No. 03-5554

In the Supreme Court of the United States

LARRY D. HIIBEL, PETITIONER

v.

SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a person stopped for an investigative detention based on reasonable suspicion may be required, consistent with the Fourth Amendment, to identify himself.

2. Whether requiring the subject of an investigative detention to identify himself infringes the Fifth Amendment privilege against compelled self-incrimination.

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INTEREST OF THE UNITED STATES

This case presents the issue whether a state statute that requires a person stopped for an investigative detention to identify himself violates either the Fourth or Fifth Amendments. The Court's resolution of that issue will have significant implications for the conduct of investigative detentions by federal law enforcement officers. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. On the evening of May 21, 2000, Humboldt County, Nevada Sheriff's Deputy Lee Dove received a report that a witness had seen an individual striking a female passenger inside a pickup truck. Dove drove to the location of the incident and spoke to the witness, and the witness directed him to a truck that was parked nearby. When Dove approached the truck, he observed skid marks in the gravel, suggesting that the truck had been pulled over in an aggressive manner. Petitioner was standing outside the truck and

his minor daughter was seated inside. Based on petitioner's mannerisms, speech, eyes, and odor, Dove believed that petitioner was intoxicated. J.A. 9-10.

Deputy Dove told petitioner that he had received a report that petitioner had been fighting with the passenger, and Dove asked petitioner to identify himself. Petitioner refused, instead placing his hands behind his back and challenging Dove to take him to jail. Dove continued to ask petitioner for identification, and petitioner continued to refuse. Petitioner stated that he had done nothing wrong, and he continued to place his hands behind his back and to ask Dove to take him to jail. After eleven unsuccessful attempts to determine petitioner's identity, and after warning petitioner that his failure to provide his identity would result in his arrest, Dove handcuffed petitioner and placed him under arrest. J.A. 4, 10, 15-16.

Petitioner was charged with resisting a public officer in violation of Nevada Revised Statutes (NRS) § 199.280 (2000), which makes it a crime to "willfully resist[], delay[] or obstruct[] a public officer in discharging or attempting to discharge any legal duty of his office."[1] Petitioner was convicted on that charge after a trial before a justice of the peace.

2. Deputy Dove demanded that petitioner identify himself under the authority of NRS § 171.123, which provides:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

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[1] When, as in this case, no dangerous weapon is used, the offense is a misdemeanor. NRS § 199.280(2). Petitioner was also charged with misdemeanor domestic battery, but that charge was dismissed before trial at the State's request. J.A. 16 n.1.

> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

At the conclusion of his trial, petitioner moved for dismissal of the charge on the ground that the identification requirement of Section 171.123(3) violates the Fourth Amendment. The justice of the peace denied the motion. J.A. 5-6.

3. Petitioner appealed to the Sixth Judicial District Court of Nevada, contending that the identification requirement was unconstitutional under the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment. The district court first concluded that the evidence was sufficient to sustain petitioner's conviction. J.A. 11. The court then addressed petitioner's Fifth Amendment claim, balancing the "public interest" served by the identification requirement against "an individual's constitutional right to remain silent." *Ibid.* The court determined that the balance weighed in favor of the identification requirement, observing that, "with both domestic battery and DUI the identity of the suspect may be crucial to determine not only for the officer's safety but also for the protection of possible victims." J.A. 12. The district court did not separately discuss petitioner's Fourth Amendment claim.

4. The Supreme Court of Nevada affirmed. J.A. 14-34.[2] The court explained that, in determining whether the identification requirement is reasonable under the Fourth Amendment, it would balance "the public interest and the individual's right to personal security free from arbitrary interference." J.A. 19 (quoting *Brown* v. *Texas*, 443 U.S. 47, 50

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[2] The court's opinion only addresses respondent's Fourth Amendment claim.

(1979)). As to the first of those considerations, the court found an "overwhelming" public interest in requiring individuals detained on reasonable suspicion to identify themselves. *Ibid.*

The court explained initially that the identification requirement enhances the safety of law enforcement officers. The court observed that the "most dangerous time for an officer may be during an investigative stop—when a suspect is approached and questioned." J.A. 20. After reviewing statistics indicating that many officers are killed while attempting to effect a stop or arrest and that the suspects in those killings frequently have a criminal record, the court stated: "Knowing the identity of a suspect allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop." *Ibid.*

The court next found that the identification requirement furthers the government's interest in effective crime prevention. For instance, the court observed, identification might reveal that an individual loitering in the vicinity of a daycare center is a registered sex offender, or that a person stopped for suspicious conduct is the subject of a restraining order or is a "wanted terrorist or sniper." J.A. 21-22. In those situations, the court reasoned, the identification requirement helps an officer to determine whether the suspect is engaged in crime. J.A. 21.

As for the other side of the balance, the court concluded that the identification requirement "involve[s] a minimal invasion of personal privacy." J.A. 22. In the court's view, "[r]easonable people do not expect their identities—their names to be withheld from officers" because "we reveal our names in a variety of situations every day without much consideration." J.A. 23. The court found it "untenable" to "hold that a name, which is neutral and non-incriminating information, is somehow an invasion of privacy." *Ibid.* The court thus held that "[r]equiring a person reasonably suspected of

committing a crime to identify himself or herself to law enforcement officers during a brief, investigatory stop is a commonsense requirement necessary to protect both the public and law enforcement officers." J.A. 23-24.[3]

5. Petitioner sought rehearing, asking the court to address his Fifth Amendment claim. Pet. App. I. The court denied rehearing. J.A. 33-34.

