriminating statements); and (2) the police officer's purpose (i.e., whether the officer acted in bad faith to exploit the illegality of the initial stop). The Court expressly rejected the idea that but-for causation is sufficient: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun*, 371 U.S. at 487–88. Instead, the focus is on whether the police exploited their own illegal conduct: "[T]he more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at *by exploitation of that illegality* or instead *by means sufficiently distinguishable* to be purged of the primary taint." *Id*. at 487–88 (emphasis added).

Thus, when the Court thought that the statements in *Wong Sun* and *Brown* were not truly voluntary and had instead been purposefully induced by the police, it suppressed them. *Wong Sun*, 371 U.S. at 486; *Brown*, 422 U.S. at 597, 605. Cf. *Missouri* v. *Seibert*, 542 U.S. 600, 612–14 (2004) (ordering suppression where police deliberately, in calculated strategy "to undermine the *Miranda* warnings" through coercion, delayed *Miranda* warnings until after unwarned interrogation had produced a confession). In contrast, when a defendant's statement had been truly voluntary, as it was for defendant Wong Sun, *Wong Sun*, 371 U.S. at 491, the Court was satisfied that the statement was not subject to the police officer's control and had not been caused by any bad faith by the officer. See also *Oregon* v. *Elstad*, 470 U.S. 298, 309, 313, 315–16 (1985) (suppression not required where pre-*Miranda* discussion "was not to interrogate the suspect," incident had "none of the earmarks of coercion," and officer's initial failure to warn was an "oversight" and not "calculated to undermine the suspect's ability to exercise his free will," making the causal connection between defendant's first and second responses to police "speculative and attenuated"); *Seibert*, 542 U.S. at 614 (distinguishing *Elstad* as involving "good-faith *Miranda* mistake" and "posing no threat to warn-first practice generally").

Justice Powell, in his *Brown* concurrence, clarified the relevance of control and good faith in the Court's attenuation cases. "[R]ecognizing that the deterrent value of the Fourth Amendment exclusionary rule is limited to certain kinds of police conduct," he suggested dividing cases into categories:

at one extreme, "the flagrantly abusive violation of Fourth Amendment rights," and at the other extreme, merely "technical Fourth Amendment violations." Where "official conduct was flagrantly abusive" he would require "the clearest indication of attenuation"—"some demonstrably effective break in the chain of events leading from the illegal arrest to the statement"—because "[i]n such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied." *Id.* at 610–11 (Powell, J., concurring) (citations omitted). But as to technical violations, "where, for example, officers in good faith arrest an individual . . . , the deterrence rationale of the exclusionary rule does not obtain," and therefore there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.* at 610–12 (Powell, J., concurring).

This Court similarly focused on the deterrence rationale in *United States* v. *Leon*, 468 U.S. 897 (1984). The *Leon* Court explained that "*Brown*'s focus on the causal connection between the illegality and the confession reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment." *Id.* at 911 n.7 (internal quotations omitted). "Where there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Id.* (internal quotations omitted).

The Court emphasized in its attenuation cases the importance of assessing the officer's control and good faith on a case-by-case basis: "[T]he *Miranda* warnings, alone and *per se*, cannot always make the act sufficiently a product of free will [to break] . . . the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." *Brown*, 422 U.S. at 603. But while the Court rejected a *per se* rule that *Miranda* warnings always break the chain of causation, it also rejected "any alternative *per se* or 'but for' rule" that the chain is never broken. *Id*. "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case." *Id*. Other circumstances the Court considered in these cases—which assessed the voluntariness of a defendant's statement in light of potential coercive police behavior—include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id*. at 603–04.

B. This Court's attenuation jurisprudence follows from its broader exclusionary-rule jurisprudence, including the well-established exception for actions taken in good faith.

By assessing the officer's ability to control the intervening circumstance and his or her good faith, the Court's reasoning in *Brown* and *Wong Sun* aligns perfectly with its exclusionary-rule jurisprudence more broadly—and in particular, with its well-established exception for errors made in good faith.

The sole purpose of the exclusionary rule is to deter misconduct by law enforcement. *Davis* v. *United States*, 131 S. Ct. 2419, 2426–27, 2432 (2011). Exclusion is not an individual right of criminal defendants. *Herring* v. *United States*, 555 U.S. 135, 141 (2009). This Court has thus repeatedly reminded courts to apply the exclusionary rule *only* when it will further its deterrence purpose. *E.g.*, *id.*; *Davis*, 131 S. Ct. at 2426–27; *United States* v. *Leon*, 468 U.S. 897, 907–08 (1984). And the deterrence benefits of suppression must outweigh its heavy costs—namely, the exclusion of relevant evidence of guilt and "letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system." *Herring*, 555 U.S. at 141.

