No. 09-11328

In the Supreme Court of the United States

WILLIE GENE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether evidence is admissible under the good-faith exception to the exclusionary rule when the evidence was obtained during a search that was conducted in objectively reasonable reliance on binding appellate precedent holding such searches lawful under the Fourth Amendment, but, after the search, that precedent was overturned by this Court.

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STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 220 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 107-123.

1. On April 27, 2007, Officer Kenneth Hadley of the Greenville Police Department conducted a routine stop of the car in which petitioner was a passenger. J.A. 99-100. The driver failed sobriety tests, was arrested, and was placed in a police vehicle. J.A. 100, 108.

Meanwhile, Corporal Curtis Miller arrived on the scene and asked petitioner for his name. J.A. 99-100. Petitioner hesitated before stating, "Ernest Harris."

J.A. 100, 108. Corporal Miller noted petitioner's slurred speech and smelled alcohol on petitioner's breath. *Ibid.* Petitioner was also fidgeting with his pockets and ignored instructions to stop moving his hands in and out of his pockets. *Ibid.*

Corporal Miller asked petitioner to exit the car. J.A. 100, 108. When petitioner began removing his jacket, Corporal Miller told him to leave it on. *Ibid.* Despite that instruction, petitioner zippered his pocket shut, removed his jacket, and left it on the seat. *Ibid.* Corporal Miller patted petitioner down and asked bystanders whether petitioner's name was Ernest Harris. *Ibid.* An onlooker identified petitioner as Willie Davis, and Corporal Miller's police dispatcher confirmed that identity. *Ibid.* Corporal Miller then arrested petitioner for providing a false name to a law-enforcement officer, handcuffed him, and put him in the back of a patrol vehicle. J.A. 100-101, 108. Corporal Miller searched the car incident to the arrests and discovered a revolver in petitioner's jacket pocket. J.A. 101, 108-109.

The officers impounded the car. J.A. 101. Pursuant to Greenville Police Department policy, they conducted an inventory search and prepared a report of the car's contents. J.A. 69-70, 101, 104-105.

2. Following his indictment (J.A. 8-9), petitioner moved to suppress the revolver. J.A. 10-16. Petitioner acknowledged that he "would not prevail under existing Eleventh Circuit precedent," J.A. 13-15 (discussing *United States* v. *Gonzalez*, 71 F.3d 819 (1996), and *United States* v. *Diaz-Lizaraza*, 981 F.2d 1216 (1993)), but requested a hearing to preserve the issue for review in light of *Arizona* v. *Gant*, No. 07-542, which was then pending before this Court. J.A. 15.

A magistrate judge held an evidentiary hearing and recommended that the suppression motion be denied. J.A. 99-106. The judge concluded that the revolver was discovered during a valid search incident to arrest under *New York* v. *Belton*, 453 U.S. 454 (1981). J.A. 102-103. The judge explained that "the Eleventh Circuit has long repeated the rule from *Belton*, firmly establishing arresting officers' ability to conduct a contemporaneous warrantless search of a passenger compartment and containers" and noted that "[b]oth parties agree that current law squarely covers these facts." J.A. 103. The judge additionally determined "[t]he officers inevitably would have discovered the evidence in the routine inventory search" that they properly executed "under Greenville Police policy." J.A. 104-105.

The district court adopted the magistrate judge's recommendation and denied petitioner's motion. J.A. 96-99. The court concluded both that "the search incident to the arrest" was lawful "under binding Eleventh Circuit case law," J.A. 96-97 (citing *Gonzalez*), and, in any event, that the revolver "would have inevitably been discovered during the inventory search." J.A. 98.

In May 2008, a jury found petitioner guilty of possessing a firearm after having been convicted of a felony. J.A. 4, 109. In November 2008, the district court sentenced petitioner and entered a judgment of conviction. J.A. 5.

3. While petitioner's appeal was pending, this Court issued its decision in *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009). *Gant* recognized that lower courts had "widely understood" *Belton* "to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 1718. The Court further

noted that the lower-court decisions reading *Belton* to permit searches conducted after the vehicle's recent occupant had been arrested, handcuffed, and placed in a police vehicle were "legion." *Id.* at 1718, 1722 n.11 (quoting *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment)).

This Court, however, read *Belton* more narrowly. *Gant* held that a search incident to the lawful arrest of a vehicle's recent occupant may include the vehicle's passenger compartment under *Belton* only when the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)). *Gant* thus "reject[ed]" the lower courts' widely accepted understanding of *Belton*. *Ibid*.

4. The court of appeals subsequently affirmed. J.A. 107-123. The court held that "the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned." J.A. 114.

The court of appeals explained that, when the officer conducted the search in this case, the search was "permitted by [its] decision in *United States* v. *Gonzalez*." J.A. 107. And *Gonzalez*, like decisions from other courts, "had read *Belton* to mean that police could search a vehicle incident to a recent occupant's arrest regardless of the occupant's actual control over the passenger compartment." J.A. 110; see J.A. 122. The court concluded that *Gant* "rejected that prevailing reading of *Belton*," J.A. 110, and that a Supreme Court decision like *Gant* that "construe[s] the Fourth Amendment

[must] be applied retroactively to all convictions that [are] not yet final at the time the decision was rendered." J.A. 111-112 (quoting *United States* v. *Johnson*, 457 U.S. 537, 562 (1982)). The court accordingly determined that the search here was unlawful because it "violated [petitioner's] Fourth Amendment rights as defined in *Gant*." J.A. 112.

The court of appeals, however, recognized that its Fourth Amendment holding did not "dictate the outcome of th[e] case" because suppression "is 'an issue separate from the question whether the Fourth Amendment'" was violated. J.A. 113 (quoting *United States* v. *Leon*, 468 U.S. 897, 906 (1984)). The exclusionary rule's remedy of suppression, the court explained, "is not an individual right." J.A. 117 (quoting *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009)). Instead, suppression is justified "only where it 'result[s] in appreciable deterrence'" and "'the benefits of deterrence * * * outweigh the costs.'" *Ibid.* (quoting *Herring*, 129 S. Ct. at 700) (brackets in original). Suppression therefore "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct" and "should not be applied[] to deter objectively reasonable law enforcement activity." *Ibid.* (quoting *Herring*, 129 S. Ct. at 698; *Leon*, 468 U.S. at 919).

Based on those principles, the court of appeals held that suppression was unwarranted because "the exclusionary rule is justified solely by its potential to deter police misconduct"; the "offending officer reasonably relied on [the court of appeals'] well-settled precedent"; and "'penalizing the officer for the court's error'" in construing *Belton* before *Gant* "'cannot logically contribute to the deterrence of Fourth Amendment viola-

tions.'" J.A. 118-119 (quoting *Leon*, 468 U.S. at 921) (brackets omitted).[1]

SUMMARY OF ARGUMENT

The good-faith exception to the exclusionary rule applies when officers obtain evidence during a search conducted in objectively reasonable reliance on binding circuit precedent that is later overturned.

I. The exclusionary rule serves a single purpose: to deter police misconduct. A Fourth Amendment violation is fully accomplished by the unlawful search, and the admission of evidence found in that search does not violate the Fourth Amendment. The exclusionary rule seeks, instead, to deter future police misconduct. Because the costs of excluding incriminating evidence are severe, exclusion can be justified only when it results in non-speculative and appreciable deterrence that outweighs those costs.

In *United States* v. *Leon*, 468 U.S. 897 (1984), this Court reasoned that, because the exclusionary rule is designed only to deter future misconduct, suppression cannot further the rule's ends in any appreciable way if the officer's conduct was objectively reasonable. *Id.* at 916, 919-920. In that situation, the suppression of evidence at trial will have no deterrent affect. *Id.* at 919. The Court has applied the good-faith exception to objectively reasonable (but unconstitutional) searches under

[1] The court of appeals noted the district court's alternative holding that "[the] police would inevitably have discovered [petitioner's] gun during an inventory search" but found it "unnecessary to address the inventory-search issue" in light of its "holding with respect to the exclusionary rule's good-faith exception." J.A. 109 n.1. If this Court were to reverse the basis for the court of appeals' judgment, the inevitable-discovery/inventory-search issue would remain open on remand.

warrant, searches in reliance on a statute later declared unconstitutional, and searches incident to arrests made in reliance on police databases containing errors attributable to courts or isolated police negligence.