SUMMARY OF ARGUMENT

Requiring the subject of an investigative detention to identify himself infringes neither the Fourth Amendment nor the Fifth Amendment privilege against compelled self-incrimination.

I. The Fourth Amendment affords protection only against those government practices that intrude on a legitimate expectation of privacy. The Court has held that the Fourth Amendment affords no basis for declining to provide a voice or handwriting exemplar, reasoning that a person has no legitimate expectation of privacy in his voice or handwriting. Because a person's name, like his voice or handwriting, is revealed in a variety of everyday interactions, there is no legitimate expectation of privacy associated with one's identity. Moreover, the Court has made clear that an officer may request the subject of an investigative detention to provide his name. A requirement to comply with such a request entails no additional intrusion on Fourth Amendment interests beyond that inherent in the underlying detention itself.

Even if an identification requirement implicates legitimate expectations of privacy, the requirement is reasonable under the Fourth Amendment: any intrusion on privacy is substantially outweighed by the substantial government

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[3] Three Justices dissented, opining that an individual's interest in preserving anonymity outweighs the public interest in requiring identification. J.A. 26-32.

interests in compelling disclosure. First, knowledge of a person's identity promotes the safety of law enforcement officers and others at the scene of an investigative detention by enabling officers to determine whether the detainee has a criminal record or an outstanding warrant. In addition, such information advances the government interest in effective prevention of crime by giving officers important additional information with which to assess the suspect's conduct and determine the proper course of action. Finally, if a person were released without knowledge of his identity, officers generally would lack the ability to locate him should the need later arise.

II. Requiring the subject of an investigative detention to reveal his identity does not infringe the Fifth Amendment privilege against compelled self-incrimination. When a law requiring individuals to provide information serves government interests other than facilitating a criminal prosecution, and the information sought is inherently neutral and narrowly circumscribed, the balance of considerations dictates that the Fifth Amendment privilege affords no defense for failing to provide the information. In *California* v. *Byers*, 402 U.S. 424 (1971), this Court held that the privilege did not justify noncompliance with a California law requiring persons involved in automobile accidents resulting in property damage to stop and leave their name and address with the property owner. The opinions forming the majority emphasized that the law was not intended to facilitate criminal conviction, and that the identification requirement did not relieve the State's burden to determine through its own independent investigation whether the accident involved criminal conduct.

In this case, likewise, the requirement to provide one's name compels disclosure of inherently neutral information and is intended to serve important interests other than facilitating criminal conviction. A name only reveals identity

and itself provides no information about whether a person is involved in crime. Although learning a person's name can facilitate further investigation, that was equally the case in *Byers*, and the Court there emphasized that any further investigation is a product of officers' own independent efforts. In addition, the government ordinarily could determine a person's name in a variety of alternate ways through further investigation.

The government interests in compelling self-identification include promoting the safety of law enforcement officers and preventing imminent crime, both of which stand apart from the interest in facilitating criminal prosecution. Although the identification requirement comes into play only with respect to persons reasonably suspected of crime, those persons have come to the attention of law enforcement not as the result of any compulsion to make incriminating disclosures, but instead as a consequence of officers' own independent observations.

ARGUMENT

A LAW REQUIRING THE SUBJECT OF AN INVESTIGATIVE DETENTION TO IDENTIFY HIMSELF IS CONSTITUTIONAL

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court held that a police officer may, consistent with the Fourth Amendment, stop and briefly detain for investigation an individual reasonably suspected of criminal activity. See, *e.g.*, *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000). During the detention, the officer may ask the detainee his name and question him concerning matters relevant to the basis for the stop. See, *e.g.*, *Hayes* v. *Florida*, 470 U.S. 811, 816 (1985); *Adams* v. *Williams*, 407 U.S. 143, 146 (1972); *Terry*, 392 U.S. at 28, 30. Requiring a person stopped under *Terry* to identify himself violates neither the Fourth Amendment protection against

unreasonable searches and seizures nor the Fifth Amendment privilege against compelled self-incrimination.

I. THE FOURTH AMENDMENT DOES NOT PROHIBIT REQUIRING THE SUBJECT OF AN INVESTIGATIVE DETENTION TO IDENTIFY HIMSELF

A. Because There Is No Legitimate Expectation Of Privacy In One's Name, An Identification Requirement Does Not Constitute A Search

1. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A particular government action does not amount to a "search" under the Fourth Amendment unless it invades "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy.'" *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); see *Hudson* v. *Palmer*, 468 U.S. 517, 525 (1984); *Katz* v. *United States*, 389 U.S. 347 (1967). It is not enough that an "individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361). The "individual's subjective expectation of privacy [must be] 'one that society is prepared to recognize as reasonable.'" *Ibid.* (quoting *Katz*, 389 U.S. at 361); see *id.* at 743-744. Requiring a person to identify himself during an investigative stop does not intrude on any legitimate expectation of privacy.