As this Court has recognized, "the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue." *Davis*, 131 S. Ct. at 2427. "When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id*. But "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id*. at 2427–28 (internal citations and quotations omitted).

Thus, this Court has calibrated its cost-benefit analysis in exclusion cases to focus on the flagrancy of the police misconduct at issue. *Davis*, 131 S. Ct. at

2427; *Herring*, 555 U.S. at 137, 143. And because the deterrence benefits of targeting non-flagrant police behavior are so low, this Court has long applied a good-faith exception to the exclusionary rule. See, e.g., *Leon*, 468 U.S. at 907–08 ("Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."); *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) (noting that when a police officer acts in complete good faith, the deterrence rationale for suppression loses much of its force); *Herring*, 555 U.S. at 142 (detailing the development of the good-faith exception); *Davis*, 131 S. Ct. at 2428 (same). Thus, the good-faith exception both allows evidence to be admitted, and protects officers from civil liability via qualified immunity. *Heien* v. *North Carolina*, 135 S. Ct. 530, 539 (2014) (collecting cases).

Relatedly, this Court has routinely declined to apply the exclusionary rule when suppression would have no deterrent effect because the police officer lacks control over the relevant circumstances. As but one example, this Court declined to apply the exclusionary rule when police conduct a search in objectively reasonable reliance on a warrant later held invalid. *Leon*, 468 U.S. at 913, 922. The Court explained that "[t]he error in such a case rests with the issuing magistrate, not the police officer, and punishing the errors of judges is not the office of the exclusionary rule." *Davis*, 131 S. Ct. at 2428 (internal quotations and citations omitted) (discussing *Leon*). Cf. *Leon*, 468 U.S. at 912–13

(noting that "no Fourth Amendment decision marking a 'clear break with the past' has been applied retroactively"); *Arizona* v. *Evans*, 514 U.S. 1, 14 (1995), (applying good-faith exception where police reasonably rely on erroneous information concerning an arrest warrant in a database maintained by judicial employees).

The Court's attenuation decisions in *Brown* and *Wong Sun* thus flow logically from this Court's broader exclusionary-rule jurisprudence. The Court excluded evidence in *Brown* and *Wong Sun* when the police exercised control over the intervening circumstance and when they acted in bad faith. But when the officers proceeded in good faith or the intervening circumstance was beyond their control, the Court allowed the evidence.

C. By overlooking an officer's good faith and lack of control over the intervening circumstance, the decision below conflicts with this Court's decisions.

By discounting Detective Doug Fackrell's good faith and his lack of control over whether Strieff was subject to an outstanding arrest warrant, the Utah Supreme Court contravened this Court's jurisprudence. The Utah courts at no point doubted Detective Fackrell's good faith; indeed, the Court of Appeals agreed with the district court that the detective had acted in good faith, and the Supreme Court did not question that determination. See *State* v. *Strieff*, 286 P.3d 317, 329–31, rev'd, 2015 UT 2 (Utah App. 2012) ("There is no indication in the record that the officer stopped Strieff with the purpose of checking for outstanding warrants, and

the district court found that he did not target Strieff in knowing or obvious disregard of constitutional limitations."). Further, it is evident that Detective Fackrell had no control over whether there was a warrant out for Strieff's arrest. Suppression is unjustified under these circumstances.

1. The minority rule is inconsistent with this Court's jurisprudence.

The minority rule contravenes this Court's jurisprudence because it ignores both police control (or lack of it) over the intervening circumstance and good faith. In effect, these courts order suppression regardless of the culpability of the police conduct, and regardless of the officers' ability to control the intervening circumstance. Cf., e.g., *Brown*, 422 U.S. at 603–05; *Wong Sun*, 371 U.S. at 486–88; *Leon*, 468 U.S. at 907–08, 912–13, 922; *Davis*, 131 S. Ct. at 2427–28; *Herring*, 555 U.S. at 137, 143; *Evans*, 514 U.S. at 14. The minority rule also contravenes this Court's requirement of case-by-case assessment by imposing a *de facto* rule of suppression. Cf. *Brown*, 422 U.S. at 603–04; *Leon*, 468 U.S. at 918.