The same logic applies when an officer relies on binding appellate precedent. An officer acts objectively reasonably in conducting a search that the relevant court has endorsed, even if that precedent is later overturned. Suppression in this context therefore yields no appreciable deterrence and exacts grave social costs. Accordingly, under this Court's precedents, suppression is unwarranted.

II. Petitioner argues that this Court should exclude evidence not because it will deter police misconduct but, instead, because it will provide criminal defendants with an incentive to challenge existing Fourth Amendment jurisprudence. That submission should be rejected for three principal reasons.

First, the exclusionary rule has always been grounded in a single principle: the deterrence of police misconduct. This Court has repeatedly rejected requests to depart from that justification. Petitioner's proposal should fare no better.

Second, even if petitioner's incentive rationale were a type of "deterrence" to be furthered by the exclusionary rule, any marginal benefits that might result do not qualify as the "appreciable" deterrence necessary to justify suppression. This Court correctly rejected similar incentive-based arguments in *Leon* and *Krull*. Defendants will continue to have sufficient incentives to litigate meritorious claims because the potential benefit from suppression is enormous and the cost of seeking suppression is small. Furthermore, as *Leon* held, courts will have Article III jurisdiction to entertain claims of

Fourth Amendment violations even when the good-faith exception applies. And the likelihood that unconstitutional police practices will escape this Court's review is remote given the multiplicity of jurisdictions in which criminal defendants can bring such challenges, including 12 courts of appeals and 50 state jurisdictions.

Civil suits provide additional opportunities to review appellate precedents. For example, municipalities are likely to train their officers to conduct searches consistent with binding appellate precedents or to have a widespread custom amongst their offices of compliance. Such municipalities are subject to suit under 42 U.S.C. 1983, successful plaintiffs recover attorney's fees, and qualified immunity is not a defense.

Third, even if petitioner's incentive-based rationale could produce appreciable deterrence, it would not outweigh the costs. Those costs include not only injuring the truthfinding function of trials and releasing guilty defendants, but also damaging to the public's perception of justice and chilling valid police activity vital to public safety. If officers cannot rely on existing precedent, they will be inclined to curtail or delay legitimate actions important for protecting the public. The total cost of suppressing reliable incriminating evidence obtained in reasonable reliance on appellate precedent far outweighs any marginal benefits from petitioner's incentive-based theory of suppression.

III. Rather than rely on this Court's good-faith decisions, petitioner relies on the Court's retroactivity jurisprudence to conclude that evidence must be suppressed when the relevant search was based on binding appellate precedent that was later overturned. But those retroactivity decisions address a different issue. The Court's holding in *Griffith* v. *Kentucky,* 479 U.S.

314 (1987), that new rules apply to all cases on direct review flows from the Court's analysis of the nature of the judicial process and a concern to treat similarly situated litigants the same. It does not turn on the policies animating the exclusionary rule. Petitioner also errs in suggesting that the good-faith argument made in this case is the same one rejected by the Court in a pre-*Griffith* retroactivity decision. To the contrary, the Court accepted a similar argument in another pre-*Griffith* decision in which evidence had been acquired in reliance on settled law that this Court later overturned. See *United States* v. *Peltier*, 422 U.S. 531, 535 (1975). The considerations animating *Peltier* are not a part of current retroactivity law, but they are reflected in the good-faith exception. And, contrary to petitioner's contention, *Leon* and *Krull*'s good-faith rationales are not limited to enforcing "existing law," but reflect a deeper principle: that the exclusionary rule should not be applied where it serves no deterrent purpose. That is the case here.

ARGUMENT

EVIDENCE SEIZED IN OBJECTIVELY REASONABLE RELIANCE ON APPELLATE COURT PRECEDENT IS ADMISSIBLE UNDER THE GOOD-FAITH EXCEPTION

This Court has repeatedly made clear that the sole purpose of the Fourth Amendment exclusionary rule is to deter police misconduct. When the police act in objectively reasonable reliance on existing law, suppression would not serve that purpose. Accordingly, even when the Fourth Amendment is violated, this Court has upheld the admission of evidence from searches under warrant, *United States* v. *Leon*, 468 U.S. 897 (1984), searches authorized by statute, *Illinois* v. *Krull*, 480 U.S. 340 (1987), and searches incident to arrests resulting from

flawed police-database information attributable to court employees, *Arizona* v. *Evans*, 514 U.S. 1 (1995), or isolated, negligent police error, *Herring* v. *United States*, 129 S. Ct. 695 (2009). Under the principles of those decisions, evidence derived from a search undertaken in reasonable reliance on binding appellate precedent does not warrant suppression; the officer has acted entirely in accordance with existing law and has committed no misconduct to deter. Applying this principle will neither stultify Fourth Amendment law nor return to a rejected regime for measuring the retroactive effect of new rules of criminal procedure. Instead, it will properly limit the enormous costs to the truthseeking process, which the exclusionary rule inevitably imposes, by confining exclusion to those contexts in which its deterrent rationale applies.

I. SUPPRESSION DOES NOT SERVE THE PURPOSES OF THE EXCLUSIONARY RULE WHEN AN OFFICER CONDUCTED A SEARCH IN OBJECTIVELY REASONABLE RELIANCE ON BINDING APPELLATE PRECEDENT THAT, AFTER THE SEARCH, IS OVERTURNED BY THIS COURT.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. "[N]o provision," however, "expressly preclud[es] the use of evidence obtained in violation of [the Amendment's] commands," *Herring*, 129 S. Ct. at 699 (quoting *Evans*, 514 U.S. at 10). Instead, the Fourth Amendment exclusionary rule is a "judicially created remedy" that was "designed to deter police misconduct rather than to punish the errors of judges." *Leon*, 468 U.S. at 906, 916 (citation omitted). The exclusionary rule therefore cannot apply when there is no police misconduct to deter. That

is the case when a search proceeds in objectively reasonable reliance on binding precedent.

A. The Exclusionary Rule Was Designed To Apply Only When The Exclusion Of Evidence Can Appreciably Deter Police Misconduct And When Such Deterrence Justifies The Substantial Social Costs Of Exclusion

This Court has "emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 362 (1998). "The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself." *Leon*, 468 U.S. at 906 (quoting *United States* v. *Calandra*, 414 U.S. 338, 354 (1974)). The exclusionary rule, therefore, "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered'" from an unlawful search or seizure. *Ibid.* (quoting *Stone* v. *Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting) (*Powell*)).