a. This Court's decisions establish that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *California* v. *Greenwood*, 486 U.S. 35, 41 (1988) (quoting *Katz*, 389 U.S. at 351); *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986). Accordingly, a person has no legitimate privacy expectation in trash left in an area "accessible to the public" (*Greenwood*, 486 U.S. at 41); no reasonable expectation that his fenced-in backyard will remain free from inspection by aircraft passing overhead

(*Ciraolo*, 476 U.S. at 215); no legitimate expectation of privacy in his activities in "open fields" that are "accessible to the public," even if the fields are surrounded by a fence or posted with "No Trespassing" signs (*Oliver* v. *United States*, 466 U.S. 170, 179 (1984)); and no reasonable expectation of privacy in his movements from one place to another in an automobile traveling on a "public thoroughfare" (*United States* v. *Knotts*, 460 U.S. 276, 281-285 (1983)).

Of particular relevance, the Court has held that a person has no reasonable expectation of privacy in his voice or handwriting. In *United States* v. *Dionisio*, 410 U.S. 1 (1973), a grand jury witness argued that a subpoena requiring a voice exemplar for identification purposes violated the Fourth Amendment. This Court rejected that claim, holding that a person has no legitimate expectation of privacy in the sound of his voice. *Id.* at 14-15. The Court explained that, "[l]ike a man's facial characteristics, * * * his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Id.* at 14. The Court has reached the same conclusion with respect to handwriting exemplars, observing: "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." *United States* v. *Mara*, 410 U.S. 19, 21 (1973).

The principle that a person can claim no Fourth Amendment protection for what he "knowingly exposes to the public" (*Katz*, 389 U.S. at 351) is readily applicable in this case. "Except for the rare recluse who chooses to live his life in complete solitude" (*Dionisio*, 410 U.S. at 14 (internal quotation marks omitted)), a person routinely exposes his identity to the public. Individuals exchange their names as a matter of course in everyday social interactions, and

regularly display their names when using credit cards or checks in commercial transactions. And a person must reveal his name in order to drive a car, obtain a job, open a bank account, or receive mail. In short, disclosing one's identity is an essential part of everyday life.

A person not only reveals his identity through his own actions, but he also cannot control the sharing of his name by third parties, who remain fully free to disclose his name to anyone including police officers. "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," *Smith*, 442 U.S. at 743-744, and "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities," *id.* at 744 (internal quotation marks omitted). In this case, accordingly, officers could have followed petitioner to his home or workplace and learned his identity from his neighbors or coworkers—an entirely lawful practice that most would consider a more significant invasion of privacy than a mere requirement to provide one's name.

For those reasons, a requirement to state one's name, like a requirement to supply a voice or handwriting exemplar, exposes nothing "that has not previously been exposed to the public at large." *Dionisio*, 410 U.S. at 14 (quoting *United States* v. *Doe (Schwartz)*, 457 F.2d 895, 899 (2d Cir. 1972), cert. denied, 410 U.S. 941 (1973)); see *United States* v. *Ward*, 488 F.2d 162, 164 (9th Cir.) ("The name a person is using, like his voice * * *, is a publicly displayed characteristic."), reversed on other grounds, 488 F.2d 167 (1973). Because the Fourth Amendment affords no grounds for "constructing a wall of privacy" that "does not exist in casual contacts with strangers," *Dionisio*, 410 U.S. at 14 (quoting *Doe*, 457 F.2d at 898-899), compelled identification invades no legitimate privacy interests.

b. An additional reason that a person has no legitimate expectation of privacy in his name is that the name merely serves as a means of identifying him. It provides no other information about the person, let alone information that might reasonably be regarded as private. This Court invoked a similar rationale in *Dionisio*, explaining that a requirement to supply a voice exemplar, like a requirement to supply fingerprints, "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." 410 U.S. at 15 (quoting *Davis* v. *Mississippi*, 394 U.S. 721, 727 (1969)).

It is true that knowledge of an individual's name, while not itself revealing of any private information, could provide a means for acquiring such information through further investigation. But the possibility that a name could be used to obtain *other* information does not confer a legitimate expectation of privacy in the name itself. Voice and handwriting exemplars likewise can lead to the discovery of private information about a person, yet there is no legitimate expectation of privacy in one's voice or handwriting. The relevant inquiry is whether the particular item sought by law enforcement implicates a legitimate expectation of privacy, not whether that item might facilitate discovery of other information that implicates a cognizable privacy interest.[4]

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[4] If it were otherwise, an individual could assert a legitimate expectation of privacy in a third party's car on the basis that a search of the car might lead to the discovery of private information about him, see *Rakas* v. *Illinois*, 439 U.S. 128 (1978) (holding that passengers have no legitimate expectation of privacy in car belonging to another), or could assert a legitimate expectation of privacy in the phone numbers he dials on the basis that knowledge of the numbers could lead to investigation that discloses the content of a particular conversation, see *Smith*, 442 U.S. at 742-746 (holding that there is no legitimate expectation of privacy in the phone numbers dialed from a private phone).