2. The concerns of the minority jurisdictions are unfounded.

Moreover, the concerns of the minority jurisdictions are unfounded, and analogous concerns have been rejected by this Court.

First, the majority rule does not encourage dragnet-style suspicionless stops. "[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). Here, the incentive is low.

As an initial matter, seizing an individual without probable cause or reasonable suspicion is illegal. This Court has stated that it is "unwilling to believe that officers will routinely and purposely violate the law as a matter of course." *Segura* v. *United States*, 468 U.S. 796, 812 (1984).

The majority rule itself also deters suspicionless stops by threatening exclusion for flagrantly illegal behavior. That is, if the officer's purpose for the initial stop is solely to check for outstanding arrest warrants and he has no other objective reason to support it, the evidence will be suppressed. See, e.g., *State* v. *Grayson*, 336 S.W.3d 138, 148 (Mo. 2011) (en banc) (ordering suppression where officer knew detainee, "knew that a lot of times there were warrants for him," and stop was nothing more than "fishing expedition"); *State* v. *Shaw*, 64 A.3d 499, 512 (N.J. 2012) (affirming suppression where stop was "random detention of an individual for the purpose of running a warrant check"); *People* v. *Mitchell*, 824 N.E.2d 642, 650 (Ill. App. 2005) (affirming suppression where "the sole apparent purpose of the detention [wa]s to check for a warrant"); *State* v. *Soto*, 179 P.3d 1239, 1245 (N.M. App. 2008) (affirming suppression where officers stopped defendant based on "vague notion that they would obtain [his] personal information"), *cert. quashed*, 214 P.3d 793 (N.M. 2009). Knowing this, police officers are not motivated to make illegal stops.

Even if the exception for flagrant illegality were not enough, police are also effectively deterred from

illegal behavior by the threat of civil liability, litigation costs, and attorney's fees. See *Hudson*, 547 U.S. at 596–98 ("[C]ivil liability is an effective deterrent here, as we have assumed it is in other contexts."); *Segura*, 468 U.S. at 812. Police are also subject to several strong institutional deterrents, including increasing professionalism of police forces and an emphasis on internal police discipline. *Hudson*, 547 U.S. at 598–99. Internal reprimands can limit or destroy successful careers. Municipalities also have an incentive to ensure proper conduct because "[f]ailure to teach and enforce constitutional requirements exposes municipalities to financial liability." *Id.*

Even setting aside the question of incentive levels for misconduct, this Court has been reluctant to indulge the specter of systemic misconduct without any evidence that a feared police tactic is actually occurring. In *Herring*, for example, this Court held unfounded "Petitioner's fears that our decision will cause police departments to deliberately keep their officers ignorant": "[T]here is no evidence that errors in Dale County's system are routine or widespread. . . . Because no such showings were made here, the Eleventh Circuit was correct to affirm the denial of the motion to suppress." 555 U.S. at 146–47. The Court explained that "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation." *Id.*; cf. *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring) ("Today's decision does not address

any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern.").

Here, no evidence has been presented that police are routinely and systematically stopping people without reasonable suspicion or probable cause, solely to check for outstanding warrants. Indeed, the vast bulk of intervening-warrant attenuation cases do not suggest bad faith. See, e.g., *United States* v. *Faulkner*, 636 F.3d 1009, 1017 (8th Cir. 2011); *United States* v. *Gross*, 662 F.3d 393, 406 (6th Cir. 2011); *United States* v. *Simpson*, 439 F.3d 490, 496 (8th Cir. 2006); *United States* v. *Green*, 111 F.3d 515, 523 (7th Cir. 1997); *State* v. *Hummons*, 253 P.3d 275, 279 (Ariz. 2011); *People* v. *Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008); *Cox* v. *State*, 916 A.2d 311, 323 (Md. 2007); *Jacobs* v. *State*, 128 P.3d 1085, 1089 (Okla. 2006); *State* v. *Frierson*, 926 So. 2d 1139, 1145 (Fla. 2006); *State* v. *Page*, 103 P.3d 454, 459 (Ida. 2004); *State* v. *Hill*, 725 So. 2d 1282, 1287 (La. 1998); *State* v. *Mazuca*, 375 S.W.3d 294, 309 (Tex. Crim. App. 2012); *People* v. *Reese*, 761 N.W.2d 405, 413 (Mich. App. 2008); *McBath* v. *State*, 108 P.3d 241, 250 (Alaska Ct. App. 2005); *Hardy*, 149 S.W.3d at 436; *Quinn* v. *State*, 792 N.E.2d 597, 602 (Ind. Ct. App. 2003).