Rather than redressing the violation of the defendant's rights, the exclusionary rule plays an entirely different role. As this Court's "foundational exclusionary rule case[s]" reflect, law-enforcement "abuses * * * gave rise to the exclusionary rule" as a judicial tool for "deter[ing] police misconduct." *Herring*, 129 S. Ct. at 702 (citation omitted). This Court established the rule as a "judicially created remedy" designed to "safeguard Fourth Amendment rights generally through its deterrent effect" on law-enforcement officers. *Leon*, 468 U.S. at 906, 916 (quoting *Calandra*, 414 U.S. at 348); *Evans*, 514 U.S. at 10. And because the "exclusionary rule [i]s aimed at deterring police misconduct," *Krull*, 480 U.S. at 350, its driving purpose has always been "to

compel respect for the [Fourth Amendment's] constitutional guaranty in the only effective available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).[2]

The exclusionary rule's "deterrent purpose" thus "necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." *Leon*, 468 U.S. at 919 (quoting *United States* v. *Peltier*, 422 U.S. 531, 539 (1975)). "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or their future counter-

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[2] The Court's early exclusionary-rule decisions originally "advanced two principal reasons" for the rule: (1) the need to "deter future unlawful police conduct" and (2) the "imperative of judicial integrity." *Powell*, 428 U.S. at 484 (citation omitted). Those cases suggested that the admission of unlawfully obtained evidence impaired "judicial integrity," because permitting such use would purportedly "'mak[e] the courts themselves accomplices'" in unlawful conduct. *Elkins*, 364 U.S. at 222-223 (citation omitted). The Court has since concluded, however, that judicial integrity has "limited force as a justification," *Leon*, 468 U.S. at 921 n.22 (quoting *Powell*, 428 U.S. at 485), because admitting evidence in court does not offend the Constitution, *id.* at 906, and the judiciary's suppression of incriminatory evidence itself risks "generat[ing] disrespect for the law and administration of justice," *id.* at 908 (citation omitted), by undermining "the truthfinding process" and "free[ing] the guilty." *Powell*, 428 U.S. at 490. It is now well settled that where "'law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law,'" "judicial integrity is 'not offended'" by the admission of the associated evidence. *Id.* at 485 n.23 (quoting *United States* v. *Peltier*, 422 U.S. 531, 538 (1975)). This Court has thus rejected the concept that, "even where deterrence does not justify" suppression, evidence may be suppressed to further judicial integrity. *Herring*, 129 S. Ct. at 700 n.2 ("Majestic or not, our cases reject this conception.").

parts, a greater degree of care toward the rights of an accused." *Ibid.* (quoting *Peltier*, 422 U.S. at 539).

The "exclusion of relevant incriminating evidence always entails" "grave" societal costs. *Hudson* v. *Michigan*, 547 U.S. 586, 595 (2006); see *Leon*, 468 U.S. at 907-908 (discussing costs); *Powell*, 428 U.S. at 489-491 (same). This Court therefore has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation" and has permitted suppression only as a "'last resort'" and "only where it 'results in appreciable deterrence.'" *Herring*, 129 S. Ct. at 700 (quoting *Hudson*, 547 U.S. at 591; *Leon*, 468 U.S. at 909); *Evans*, 514 U.S. at 11.

Not only must suppression deter misconduct, but "the benefits of deterrence must outweigh the costs." *Herring*, 129 S. Ct. at 700. Suppression is not justified by a "minimal advance in the deterrence of police misconduct" or by deterrent effects that are "speculative." *Calandra*, 414 U.S. at 351-352. Because suppression is an "extreme sanction" carrying "substantial social costs," the exclusionary "rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." *Herring*, 129 S. Ct. at 700-701 (quoting *Leon*, 468 U.S. at 916; *Krull*, 480 U.S. at 352; *Scott*, 524 U.S. at 364-365).

B. The Good-Faith Exception To The Exclusionary Rule Applies When Officers Engage In Objectively Reasonable Conduct

1. Originally, this Court's exclusionary-rule jurisprudence "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Hudson*, 547 U.S. at 591 (citation omitted). But

by 1984, the Court's "years of experience" with the exclusionary rule "forcefully suggest[ed]" that the rule should be "modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment." *Leon*, 468 U.S. at 909, 913 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 255 (1983) (White, J., concurring in the judgment)); see *id.* at 913 n.11 (noting that Members of this Court repeatedly had "urged reconsideration of the scope of the exclusionary rule"). This Court in *Leon* "reexamined the purposes of the exclusionary rule," concluded that the rule's "modification" was warranted, and accordingly modified the doctrine by creating the "good-faith exception to the Fourth Amendment exclusionary rule." *Id.* at 913, 926; see *id.* at 900, 909.

The Court reasoned that the "exclusionary rule is designed to deter police misconduct" but that, "where [an] officer's conduct is objectively reasonable," suppression "'will not further the ends of the exclusionary rule in any appreciable way.'" *Leon*, 468 U.S. at 916, 919-920 (quoting *Powell*, 428 U.S. at 539 (White, J., dissenting)). In that context, "the officer is acting as a reasonable officer would and *should act* in similar circumstances." *Id.* at 920 (citation omitted). Suppression therefore "can in no way affect his future conduct." *Ibid.* (citation omitted).

Leon concluded that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." 468 U.S. at 919. The Court further explained that "evidence obtained from a search should be suppressed *only if* it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search

was unconstitutional under the Fourth Amendment." *Ibid.* (emphasis added) (quoting *Peltier*, 422 U.S. at 542). That objective "good-faith inquiry" turns on "the objectively ascertainable question whether a reasonably trained officer would have known that the search was illegal" and thereby "requires officers to have a reasonable knowledge of what the law prohibits." *Id.* at 919 n.20, 922 n.23; see *Herring*, 129 S. Ct. at 703 (discussing this "objective" test).

Applying that analysis, the Court held that suppression is unjustified when "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Leon*, 468 U.S. at 920. Even if a reviewing court later holds the warrant to be defective (and the resulting search unconstitutional) because the magistrate erred in his legal determination of probable cause, *id.* at 905, the Court in *Leon* held that an officer's "objectively reasonable" reliance on a magistrate's erroneous decision triggers the good-faith exception and precludes suppression. *Id.* at 922. The Court emphasized that "the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of judges," and it expressly rejected the contention that the exclusionary rule should also focus (contrary to its historical origins) on the potential "behavioral effects on judges" of excluding evidence. *Id.* at 916; accord *Massachusetts* v. *Sheppard*, 468 U.S. 981, 990 (1984) (explaining, in *Leon*'s companion case, that "[t]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges" and holding that the good-faith exception applies where "it was the judge, not the police officers, who made the critical mistake") (citation omitted).

2. This Court has followed *Leon's* principles in a series of decisions applying the good-faith exception to the exclusionary rule. In *Krull*, the Court held that the good-faith exception applies where police officers conduct a search in objectively reasonable reliance on a statute that purports to authorize such searches, even though the statute is later declared unconstitutional. 480 U.S. at 349-361. The Court emphasized that "the exclusionary rule [i]s aimed at deterring police misconduct" and that "legislators, like judicial officers, are not the focus of the rule." *Id.* at 350. Where an officer conducts a search in "objectively reasonable reliance on a statute," *Krull* reasoned, the subsequent suppression of evidence "cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 349-350. Suppression, the Court reasoned, "will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 350. The Court further explained that, even if it were appropriate to consider the "effect [of exclusion] on legislators," it found "no basis" for concluding that the "'extreme sanction of exclusion'" was warranted. *Id.* at 350-351 (citation omitted). Any incremental deterrent, the Court concluded, would be outweighed by the "substantial social costs exacted by the exclusionary rule." *Id.* at 352-353 (citation omitted).

The Court in *Evans* applied the same analysis where a police officer found evidence during the defendant's arrest based on reasonable reliance on an entry in a police computer system that erroneously indicated an outstanding warrant for the defendant's arrest. 514 U.S. at 3-4, 14-16. The Court assumed that "the erroneous information resulted from an error committed by an employee of the office of the Clerk of Court," *id.* at 4, and

applied the "*Leon* framework" to conclude that the good-faith exception applied. *Id.* at 14-16. The Court based that holding on two distinct grounds. "First, as [the Court] noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees." *Id.* at 14. For that reason, *Evans* held that the lower court's application of the exclusionary rule when "'the error rested with the justice court'" was "contrary to the reasoning of *Leon*." *Ibid.* (citation omitted). Second, and in any event, the Court found no inclination by court employees to subvert the Fourth Amendment and no basis for concluding that suppression would have any meaningful deterrent effect on such employees. *Id.* at 14-15.