2. Although an individual has no legitimate expectation of privacy in his name, he does have a cognizable Fourth Amendment interest in moving about free of unreasonable government intrusion. See *Terry*, 392 U.S. at 16-17. The Court held in *Terry*, however, that when officers form a reasonable suspicion of criminal activity, a brief, investigative detention for purposes of questioning the suspect is reasonable under the Fourth Amendment. *Id.* at 20-23. The Court has made clear that the questions put to the subject of a *Terry* stop can include a request for the person's name. See *Hayes*, 470 U.S. at 816; *Adams*, 407 U.S. at 146.

Requiring the individual to respond to an officer's request for his name entails no additional interference with freedom of movement beyond that inherent in the detention itself. It takes no longer to provide a name than to refuse to provide it. A warning that refusal to disclose identity will result in an arrest in fact could shorten the duration of the detention by prompting swifter cooperation. Nor does an identification requirement increase the qualitative severity of the detention. The obligation entails no physical contact with a detainee, and complying by stating one's name should add no anxiety or discomfort beyond what already ensues from the detention and questioning. Requiring a suspect to identify himself in the course of an investigative detention thus neither prolongs nor aggravates the interference with Fourth Amendment interests inherent in the detention itself.

B. An Identification Requirement For Investigative Stops Is Reasonable Under The Fourth Amendment

Even if Nevada's identification requirement for investigative stops intrudes on a legitimate expectation of privacy, the requirement is consistent with the Fourth Amendment. The essential purpose of the Fourth Amendment is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials * * * in order to

'safeguard the privacy and security of individuals against arbitrary invasions.'" *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979) (quoting *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312 (1978) and *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967) (footnotes omitted)). The reasonableness of a law enforcement practice is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Prouse*, 440 U.S. at 654; see *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Terry*, 392 U.S. at 21.

With regard to the degree of intrusion on Fourth Amendment interests, to the extent that compelled identification during an investigative detention intrudes on any legitimate expectation of privacy, the intrusion, for the reasons explained, is not significant. On the other side of the balance, the identification requirement serves a number of substantial government interests.

1. First, the identification requirement promotes the ability of law enforcement officers to protect themselves and others in the fluid and potentially volatile circumstances of an investigative stop. This "Court recognized in *Terry* that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams*, 407 U.S. at 146; see *United States* v. *Hensley*, 469 U.S. 221, 235 (1985) (explaining that officers may "take such steps as [are] reasonably necessary to protect their personal safety * * * during the course of [a] stop"). "Knowing the identity of a suspect," as the Nevada Supreme Court explained, "allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop." J.A. 20.

Knowledge of a person's identity enables officers to determine whether he has a criminal record. That information is highly useful. Although an officer can conduct a frisk for weapons based on a reasonable fear that a detainee is armed

and dangerous, see *Terry*, 392 U.S. at 30, an officer who lacks information about the detainee's criminal record may not recognize that he presents a danger. Regardless of any frisk, moreover, an officer's awareness that a person has a criminal record could justify special safety precautions —ranging from calling for backup assistance to drawing his weapon and handcuffing the suspect if there is indication that he is especially dangerous.[5] Similarly, an officer who learns that a person is the subject of an outstanding warrant could develop concerns that the person might resort to violence to resist or avoid execution of the warrant. Courts thus have recognized that police officers may, for their safety, request criminal history checks during investigative stops. See, *e.g.*, *United States* v. *Finke*, 85 F.3d 1275, 1279 (7th Cir. 1996); *United States* v. *McRae*, 81 F.3d 1528, 1535-1536 n.6 (10th Cir. 1996). Indeed, given that officers may conduct the "severe" intrusion of a pat-down frisk to assure their own safety and that of the public (*Terry*, 392 U.S. at 24-25), the far lesser intrusion of requiring a detainee to state his name should be permissible for the same purpose.

2. The identification requirement also promotes the government's interests in effective crime prevention and ensuring public safety. See *Terry*, 392 U.S. at 22. Knowing a detainee's criminal history can be significant in assessing a person's conduct and determining the appropriate course of an investigative stop.

As the Nevada Supreme Court explained, for instance, it would be important for an officer to know that an individual observed acting suspiciously in the vicinity of a school play-

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[5] The courts of appeals have repeatedly held that officers conducting a *Terry* stop may handcuff a suspect and draw their weapons as a safety precaution where such actions are warranted. *E.g.*, *United States* v. *Gil*, 204 F.3d 1347, 1351 (11th Cir.), cert. denied, 531 U.S. 951 (2000); *United States* v. *Vega*, 72 F.3d 507, 515 (7th Cir. 1995), cert. denied, 518 U.S. 1007 (1996); *United States* v. *Edwards*, 53 F.3d 616, 619 (3d Cir. 1995).

ground has a history of sexually abusing minors, or that a detainee observed acting suspiciously near a potential terrorist target is on a terrorist watch list. See J.A. 21. Information of that sort could have a significant effect on the officer's assessment of the proper course of action, and ultimately could allow prevention of an imminent crime or additional harm to victims in an ongoing crime. In addition, even if the officer does not develop probable cause for an arrest, a detainee's knowledge that the officer now knows his name potentially could deter him from following through on any plans to commit a crime.[6]