Second, any fears of "recurring or systemic negligence" would be misplaced here. *Davis*, 131 S. Ct. at 2428–29 ("Unless the exclusionary rule is to become a strict-liability regime, it can have no

application in a case that does not involve any recurring or systemic negligence on the part of law enforcement and in which law enforcement officers did not violate a defendant's Fourth Amendment rights deliberately, recklessly, or with gross negligence." (internal quotations omitted)). Indeed, negligence is not what the minority jurisdictions are concerned about. Instead, they are concerned about police officers *intentionally* employing dragnet-style stops solely to conduct warrant checks. See, e.g., *Gross*, 662 F.3d at 404–05; *State* v. *Moralez*, 300 P.3d 1090, 1102 (Kan. 2013). As addressed above, that concern is negated through several different mechanisms, including the rule itself. The minority rule excluding evidence discovered pursuant to a valid arrest does not provide any incremental deterrence against police negligence.

3. Any supposed incremental value of the minority rule is outweighed by its great social costs.

The fact that the minority rule provides little, if any, incremental deterrence puts it at odds with this Court's precedent. "Quite apart" from issues of causation, "the exclusionary rule has never been applied *except* where its deterrence benefits outweigh its substantial social costs." *Hudson*, 547 U.S. at 594 (quotation omitted) (emphasis added). And this Court has held clearly that "marginal or nonexistent [deterrence] benefits" will not justify "the substantial costs of exclusion." *Herring*, 555 U.S. at 146 (quoting *Leon*, 468 U.S. at 909).

Suppression is denied where it "fails to yield appreciable deterrence" because it "exacts a heavy

toll on both the judicial system and society at large." *Davis*, 131 S. Ct. at 2426–27. That is, it requires courts to ignore reliable, trustworthy evidence bearing on guilt and potentially to set criminals loose in the community without punishment. *Id*. Exclusion is thus a "bitter pill" that society must swallow only as a "last resort" when the benefits of suppression outweigh its heavy costs. *Id*.; see also *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006).

"The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." *Id*. "To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention and surely its [e]xtension to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law." *Stone* v. *Powell*, 428 U.S. 465, 499-500 (1976) (Burger, C.J., concurring). See also *Leon*, 468 U.S. at 910; *Herring*, 555 U.S. at 141; *Hudson*, 547 U.S. at 591.

"Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *Leon*, 468 U.S. at 907–08. In that instance, "[i]ndiscriminate application of the exclusionary rule . . . may well generate disrespect for the law and administration of justice." *Id*. Such is the case here.

* * *

In short, the minority rule that non-flagrant police behavior almost automatically triggers suppression when evidence was seized incident to a valid arrest warrant, but following a stop later held to be unlawful, "cannot be squared with the principles underlying the exclusionary rule, as they have been explained in [this Court's] cases." *Herring*, 555 U.S. at 147. "An error that arises from nonrecurring and attenuated negligence is [] far removed from the core concerns that led [this Court] to adopt the [exclusionary] rule in the first place." *Id.* at 144. At worst, Detective Fackrell's conduct involved "only simple, isolated negligence," *Davis*, 131 S. Ct. at 2427–28, and he lacked control over the existence of Strieff's outstanding arrest warrant. Because the Utah Supreme Court's decision conflicts with this Court's jurisprudence, and because the circuits and highest state courts are split on this issue, this Court should grant certiorari.

CONCLUSION

For the reasons stated above, this Court should grant the State of Utah's petition for a writ of *certiorari*.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Kathryn M. Dalzell
Assistant Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

Dated: JUNE 2015

Douglas S. Chin
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

Gregory F. Zoeller
Attorney General
State of Indiana
302 W. Washington St.
IGC-South, Fifth Fl.
Indianapolis, IN 46204

Derek Schmidt
Attorney General
State of Kansas
120 S.W. 10th Ave.,
2nd Fl.
Topeka, KS 66612-
1597

Jack Conway
Attorney General
Commonwealth of
Kentucky
700 Capital Ave., Ste.
118
Frankfort, KY 40601

Douglas J. Peterson
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

Adam Paul Laxalt
Attorney General
State of Nevada
100 North Carson St.
Carson City, NV 89701

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Ave.
Bismarck, ND 58505-
0040

Michael DeWine
Attorney General
State of Ohio
30 E. Broad St, 17th
Fl.
Columbus, OH 43215

Ellen F. Rosenblum
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

Peter K. Michael
Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, WY 82002