Most recently, the Court in *Herring* held that the good-faith exception applied where the police obtained evidence incident to a defendant's arrest by an officer who reasonably relied on a police database that erroneously indicated an outstanding warrant for the defendant's arrest, when the error was the result of a "negligent bookkeeping" mistake by another police employee. 129 S. Ct. at 698, 701-704. The Court again emphasized that litigants urging application of the exclusionary rule must overcome a "high obstacle" by demonstrating that suppression would lead to "appreciable deterrence" that outweighs its substantial social costs. *Id.* at 700-701 & n.2 (citation omitted). The Court concluded that, although the "exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" by the police, *id.* at 702, an unlawful arrest based on the isolated negligence of a police employee was not "sufficiently deliberate that exclusion can meaningfully deter it" nor "sufficiently culpable that [any] such deterrence

is worth the price" that the justice system inevitably pays when evidence is suppressed. *Id.* at 702-703 & n.4.

C. The Good-Faith Exception Applies In This Case

Under these principles, the good-faith exception applies where, as here, officers conduct a search in objectively reasonable reliance on binding appellate precedent that, after the search, is overturned by this Court. Excluding evidence derived from the search could not produce appreciable deterrence of police misconduct: the officer who conducted the search acted as any objectively reasonable and well-trained officer would and should have acted in similar circumstances at the time. Accordingly, the enormous social costs of suppressing reliable evidence cannot be justified.

The Eleventh Circuit had long held that "[w]hen an occupant of an automobile is the subject of a lawful arrest, the Fourth Amendment permits the arresting officers to contemporaneously conduct a warrantless search * * * of the passenger compartment of the automobile, as well as any closed (or open) containers found in this area of the automobile." *United States* v. *Gonzalez*, 71 F.3d 819, 825 (11th Cir. 1996) (citation omitted). "Containers," the court explained, included "an automobile's glove compartment (whether locked or unlocked), as well as any containers found therein, such as the zipped leather bag" in which the police in *Gonzalez* had discovered a gun. *Id*. at 826. Accordingly, when Corporal Miller searched petitioner's car in April 2007, his actions were fully lawful under binding appellate precedent. He engaged in no culpable conduct whatsoever. See *Herring*, 129 S. Ct. at 701-703 (requiring culpable conduct greater than isolated negligence to justify suppression).

The Eleventh Circuit was but one amongst the "'legion'" of courts that had interpreted *Belton* "to allow a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search." *Arizona* v. *Gant*, 129 S. Ct. 1710, 1718 (2009) (citation omitted). That pre-*Gant* understanding of *Belton* "ha[d] been widely taught in police academies" for more than a quarter century and had guided law-enforcement officers "in conducting vehicle searches during [that period]." *Id.* at 1718, 1722; cf. 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c), at 517 & n.89 (4th ed. 2004) ("[U]nder *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car.") (collecting cases). Indeed, in *Gant*, five Members of this Court read *Belton* the same way as had the lower courts, interpreting it to adopt a bright-line rule permitting searches of the passenger compartment of an arrestee's car.[3]

Gant concluded that the lower courts' "widely accepted" understanding of *Belton* was incorrect. 129 S. Ct. at 1718-1719, 1722 n.11; see pp. 3-4, *supra*. But because Corporal Miller complied fully with Eleventh Circuit law, which reflected the then-prevailing under-

[3] For Justice Scalia, "the rule set forth in * * * *Belton*" was "that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons." *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring). Although he disagreed with Justice Stevens's reading of *Belton*, he joined Justice Stevens's opinion in order to provide the Court with a majority decision. *Id.* at 1725 (explaining that "a 4-to-1-to-4 opinion" would be "the greater evil"). The four dissenting Justices agreed with the bright-line reading of *Belton* and would have retained it. See *id.* at 1725 (Breyer, J., dissenting); *id.* at 1726-1727 (Alito, J., dissenting) (joined by the Chief Justice, Justice Kennedy, and, in pertinent part, Justice Breyer).

standing of the Fourth Amendment, he engaged in no misconduct that might be deterred through the "extreme sanction" of suppression, *Herring*, 129 S. Ct. at 700 (quoting *Leon*, 468 U.S. at 916). Before *Gant*, a well-trained officer in Corporal Miller's position would have had an objectively reasonable belief that a search of the car was lawful. Even petitioner "acknowledge[s] that [the] search was constitutional according to Eleventh Circuit precedent" at the time. Br. 3, 28. Corporal Miller's reliance on then-valid precedent therefore provides no occasion for deterrence. To the contrary, law-enforcement officers should be encouraged to follow governing precedents in performing their public functions and not to shade their decisions by anticipating that such precedents could be overruled.

Indeed, the good-faith exception's standard of objective reasonableness "requires officers to have a reasonable knowledge of what the law prohibits." *Leon*, 468 U.S. at 920 n.20. And when applying the good-faith exception, this Court has repeatedly emphasized that "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring*, 129 S. Ct. at 701 (quoting *Krull*, 480 U.S. at 348-349). Those longstanding principles are firmly rooted in an officer's "reasonable" understanding of the law at the time, not on speculation about what the law might become if settled precedents are overturned. Officers who assiduously comply with binding appellate precedent articulating the boundaries of reasonable searches and seizures thus fall far short of the standard that this Court has demanded for suppression.

Officer Miller's objectively reasonable reliance on settled Eleventh Circuit law is functionally similar to an officer's objectively reasonable reliance on a statute that, after the relevant search, is declared unconstitutional. Because *Krull* held that objectively reasonable reliance on a statute later found unconstitutional triggers application of the good-faith exception, that exception would apply if a legislature enacted a statute authorizing its law-enforcement officers to conduct vehicle searches to the full extent allowed under the pre-*Gant* understanding of *Belton*. At least one State enacted such a statute and, although the statute was recently held unconstitutional in light of *Gant*, see *State* v. *Henning*, 209 P.3d 711 (Kan. 2009), the good-faith exception has been applied to evidence previously obtained from (unlawful) searches under the statute. See *State* v. *Daniel*, 242 P.3d 1186, 1191-1195 (Kan. 2010). Whether a court later holds a statute to be unconstitutional or whether it subsequently overturns settled appellate precedent, it is equally true that "excluding evidence obtained pursuant to [such invalidated authority] prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility" to comply with the law. *Krull*, 480 U.S. at 350. "Penalizing the officer for the [court's earlier] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

II. THE EXCLUSIONARY RULE IS DESIGNED TO DETER POLICE MISCONDUCT, NOT TO PROVIDE AN INCENTIVE FOR CRIMINAL DEFENDANTS TO CHALLENGE EXISTING FOURTH AMENDMENT PRECEDENTS

Petitioner contends (Br. 27-39) that the purpose of the exclusionary-rule remedy established by this Court is not only to deter police misconduct, but also to provide criminal defendants with an adequate "incentive to argue for a change in the law" that the police reasonably followed when they discovered the contested evidence. Br. 29, 32. Petitioner admits that his incentive-based theory "is not needed to ensure police compliance with existing law" because, when the police properly follow such law, "[t]here is no police 'error.'" Br. 30. Petitioner instead argues that a judge-made incentive is necessary more generally to "deter[] constitutional violations by making sure that the caselaw the police enforce accurately interprets the Fourth Amendment" and by giving this Court an "opportunity to make corrections" to existing law. Br. 29-30. Petitioner asserts (Br. 39-43) that "no other remedy creates an incentive to argue for corrections in Fourth Amendment doctrine," Br. 39, and contends (Br. 43-49) this Court's good-faith decisions in *Leon*, *Krull*, and *Herring* do not foreclose his incentive-based theory. Petitioner is incorrect.

A. The Exclusionary Rule Was Designed To Deter Only Police Misconduct, Not To Correct Errors By Courts

1. This Court developed the exclusionary rule in the early 20th Century as a direct response to "intentional" and "patently unconstitutional" abuses by federal law-enforcement officers and, in 1961, expanded the rule to the States after confronting "[e]qually flagrant conduct" by state officers. *Herring*, 129 S. Ct. at 702 (discussing

Weeks v. *United States*, 232 U.S. 383 (1914), and *Mapp* v. *Ohio*, 367 U.S. 643 (1961)). The exclusionary rule therefore was "adopted to deter unlawful searches by police," *Sheppard*, 468 U.S. at 990 (citation omitted), and "was historically designed as a means of deterring police misconduct." *Evans*, 514 U.S. at 11, 14.