3. Finally, without knowledge of identity, "subsequent apprehension of [a] released suspect, if he is later shown to have perpetrated the suspected crime or some other offense, will usually be impossible." 4 Wayne R. LaFave, *Search and Seizure* § 9.5(g), at 305 (3d ed. 1996); see *United States* v. *Jones*, 759 F.2d 633, 642 (8th Cir.) ("Limits on the ability of an officer to ascertain the identity of a person would in many instances make investigative stops serve no useful purpose," because "[i]f police during a stop near a crime scene are unable to obtain identification from a suspect, they likely will never be able to relocate the suspect should probable cause later develop."), cert. denied, 474 U.S. 837 (1985). Moreover, officers might subsequently desire to locate an individual detained in an investigative stop not because he remains a suspect, but because he was on the scene as a witness and is a potential source of information. See Model Code of Pre-Arraignment Procedure § 110.2 cmt., at 270 (1975) ("officer will be confronted with many situations in which it seems necessary to acquire some further information from * * * a

[6] Conversely, an officer who learns that a suspect has no criminal record might more readily accept an innocent explanation for suspicious conduct or otherwise limit the scope of the detention.

person whose name he does not know, and whom, if further action is not taken, he is unlikely to find").

For those reasons, the legitimate government interests served by Nevada's identification requirement for investigative stops substantially outweigh any minimal intrusion on legitimate expectations of privacy. The identification requirement thus is consistent with the Fourth Amendment.[7]

II. REQUIRING THE SUBJECT OF AN INVESTIGATIVE DETENTION TO IDENTIFY HIMSELF DOES NOT INFRINGE THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

A. The Fifth Amendment Does Not Bar The Government From Requiring Disclosure Of Essentially Neutral Information In Service Of Interests Unrelated To Criminal Prosecution

1. The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." The core protection afforded by the Clause is that a criminal defendant cannot be compelled to testify against himself in a criminal trial. See *Chavez* v. *Martinez*, 123 S. Ct. 1994, 2000-2001 (2003) (plurality opinion); *id.* at 2006 (Souter, J.,

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[7] Petitioner argues (Br. 28-33) that Nevada's identification requirement violates the Fourth Amendment because it permits an officer to arrest a person without probable cause to believe that he committed the crime for which he was initially stopped. The arrest, however, is for a separate crime—failing to identify oneself during an investigative stop—as to which there undoubtedly is probable cause.

There also is no merit to petitioner's suggestion (Br. 34-37) that the identification requirement infringes the First Amendment interest in anonymous speech. Because there is no indication that petitioner was engaged in expressive activity when he was detained, this case does not implicate any interest in anonymous speech.

concurring). To safeguard that core guarantee, this Court has permitted assertion of the privilege outside of a criminal trial when the information sought could prove incriminating in any eventual prosecution. See *id.* at 2003-2004 (plurality opinion); *United States* v. *Balsys*, 524 U.S. 666, 671 (1998); *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984). But the focus remains on the potential for incrimination in a subsequent criminal prosecution. See *Balsys*, 524 U.S. at 671; *Murphy*, 465 U.S. at 426.

The emphasis on the effect in an ultimate criminal prosecution reflects "the fundamental purpose of the Fifth Amendment—the preservation of an adversary system of criminal justice." *Garner* v. *United States*, 424 U.S. 648, 655 (1976). The "adversary system of criminal justice * * * is undermined," this Court has explained, "when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures." *Id.* at 655-656; see *Malloy* v. *Hogan*, 378 U.S. 1, 7-8 (1964). Consequently, when the government is engaged in the process of developing its evidentiary case for a criminal prosecution, the Fifth Amendment prevents the government from making its case through the expedient of compelling the defendant to furnish the government with incriminating disclosures.

"In areas where a government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings." *Garner*, 424 U.S. at 656. The Fifth Amendment thus affords no basis for refusing to comply with a law requiring individuals to provide information when the requirement serves government interests other than facilitating criminal prosecution and the information sought is narrowly circumscribed and inherently neutral, such that providing it does not relieve the government's "burden[] of independent investigation." *Ibid.*; see *Baltimore City Dep't*

of Social Servs. v. *Bouknight*, 493 U.S. 549, 556 (1990) ("The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."). See also *United States* v. *Hubbell*, 530 U.S. 27, 35 (2000) ("[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.") (footnotes omitted).

2. This Court's decision in *California* v. *Byers*, 402 U.S. 424 (1971), is instructive, because that case represents the Court's only previous occasion to explore the Fifth Amendment implications of a law requiring disclosure of a person's identity. *Byers* involved a California law requiring individuals involved in an automobile accident causing property damage to stop and provide their name and address to the owner or person in charge of the affected property. This Court rejected Byers's argument that the Fifth Amendment privilege afforded him a defense to his prosecution for failing to stop and leave his name after an accident.

The plurality opinion, joined by four Justices, reasoned that when "the Court is confronted with the question of a compelled disclosure that has an incriminating potential," resolution of the claim turns on "balancing the public need" against "the individual claim to constitutional protections." 402 U.S. at 427. Although the California Vehicle Code "defines some criminal offenses," the plurality explained, the hit-and-run law "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents." *Id.* at 430. The plurality acknowledged that "the compelled disclosure of identity could have led to a charge that might not have been made

had the driver fled the scene." *Id.* at 434. The plurality emphasized, however, that a name merely reveals identity and that a prosecution would require development of "independent evidence." *Ibid.* In the plurality's view, therefore, "the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here." *Id.* at 428.