For that reason, this Court on at least three occasions has rejected attempts to expand the exclusionary rule's focus beyond police misconduct in order to address Fourth Amendment legal errors committed by actors in other branches of government. First, when *Leon* established the good-faith exception to the exclusionary rule, the Court expressly held that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges." 468 U.S. at 916; see *id.* at 918 ("If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect * * * it *must* alter the behavior of individual law enforcement officers or the policies of their departments.") (emphasis added). Next, in *Krull*, the Court held that a legislature's error in enacting a statute later held to violate the Fourth Amendment did not undermine application of the good-faith exception when officers reasonably followed the statute because "legislators, like judicial officers, are not the focus of the rule." 480 U.S. at 350; *id.* at 348 (emphasizing that "the exclusionary rule was historically designed 'to deter police misconduct'") (citation omitted); see *Herring*, 129 S. Ct. at 701 (discussing *Krull*). And in *Evans*, the Court held that the lower court's suppression of evidence unlawfully obtained due to a court clerk's error was "contrary to the reasoning of *Leon*" because the exclusionary rule is "designed as a means of deter-

ring police misconduct, not mistakes by court employees." 514 U.S. at 14.

The Court in each of those decisions also explained that judicial and legislative officers were not inclined to ignore or subvert the Fourth Amendment and that nothing warranted the conclusion that suppression would have a "significant effect" in deterring such officials. *Evans*, 514 U.S. at 14-15; *Krull*, 480 U.S. at 350-351; *Leon*, 468 U.S. at 916-917. But those additional conclusions in no way diminish the Court's leading basis for rejecting an expansion of the exclusionary rule's function: the rule is and always has been designed only to deter police misconduct. See pp. 11-18, *supra*. Petitioner thus seeks to transform the exclusionary rule's purpose from the deterrence of police misconduct to the development of Fourth Amendment jurisprudence. That would be a major innovation in a judicially created doctrine that originated in the desire to prevent "flagrant" misconduct by the police. *Herring*, 129 S. Ct. at 702.

In proposing that officers operate at their peril in relying on binding precedent, petitioner ignores the very practical needs of law-enforcement officials who must discharge daily their important public functions and protect the citizenry. Police are encouraged to run training programs and institute policies based on constitutional law as pronounced by the courts. If police departments cannot reliably follow precedents that are binding at the time of a search, they can rely on no authoritative statement of their obligations under the Fourth Amendment. The result would be to place law enforcement at risk of jeopardizing prosecutions simply by following the law as the courts have interpreted it.

2. Petitioner cites little authority to support his reformulation of the exclusionary rule. He appears to rely principally on a single sentence in this Court's retroactivity decision in *Stovall* v. *Denno*, 388 U.S. 293 (1965), to support his contention that suppression "provides the incentive needed for defendants to challenge erroneous precedents." Br. 31-32, 35; see also, *e.g.*, Br. 11, 18, 37, 47.[4] But the sentence in *Stovall* on which petitioner relies is dictum and does not even address the Fourth Amendment exclusionary rule. *Stovall* rejected a federal habeas petitioner's argument that he should be granted habeas relief because of the then-new Sixth Amendment rule in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), requiring the presence of counsel at certain pre-trial confrontations for identification purposes. *Stovall* held that those decisions could be invoked only to exclude evidence from future identifications (unless the identification violated due process). 388 U.S. at 296-302.

Stovall then observed (in dicta) that Wade and Gilbert had the benefit of the rule in their cases because "[s]ound policies of decision-making" counseled against denying them that benefit. 388 U.S. at 301. The Court noted that those policies were rooted, *inter alia*, in "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law." *Ibid.* That "possible effect" is a slender reed on which to reformulate the longstanding purpose of the exclusionary rule,

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[4] Petitioner attempts to bolster his case by asserting that "*Leon* approvingly cites *Stovall*," Br. 47, but *Leon* invoked *Stovall* only to explain that the Court's retroactivity decisions at the time utilized a three-factor test that considered the purpose of the new constitutional rule being considered for retroactive effect, not for the dicta on which petitioner relies. See *Leon*, 468 U.S. at 912 n.10.

and it cannot overcome this Court's more recent description of the rule in *Leon* and in other good-faith cases. That is particularly true because the Court's approach to retroactivity underwent a seismic shift in the nearly half century since *Stovall*, see pp. 43-44, 48-49, *infra*, and the Court's modern retroactivity decisions never repeated *Stovall*'s reference to providing "incentive[s]" to litigants as a justification for applying a new rule to certain defendants.

Petitioner attempts to find support in the discussion in *Krull* and *Leon* of "incentives to challenge police action." Br. 37. But as discussed *infra* (at pp. 28-29), those decisions did so only in rejecting arguments similar to the one petitioner advances. See *Krull*, 480 U.S. at 354, 355 n.11; *Leon*, 468 U.S. at 924 & n.25. The Court's rejection of contentions pressed by litigants does not suggest that the Fourth Amendment's exclusionary rule is designed to provide incentives to challenge existing precedent.

In the face of this Court's repeated explanation that the exclusionary rule is designed only to "deter" police misconduct, petitioner acknowledges that it "may seem counterintuitive to speak of incentives in criminal litigation as matters of 'deterrence'" addressed by the exclusionary rule. Br. 38. That linguistic disconnect underscores that this Court's exclusionary-rule decisions do not support petitioner's incentive-based theory, and it confirms that the exclusionary rule's exclusive focus is the deterrence of police misconduct.

B. Applying The Good-Faith Exception In This Case Will Not Stymie The Development Of Fourth Amendment Jurisprudence

Assuming *arguendo* that providing an additional "incentive" to criminal defendants to challenge appellate precedents can qualify as a type of "deterrence" fostered by the exclusionary rule, any marginal benefits that might result from that incentive are speculative and, at best, minimal. They do not rise to the level of "appreciable deterrence" necessary to justify suppression. *Herring*, 129 S. Ct. at 700 (citation omitted).

Petitioner contends (Br. 39-43) that the exclusionary rule should be applied where officers have conducted a search in objectively reasonable reliance on binding appellate precedent "because no other remedy creates an incentive to argue for corrections in Fourth Amendment doctrine." Br. 39. That assertion rests on two flawed premises. First, although the good-faith exception in this context may diminish the incentive for certain criminal defendants to bring suppression challenges when officers follow binding appellate precedent, defendants will nevertheless retain an adequate incentive to bring meritorious challenges to unlawful searches and seizures. Second, civil damage actions provide an ample means for litigants to challenge recurring categories of law-enforcement searches and seizures. Combined, criminal and civil cases will enable this Court to correct any recurring errors of significance concerning the lawfulness of searches and seizures under the Fourth Amendment. Denying the good-faith exception in this context to create additional incentives is unnecessary.

1. In the criminal context, no sound reason justifies concluding that defendants will lack the incentive to bring meritorious challenges to police searches or sei-

zures, or that appellate decisions upholding such practices will evade this Court's review, if the good-faith exception is applied to searches and seizures made in objectively reasonable reliance on appellate precedent.

a. This Court rejected similar incentive-based arguments in *Leon* and *Krull*.[5] Although "insubstantial suppression motions" may well be curtailed in some contexts where officers act in objectively reasonable reliance on settled appellate precedent, it is doubtful that many defendants would "lose their incentive to litigate meritorious Fourth Amendment claims." *Leon*, 468 U.S. at 924 n.25. "[T]he magnitude of the benefit conferred on defendants by a successful [suppression] motion" itself "makes it unlikely that litigation of colorable claims will be substantially diminished." *Ibid.*; accord *Krull*, 480 U.S. at 353-354. The defendant's cost of pursuing suppression "would be small" and the upside in many cases "enormous": the suppression of key evidence amounting to a "get-out-of-jail-free card." *Hudson*, 547 U.S. at 595.

Just as defendants have "no reason not to argue that a police officer's reliance on a warrant or statute was not objectively reasonable and therefore cannot be considered to have been in good faith," *Krull*, 480 U.S. at 354; see *id.* at 355 n.11, they similarly have every reason to

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[5] The defendant in *Leon* argued that a "good faith exception would effectively eliminate any incentive to challenge dubious police practices in court" and that defendants would be unlikely to press arguments that would ultimately "have no bearing on the outcome of their cases." Leon Br. at 28, *Leon*, *supra* (No. 82-1771). In *Krull*, the defendant asserted that "defendants will choose not to contest the validity of statutes if they are unable to benefit directly by the subsequent exclusion of evidence, thereby resulting in statutes that evade constitutional review." 480 U.S. at 353.

argue that existing precedent is unsound and that reliance on it is unreasonable. At a minimum, defendants can argue that a flawed existing precedent should be limited to its facts and that no officer could rely in good faith on that precedent as extended to the factual variation before the court. Defense counsel are exceptionally creative in distinguishing their client's cases from those resolved by prior decisions involving different searches and seizures. And the unique incentives of defendants to challenge the government's case, through state-provided counsel if the defendant is indigent, ensure that arguable defects in the law will be vigorously urged. If a court believes that the defendant's arguments have exposed a flaw in existing Fourth Amendment precedent, even if a good-faith exception applies, "nothing will prevent [the] court[] from deciding that question"—or suggesting that it warrants further review—"[i]f the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers." *Leon*, 468 U.S. at 924.

b. The nature of Fourth Amendment jurisprudence encourages advocacy seeking to navigate around existing precedent, thereby leaving defendants ample incentive to argue that an officer's conduct was objectively unreasonable. The Fourth Amendment's "touchstone * * * is reasonableness," *United States* v. *Knights*, 534 U.S. 112, 118 (2001), which must be assessed under the "totality of the circumstances" in each case. *Samson* v. *California*, 547 U.S. 843, 848 (2006) (citation omitted). Even well-known principles like "probable cause" and "reasonable suspicion" are "fluid concepts" that are "'not readily, or even usefully, reduced to a neat set of legal rules'" because they "take their substantive content from the particular contexts" in which they apply.

Ornelas v. *United States*, 517 U.S. 690, 695-696 (1996) (citation omitted). Defense counsel can therefore be expected to exploit the fact-specific nature of much Fourth Amendment jurisprudence to argue in favor of suppression even when existing precedent stands in the way. As petitioner himself explains, "[b]ecause Fourth Amendment law is intensely fact-specific, every search or seizure will be different." Br. 41.

Experience with the good-faith exception confirms as much. Under petitioner's logic, the creation of the good-faith exception in *Leon* should have eliminated the incentive for defendants to challenge searches conducted pursuant to facially valid warrants: the good-faith exception should have halted the development of Fourth Amendment law on questions such as whether a warrant particularly described the place to be searched or person or thing to be seized and whether a warrant is supported by probable cause. But the last 25 years have not demonstrated a dearth of Fourth Amendment challenges. To the contrary, criminal defendants, undaunted, have continued to seek the suppression of evidence from searches under facially valid warrants, and courts have continued to analyze the constitutionality of such warrants, even when they ultimately *deny* suppression pursuant to the good-faith exception. Courts, for instance, continue to determine whether warrants describe "the place to be searched," *Leon*, 468 U.S. at 923, with sufficient particularity to satisfy the Fourth Amendment. See, *e.g.*, *United States* v. *Rosa*, 626 F.3d 56, 62-66 (2d Cir. 2010); *United States* v. *Tracey*, 597 F.3d 140, 146-154 (3d Cir. 2010); *United States* v. *Otero*, 563 F.3d 1127, 1131-1133 (10th Cir.), cert. denied, 130 S. Ct. 330 (2009); *United States* v. *Riccardi*, 405 F.3d 852, 860-864 (10th Cir.), cert. denied, 546 U.S. 919

(2005); *United States* v. *Bridges*, 344 F.3d 1010, 1016-1019 (9th Cir. 2003); *United States* v. *Thomas*, 263 F.3d 805, 807-808 (8th Cir. 2001), cert. denied, 534 U.S. 1146 (2002); see also *United States* v. *Clark*, 31 F.3d 831, 835 (9th Cir. 1994) (warrant not supported by probable cause), cert. denied, 513 U.S. 1119 (1995).

The same is true of cases covered by *Krull*. Because of the huge incentive to suppress evidence, defendants continue to challenge the constitutionality of statutes, and courts occasionally agree with their challenges, even when ultimately admitting the evidence under the good-faith exception. For example, in *United States* v. *Warshak*, No. 08-3997, 2010 WL 5071766, at *9-*14 (6th Cir. Dec. 14, 2010), the court held that 18 U.S.C. 2703's authorization for the government to obtain email from a commercial service provider without first obtaining a warrant based on probable cause violated the Fourth Amendment. But the Court upheld the admission of evidence under *Krull*. *Id*. at *14 ("Naturally, Warshak argues that the provisions of the [law] at issue in this case were plainly unconstitutional. * * * [W]e disagree."). Other cases that reject suppression nonetheless attest to the persistence of Fourth Amendment challenges to statutes, notwithstanding *Krull*. See *e.g.*, *United States* v. *Steed*, 548 F.3d 961, 969 (11th Cir. 2008) (applying *Krull* without deciding Fourth Amendment issue); *United States* v. *Vanness*, 342 F.3d 1093, 1097 (10th Cir. 2003) (same); *United States* v. *Branson*, 21 F.3d 113, 114-115 & n.1 (6th Cir. 1994) (upholding state warrantless-inspection statute as constitutional without applying *Krull*; reversing district court, which had rejected good-faith exception). The good-faith exception thus has not precluded the development of Fourth Amendment law, including on new issues.

c. The likelihood that meaningful police practices would escape this Court's review is further diminished by the multiplicity of jurisdictions in which criminal defendants may challenge those practices: 12 federal courts of appeals, 50 States, and the District of Columbia. Even if some of those jurisdictions have upheld the constitutionality of particular types of searches or seizures, it is unlikely that all 63 jurisdictions will have done so. And in those jurisdictions in which the question remains open, defendants have an undiminished incentive to raise the issue. When litigants can make reasonable arguments on both sides of a Fourth Amendment issue, the normal result is a patchwork of decisions reaching varying results. Such conflicts regularly result in this Court's review. At that point, the Court can correct any Fourth Amendment errors.[6]

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[6] Even when this Court has resolved a particular issue, thereby curtailing the development of conflicts in the lower courts, defendants will still have strong incentives to frame their arguments to distinguish this Court's precedent, while simultaneously making clear their disagreement with it and arguing that officers acted objectively unreasonably in straying beyond it. This Court may then take the opportunity to squarely resolve the validity of its precedent. Cf. *Batson* v. *Kentucky,* 476 U.S. 79, 84 n.4, 100 n.25 (1986) (noting that the petitioner raised a Sixth Amendment objection to race-motivated peremptory challenges "in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents"; holding nevertheless that the case turned on equal-protection principles and partially overruling *Swain* v. *Alabama*, 380 U.S. 202 (1965)). While a good-faith rule for reliance on appellate precedent might mean that direct challenges to a Fourth Amendment decision of this Court could not result in suppression of evidence even if this Court overruled the decision, that singular situation does not justify the costs of suppression in change-of-appellate-law cases generally under the logic of this Court's good-faith holdings.

d. Petitioner contends (Br. 22-27) that if the Court adopted a good-faith exception for objectively reasonable reliance on appellate precedent, this Court would thereafter lack Article III jurisdiction to review challenges to existing Fourth Amendment doctrine. That is incorrect. Petitioner first asserts (Br. 23-25) that a good-faith rule would permit "new Fourth Amendment decisions to be applied only prospectively," thus amounting to "a regime of rule-creation by advisory opinion." Br. 23, 25. But *Leon* itself rejected the contention that "application of a good-faith exception" would "preclude review of the constitutionality of the search or seizure," explaining that federal courts may decide whether the Fourth Amendment was violated "before turning to the good-faith issue" and "undoubtedly" have Article III authority to resolve such questions concerning the "suppression of the fruits of allegedly unconstitutional searches or seizures." 468 U.S. at 924-925. The Fourth Amendment rule would apply to the parties, even if the exclusionary-rule remedy would not result. This is no different for Article III purposes from the correction of Fourth Amendment errors when defendants may receive no relief because any error might be found harmless. See, *e.g.*, *Kyllo* v. *United States*, 533 U.S. 27, 40 (2001); *Wilson* v. *Arkansas*, 514 U.S. 927, 937 n.4 (1995).