Justice Harlan concurred in the judgment. He emphasized "the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the [limited] nature of the disclosures involved." 402 U.S. at 458. As to the latter, Justice Harlan observed that, notwithstanding the obligation to disclose one's name and address, "the State must still bear the burden of making the main evidentiary case." *Id.* at 457.[8]

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[8] In *Baltimore Department of Social Services* v. *Bouknight*, 493 U.S. 549 (1990), the Court relied on *Byers* and similarly balanced the public interest in a compelled disclosure against the incriminating potential. That case addressed whether a mother who had been named her child's custodian could rely on her Fifth Amendment privilege to resist an order of the juvenile court to produce her child. The mother claimed that the act of producing the child would amount to a testimonial affirmation of her control over him. The Court acknowledged that in some cases the act of producing a child might incriminate the custodian. 493 U.S. at 561. The Court explained, however, that "[t]he possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production." *Id.* at 555. The Court emphasized the regulatory scheme's purpose of providing for the care and protection of children, as well as the fact that "production in the vast majority of cases will embody no incriminating testimony." *Id.* at 561. The Court thus concluded that the mother could not invoke the privilege to resist the production order. *Ibid.* The Court left open whether there may be any limitations on the State's use in a subsequent criminal prosecution of the testimonial aspects of the mother's act of production. *Ibid.*

B. Nevada's Identification Requirement Calls For Disclosure Of Inherently Neutral Information In Service Of Interests Other Than Facilitating Criminal Prosecution

As with the law upheld in *Byers*, Nevada's requirement that the subject of an investigative stop reveal his identity promotes significant government interests other than furthering criminal prosecution and does so through a narrow requirement to provide fundamentally neutral information.

1. A requirement to provide one's name calls for disclosure of inherently neutral information

a. In *Garner* v. *United States*, this Court left open the question of "what types of information are so neutral that the [Fifth Amendment] privilege could rarely, if ever, be asserted to prevent their disclosure." 424 U.S. at 651 n.3. A person's name fits squarely in that category. A name asserts no fact other than identity, and it implies nothing about one's activities, licit or illicit. As the *Byers* plurality explained, a name "identifies but does not by itself implicate anyone in criminal conduct." 402 U.S. at 434. Rather, "[d]isclosure of name * * * is an essentially neutral act." *Id.* at 432; see 4 Wayne R. LaFave, *supra*, § 9.5(g), at 304 ("it is by no means apparent that the 'right to remain silent' * * * encompasses an unlimited freedom to remain anonymous").

The essential neutrality of a name is reflected in decisions applying the rule of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The Court has defined "interrogation" for *Miranda* purposes as "words or actions * * * reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). The courts of appeals have held that asking a suspect his name does not qualify as "interrogation" under that standard, because "biographical [questions]—name, address, etc.—rarely elicit[] an incriminating response." *United States* v. *Ventura*, 85 F.3d 708, 712 n.5 (1st Cir. 1996);

accord *United States* v. *Bogle*, 114 F.3d 1271, 1275 (D.C. Cir.), cert. denied, 522 U.S. 938 (1997). See also *United States* v. *Reyes*, 225 F.3d 71, 77 (1st Cir. 2000) ("it would be a rare case indeed in which asking an individual his name, date of birth, and Social Security number would violate *Miranda*").[9]

b. An individual's name, while not itself incriminating, can facilitate further investigation. And the Fifth Amendment "privilege not only extends 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.'" *Ohio* v. *Reiner*, 532 U.S. 17, 20 (2001) (per curiam) (quoting *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951)). Nonetheless, a name merely provides a means of referring to a person: it does not direct officers where to go, whom to speak to, or what to look for. Whatever evidence officers ultimately uncover is the product of their own independent efforts. Such evidence, in the context of a law requiring disclosure of information for reasons other than facilitating criminal prosecution, does not bear a sufficient connection to the compelled disclosure to warrant invoking the protection of the Fifth Amendment privilege.[10]

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[9] Cf. *Pennsylvania* v. *Muniz*, 496 U.S. 582, 601 (1990) (plurality opinion) (concluding that questions concerning suspect's name, address, height, weight, eye color, and age amounted to interrogation where suspected offense was driving while intoxicated and inability to answer such questions might reveal impaired mental faculties).

[10] In *United States* v. *Sullivan*, 274 U.S. 259 (1927), the Court held that the Fifth Amendment privilege affords no defense to prosecution for failing to file an income tax return. The defendant, who had made his income as a bootlegger of liquor, claimed that reporting his income could prove incriminating. The Court held that the defendant was required to claim the privilege as to specific questions instead of declining to file a return, *id.* at 263-264, and observed that it "would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized

In *Byers*, for instance, the plurality acknowledged that "compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene." 402 U.S. at 434. But the plurality found that form of but-for causal relationship insufficient to justify applying the Fifth Amendment privilege, explaining that the possibility that disclosure of the driver's name would lead to prosecution "depend[s] on different factors and independent evidence." *Ibid.* Justice Harlan reached the same conclusion in his concurring opinion, explaining: "California's decision to compel Byers to stop after his accident and identify himself will not relieve the State of the duty to determine, entirely by virtue of its own investigation after the coerced stop, whether or not any aspect of Byer's behavior was criminal," and "the State [thus] must still bear the burden of making the main evidentiary case against Byers." *Id.* at 457. Cf. *Doe* v. *United States*, 487 U.S. 201, 215 (1988) ("Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. The Government must locate that evidence by the independent labor of its officers.") (internal quotation marks omitted).