Petitioner also contends (Br. 25-27) that the proposed good-faith rule would remove Article III "standing" to appeal. Assuming *arguendo* that "standing" concepts apply to a criminal defendant seeking to appeal her conviction, petitioner's argument confuses the requirements of standing with the merits of appellate issues. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 624 (1989) (standing "in no way depends on the merits of the claim") (citation and brackets omitted). A defendant

challenging the admission of evidence virtually always would meet "standing" requirements: the conviction is a concrete injury, assertedly traceable to the challenged evidence, and redressable if the appellate court reverses. See *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998); cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (standing doctrine's redressibility requirement merely demands a showing that "the requested relief" would likely redress an injury in fact); *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). A defendant is no more deprived of "standing" by a potential good-faith obstacle to relief (which the defendant is free to contest) than the defendant would be deprived of standing because the admission of challenged evidence would be found harmless error.

In short, as this Court explained when it created the good-faith exception for warrant-authorized searches, an exception from suppression for objectively reasonable reliance on settled precedent should neither "preclude review of the constitutionality of the search[es] or seizure[es]" nor "freeze Fourth Amendment law in its present state." *Leon*, 468 U.S. at 924.

2. The availability of civil actions in which plaintiffs may challenge searches and seizures confirms that conclusion. For example, a plaintiff may bring a damages action against a municipality under 42 U.S.C. 1983 for a violation of the plaintiff's federal rights by an officer who acted pursuant to a "policy," "custom," "usage," or "practice" of the municipality. *Los Angeles County* v. *Humphries*, 131 S. Ct. 447, 452 (2010) (citing *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690-691 (1978)). A municipality that has affirmatively taught its officers to conduct law-enforcement searches in a manner that violates the Fourth Amendment will therefore be sub-

ject to Section 1983 liability for resulting violations. See, *e.g.*, *Hartline* v. *Gallo*, 546 F.3d 95, 103-104 (2d Cir. 2008). In such cases, the municipality is liable because it has effectively "direct[ed] an employee" to take conduct that violates federal law. See *Board of the County Comm'rs* v. *Brown*, 520 U.S. 397, 404-405 (1997). Indeed, even an unwritten but "widespread practice" can constitute a municipal "custom" or "usage" if it is sufficiently permanent and well settled. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

In such suits, municipalities cannot claim qualified immunity based on the good faith of the officers involved, *Owen* v. *City of Independence*, 445 U.S. 622, 638, 650-652 (1980), and no other significant barrier would prevent the courts from resolving whether a search or seizure conducted as part of a municipal practice violates the Fourth Amendment. Indeed, the availability of attorney's fees under 42 U.S.C. 1988(b) provides ample incentive for such challenges. See *Hudson*, 547 U.S. at 597-598 (rejecting view that Section 1983 actions against municipalities are an ineffective means of challenging Fourth Amendment violations).

Even where a widespread police practice has been upheld in certain appellate jurisdictions, plaintiffs armed with meritorious claims in those jurisdictions could seek this Court's review of any resulting adverse judgment. And plaintiffs in appellate jurisdictions that had yet to resolve the Fourth Amendment question could pursue such claims below, and, if unsuccessful, seek this Court's review. Ultimately, if the Fourth Amendment claim has merit, civil plaintiffs will present it to this Court. This method of resolving allegations of Fourth Amendment violations is highly preferable in at least one significant respect: it allows plaintiffs entirely

innocent of criminal activity to enforce their rights and develop Fourth Amendment jurisprudence.

Local law-enforcement officers conduct a substantial number of the searches and seizures nationwide, including those later challenged in federal prosecutions like this case. Although petitioner apparently fears that significant law-enforcement practices will evade judicial scrutiny, municipalities have powerful incentives to teach search-and-seizure rules to their officers because the "[f]ailure to teach and enforce constitutional requirements [to police officers] exposes municipalities to financial liability" under Section 1983. *Hudson*, 547 U.S. at 599. The very existence of appellate precedents upholding any such practices, moreover, makes it much more, not less, likely that those judicially approved practices will be taught to local law-enforcement officers in a manner subject to review in Section 1983 actions. Cf. *ibid.* (noting "increasing evidence that police forces across the United States take the constitutional rights of citizens seriously"); *Gant*, 129 S. Ct. at 1722 (observing that "it appears that the State's reading of *Belton* has been widely taught in police academies").

Petitioner asserts (Br. 42) that Section 1983 plaintiffs must establish "deliberate indifference" to impose municipal liability. That is incorrect. Deliberate indifference must be established in so-called "failure-to-train cases" in which liability is premised on a municipality's "decision *not* to train" its employees about certain matters. *Brown*, 520 U.S. at 409 (discussing *City of Canton* v. *Harris*, 489 U.S. 378 (1989)) (emphasis added). Such cases require "rigorous standards of culpability" because they involve a "facially lawful municipal action" regarding the extent of appropriate training that (indirectly) causes an undertrained employee to violate fed-

eral rights. *Id.* at 405, 407. But where a municipality has itself "directly inflicted an injury" through its *affirmative* instructions to employees, no additional culpability is needed because the municipality is itself "the moving force behind the injury." See *id.* at 405.

C. Even If Petitioner's Incentive-Based Understanding Of The Exclusionary Rule Were Correct And Resulted In Appreciable Deterrence, The High Costs Of Exclusion Would Outweigh Any Likely Benefits

Even assuming *arguendo* that (1) providing an "incentive" for criminal defendants to challenge prevailing precedents may properly be deemed to advance the exclusionary rule's "deterrent" function and (2) an "appreciable" deterrence would result from denying the good-faith exception where officers reasonably rely on binding appellate precedent, any such "deterrent" effect would be outweighed by the substantial societal costs associated with petitioner's rule. Because petitioner fails to demonstrate that any such deterrence "outweigh[s] the costs," he fails to clear the "'high obstacle'" that those urging exclusion must overcome. *Herring*, 129 S. Ct. at 700- 701 (citation omitted).

1. The societal costs imposed by the courts' suppression of evidence obtained in objectively reasonable reliance on binding appellate precedent are grave.

First, the "ultimate question of guilt or innocence * * * should be the central concern in a criminal proceeding." *Powell*, 428 U.S. at 490; see *United States* v. *Havens*, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."). A criminal defendant's request that a court suppress evidence from a search that violated the Fourth Amendment is therefore "crucially different"

from claims based on violations of "many other constitutional rights." Although the "means" by which the evidence was obtained may have been unlawful, the evidence itself ordinarily has been "in no way * * * rendered untrustworthy." *Powell*, 428 U.S. at 490 (citation omitted). In fact, such evidence is both "typically reliable and often the most probative evidence bearing on guilt or innocence." *Ibid.* The judiciary's decision to remove such reliable proof from consideration by a jury fundamentally undermines "the truthfinding process," "often frees the guilty," *ibid.*, and risks sending "possibly dangerous defendants" back into society. *Herring*, 129 S. Ct. at 701; see *Hudson*, 547 U.S. at 595. The "magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system" where, as here, "law enforcement officers have acted in objective good faith." *Leon*, 468 U.S. at 908.