In important respects, the hit-and-run law in *Byers* called for *more* incrimination than the identification requirement at issue here. In the circumstances of *Byers*, law enforcement officers might never come into contact with a person involved in an automobile accident if not for the driver's

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a man to refuse to state the amount of his income because it had been made in crime," *ibid.* The plurality in *Byers* explained that, although "Sullivan's tax return, of course, increased his risk of prosecution and conviction for violation of the National Prohibition Act," the "Court had no difficulty in concluding that an extension of the privilege to cover that kind of mandatory report would have been unjustified." 402 U.S. at 429.

obligation to leave his name and address at the scene. See 402 U.S. at 434 (plurality opinion). The driver thus is required to "focus[] attention on himself as an accident participant." *Id.* at 457 (Harlan, J., concurring in the judgment). By contrast, the subject of an investigative detention comes to the attention of law enforcement officers not as the result of any compelled disclosures, but instead as the result of officers' own independent observations.

c. Officers whose own observations lead them to focus their attention on a particular person ordinarily could determine his identity through means other than compelling him to state his name during an investigative detention. If the person were arrested, the government could establish his identity through fingerprint evidence taken at the time of arrest or through third-party identification or information such as an address or license plate number. Moreover, officers can search an arrestee's wallet or purse incident to arrest and thereby obtain the individual's driver's license or other form of identification. If the person were not arrested, officers could determine his identity by following him and conducting further investigation, including by talking to acquaintances or neighbors.

The issue in this case thus essentially is when—rather than whether—officers can learn the identity of a person whose conduct has drawn their attention. The Fifth Amendment does not compel an approach that would require officers to wait to determine the person's name until after an investigative detention rather than learning it when it can help to ensure their own safety and prevent imminent crime. Cf. *Bouknight*, 493 U.S. at 555 (although compliance with order to produce child might constitute compelled assertion

of child's identity, identity is "insufficiently incriminating" because "State could readily establish" it in other ways).[11]

2. Nevada's identification requirement serves important interests other than facilitating criminal prosecution

The Nevada Supreme Court found (J.A. 21-22) that the law in this case advances two state interests—ensuring officer safety and preventing the commission of crime—each of which is distinct from the government's interest in facilitating a criminal conviction. Neither of those interests thus implicates the basic Fifth Amendment concern with requiring the government to make its evidentiary case through its own independent efforts.

a. Petitioner suggests (Br. 21) that Nevada's identification requirement is materially different from the hit-and-run law at issue in *Byers* because that law "was essentially

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[11] During the investigative stop itself, Nevada evidently permits the subject to comply with the identification requirement either by stating his name or by producing an identification. See Resp. Br. 13. The latter means of compliance generally raises no Fifth Amendment concerns. The document evidencing identity, which usually will have been prepared voluntarily, does not represent the suspect's compelled testimony. See, *e.g.*, *Hubbell*, 530 U.S. at 35-36 (contents of voluntarily prepared documents are not "'compelled' within the meaning of the privilege"). See also *Shapiro* v. *United States*, 335 U.S. 1 (1948) (Fifth Amendment privilege is inapplicable to required records). Although an act of production itself can amount to testimony "about the existence, custody, and authenticity of the documents," *Hubbell*, 530 U.S. at 37, the testimonial components of a requirement to produce identification would be non-incriminating in almost all situations. If compelled production of an identification generally raises no Fifth Amendment concerns, it would be anomalous to conclude that a compelled statement of identity infringes the Fifth Amendment privilege, especially when an individual can comply with the identification requirement by either route. It is not clear in this case whether petitioner was made aware that he could comply with Nevada's identification requirement by producing an identification rather than stating his name.

regulatory, not criminal, in nature." The salient distinction under the Fifth Amendment, however, is not between "criminal" and "regulatory" requirements, but between requirements designed to serve the government's interest in "facilitat[ing] criminal convictions" (*Byers*, 402 U.S. at 430 (plurality opinion)) and requirements that serve other government interests.

This Court's decisions in the Fifth Amendment context illustrate the distinction. In *New York* v. *Quarles*, 467 U.S. 649 (1984), the Court established a public safety exception to the *Miranda* rule, grounding the exception in the distinction between questioning designed to obtain incriminating evidence and questioning designed to ensure public safety. See *id.* at 658-659 ("We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."). In this case, the government interests in compelling disclosure of identity likewise relate to ensuring the safety of officers and preventing imminent crime rather than obtaining incriminating testimony. Although the identification requirement can have the effect of facilitating further investigation, that is equally the case with "regulatory" requirements like the one at issue in *Byers*, yet the Court there denied application of the Fifth Amendment privilege.

Significantly, Nevada's identification requirement is narrowly circumscribed, requiring a statement of one's name and nothing more. The targeted nature of the requirement confirms that it serves substantial interests other than facilitating criminal prosecution. The disclosure obligation contributes significantly to officer safety and effective crime prevention, but without sweeping more broadly than necessary to serve those interests. See *Byers*, 402 U.S. at 456 (Harlan, J., concurring in the judgment) (observing that hit-and-run law involves "the minimal level of disclosure of information

consistent with the use of compelled self-reporting in the regulation of driving behavior"). Also, the fact that the State ordinarily could discover the identity of a person subject to an investigative detention without requiring disclosure at that particular time reinforces that the State's interests in ensuring officer safety and preventing crime independently support the requirement to self-identify during an investigative detention.

b. Petitioner argues (Br. 21-22) that this case raises concerns absent in *Byers* because the identification requirement targets persons "inherently suspect of criminal activities." *Byers*, 402 U.S. at 430 (plurality opinion) (quoting *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965)). That argument lacks merit.

The quoted language comes from a series of decisions addressing laws requiring disclosure of "inherently illegal activity." *Byers*, 402 U.S. at 431 (plurality opinion); see *Haynes* v. *United States*, 390 U.S. 85 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Albertson*, 382 U.S. at 70. For instance, *Marchetti* and *Grosso* involved tax returns that "required disclosures only of gamblers, the great majority of whom were likely to incriminate themselves by responding," *Garner*, 424 U.S. at 660, and *Haynes* involved a firearms registration obligation that in effect required admitting criminal noncompliance with other laws, 390 U.S. at 96. The Court held in each case that the Fifth Amendment privilege afforded a defense to prosecution for failing to comply with the disclosure obligation.

The laws in those cases differ from Nevada's identification requirement in two material respects. First, in each of those cases, the nature of the information required to be disclosed itself amounted to an outright admission of crime. See *Byers*, 402 U.S. at 456 (Harlan, J., concurring in the judgment) (laws in *Marchetti* and *Grosso* "are hardly distinguishable from a governmental scheme requiring robbers to

register as such for purposes of paying an occupational tax and a tax on the proceeds of their crimes"). Second, an individual who was otherwise unknown to the government was required to call attention to himself as a criminal suspect.

By contrast, Nevada's law, far from compelling an admission of crime, merely compels disclosure of a name. In addition, while Nevada's identification requirement only arises with respect to persons reasonably suspected of engaging in crime, those persons are not required to bring themselves to the attention of law enforcement by making incriminating disclosures. Instead, they have already attracted the attention of officers by virtue of the officers' independent observations. Accordingly, as in *Byers*, the Fifth Amendment privilege affords no justification for refusing to comply with Nevada's identification requirement for investigative detentions.

C. Petitioner Cannot Establish That Nevada's Identification Requirement Infringes The Fifth Amendment On Its Face

Petitioner argues (Br. 20-25) that Nevada's identification requirement violates the Fifth Amendment on its face. That contention lacks merit. Even if the Court were to reject the government's submission that the Fifth Amendment privilege affords no basis for refusing to comply with the identification requirement, the proper course would be to leave for case-by-case resolution whether assertion of the privilege in any particular case is valid. If the privilege exists in this context, a valid assertion of it would afford a complete defense to prosecution. See, *e.g.*, *Garner*, 424 U.S. at 662-663; *Haynes*, 390 U.S. at 99.

This Court has declined to resort to facial invalidation under the Fifth Amendment even when addressing laws requiring disclosure of inherently illegal activity. In *Haynes* for instance, the Court found it "inappropriate" to "declare these sections impermissible on their face," ruling instead

that the "rights of those subject to the" disclosure obligation "will be fully protected if a proper claim of privilege is understood to provide a full defense to any prosecution * * * for failure to register." 390 U.S. at 99; accord *Marchetti*, 390 U.S. at 61 ("emphasiz[ing] that we do not hold that these wagering tax provisions are as such constitutionally impermissible," but instead "that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply").

Consequently, if the Court were to conclude that the Fifth Amendment can justify a refusal of a suspect in an investigative detention to provide his name, petitioner would have a defense to his prosecution for failing to comply with the identification requirement if he properly asserted the privilege and his assertion was valid on the facts of this case. See *Marchetti*, 390 U.S. at 60-61.[12] Petitioner argues (Br. 23) that he reasonably feared incrimination from disclosing his last name because it could have been used to establish his relationship with his daughter in a prosecution for domestic battery. Because no court has addressed the merits of that argument or whether petitioner waived any Fifth Amendment claim by failing to raise the privilege as a defense at trial, see *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927), this Court should remand for a determination of those issues if it concludes that a Fifth Amendment defense is available. See *Haynes*, 390 U.S. at 100.[13]

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[12] There is no merit to the contention of petitioner's amicus Electronic Frontier Foundation (Br. 4-5) that an individual is entitled to a judicial determination of whether a disclosure would qualify as incriminating before he must decide whether to disclose. See *Garner*, 424 U.S. at 664-665.

[13] The government is advised by the State that petitioner did not raise a Fifth Amendment defense at trial. Accordingly, the trial court had no occasion to address whether petitioner's present arguments concerning incrimination would establish a valid assertion of the privilege. The State did not argue that petitioner had waived his Fifth Amendment claim

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted.

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either in the Nevada appellate courts or in its brief in opposition in this Court.