Second, suppression of evidence, and freeing the guilty, when officers have simply followed the lead of appellate courts risks "generat[ing] disrespect for the law and administration of justice." *Leon*, 468 U.S. at 908 (citation omitted). "[T]he exclusionary rule is not an individual right." *Herring*, 129 S. Ct. at 700; accord *Leon*, 468 U.S. at 906. It is a "judicially created remedy," *ibid.* (citation omitted), that is "prudential rather than constitutionally mandated," *Scott*, 524 U.S. at 363. Reflecting its prudential character, the exclusionary rule has been tailored in modern jurisprudence, including the good-faith-exception decisions, to avoid the rule's application where it would undermine commonsense notions of justice. It would be extraordinarily difficult for the courts to justify—as a prudential rule—the "extreme sanction of exclusion," *Leon*, 468 U.S. at 916, when officers relied in objective good faith on then-gov-

erning precedents issued by the courts themselves. Unlike reversals for most trial errors—which frequently involve an opportunity to correct any error on retrial—the exclusion of evidence obtained before trial irrevocably removes highly probative proof of guilt from the judicial process.

Third, denying law-enforcement officers the ability to safely conduct their public duties though the objectively reasonable reliance on binding appellate precedent significantly risks deterring police conduct that is critical to the public interest. Even if petitioner's rule would marginally increase the Court's ability to overturn incorrect Fourth Amendment precedent from the lower courts, such changes in the law would be relatively rare especially compared to the total body of appellate Fourth Amendment jurisprudence governing police conduct. But officers in the field must make real-world judgments well in advance of any potential change in governing precedent. If their objectively reasonable reliance on existing precedents cannot save evidence of crime from suppression, officers will be inclined to operate well within the boundaries of constitutional searches and seizures. See *Gates*, 462 U.S. at 258 (White, J., concurring in the judgment) ("It would be surprising if the suppression of evidence garnered in good faith, but by means later found to violate the Fourth Amendment, did not deter legitimate * * * police activities" and "hinder[] the solution and even the prevention of crime.").

Such excessive self-restraint is undesirable. The Fourth Amendment's touchstone of reasonableness strikes the appropriate balance "needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-119 (citation omitted)). The public, for instance, has a strong interest in police acting promptly as

soon as they perceive exigent circumstances that justify a search under then-current law. If police delay their response because of doubt about whether the line suggested by then-governing precedent may later be redrawn, the public suffers. The public likewise has a significant interest in officers exercising their ability to conduct brief, investigatory stops when they have a reasonable, articulable suspicion that a crime has occurred or is afoot. Passing up some of those opportunities permitted under governing precedent in order to hedge against unknown future jurisprudential changes will injure the public interest. Cf. *Hudson*, 547 U.S. at 595 (explaining that because the precise requirements of the Court's knock-and-announce jurisprudence is "necessarily uncertain," the "massive" consequences of suppression for knock-and-announce violations would lead officers "to wait longer than the law requires" and "produc[e] preventable violence against officers in some cases, and the destruction of evidence in many others").

2. Petitioner contends (Br. 49-60) that the "costs of the exclusionary rule when courts overturn Fourth Amendment precedents are modest" and are outweighed by the benefit of encouraging defendants to challenge existing appellate precedent. Br. 49-50. In some cases, he argues (Br. 51-53), the searches conducted in reliance on such precedents will be deemed constitutional under a new constitutional test. And in the other cases in which unconstitutionally obtained evidence was admitted, convictions may sometimes be preserved under other doctrines. Br. 53-58. Petitioner significantly underestimates the costs of suppression, his prediction of "modest" costs is speculative, and any claimed benefits are exceedingly limited. In the end, foregoing the good-

faith exception imposes substantial costs wholly unjustified by petitioner's incentive theory.

First, petitioner ignores the significant costs of deterring *lawful* police activity and of engendering disrespect for the law and administration of justice. See pp. 38-40, *supra*.

Second, it is difficult to estimate how often other legal doctrines might salvage cases where police obtained evidence from searches conducted in objectively reasonable reliance on then-binding precedent that is later overturned. For instance, the harmless-error doctrine (Br. 58) is often unavailable for entire categories of drug- and gun-possession charges (like the charge in this case) because suppression usually targets the key evidence. Moreover, to the extent that petitioner uses a handful of reported decisions to suggest (Br. 53-55) that a meaningful portion of the evidence obtained from pre-*Gant* vehicle searches made incident to an arrest (which are now invalid under *Gant*) may still be used in prosecutions, petitioner presents an incomplete picture. It is likely that many prosecutions with more significant *Gant* problems were simply abandoned or never filed. Prosecutors have limited resources and must exercise discretion in deciding what cases will be pursued. A review of reported decisions therefore cannot capture the full impact that *Gant* has had on prosecutions nationwide. This Court, perhaps for similar reasons, has not judged the appropriateness of good-faith exception based on the fraction of cases that will require reversal. It has instead emphasized that the relevant cost is that "some guilty defendants will go free." See *Leon*, 468 U.S. at 907.

This Court has repeatedly emphasized that, "[a]s with any remedial device, the application of the [exclu-

sionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Leon*, 468 U.S. at 908 (quoting *Calandra*, 414 U.S. at 348); see also, *e.g.*, *Hudson*, 547 U.S. at 591; *Scott*, 524 U.S. at 363; *Evans*, 514 U.S. at 11. The suppression of evidence obtained by officers in objectively reasonable reliance on binding precedent authorizing the search would serve little or no additional deterrent effect and would impose substantial social costs. The court of appeals correctly applied the good-faith exception in this case.

III. THIS COURT'S RETROACTIVITY JURISPRUDENCE DOES NOT ADDRESS THE PROPER SCOPE OF THE GOOD-FAITH EXCEPTION

Rather than relying on this Court's doctrine in *Leon*, *Krull*, and *Herring* to determine whether the good-faith exception applies in this context, petitioner contends (Br. 10-22) that this Court's retroactivity jurisprudence governs the application of the Fourth Amendment exclusionary rule. He argues that "[t]he exclusionary rule is available in all cases not yet final on the date" that a new Fourth Amendment principle is announced because such "[n]ew decisions are retroactive." Br. 13. Petitioner's use of retroactivity principles to dictate the application of the exclusionary rule confuses two currently distinct, but historically related, doctrines.

In the criminal context, "retroactivity" addresses whether a criminal defendant is eligible to *seek* relief in his case for past constitutional violations under a newly announced constitutional rule of criminal procedure. The Court's retroactivity jurisprudence determines in which proceedings the new rule may be invoked: under current doctrine, it may be invoked on direct review, and

it generally may not be invoked on federal collateral attack. The exclusionary rule, in contrast, is a potential form of relief for Fourth Amendment violations that a defendant may assert in certain contexts.

Contemporary jurisprudence grounds retroactivity doctrine in the nature of the judicial process, the equitable treatment of litigants, and principles of finality. By contrast, the determination of whether the exclusionary rule is available turns on whether its deterrent purposes will be sufficiently advanced to justify its costs. Petitioner cannot rely on modern retroactivity principles to avoid this Court's separate analysis of exclusionary-rule policy. Nor is petitioner correct in suggesting (Br. 20-22) that applying the good-faith exception when an officer relies on binding appellate precedent that is later overturned would revive now-discredited retroactivity law. Rather, it would simply apply considerations that were previously relevant to retroactivity law, but that are now captured in the good-faith doctrine of *Leon*, *Krull*, and *Herring*. Those are the relevant precedents, and petitioner's effort (Br. 43-49) to limit those cases to enforcement of "existing precedents" is unsound.

A. Retroactivity Jurisprudence Addresses Whether A Defendant May Seek Relief For Violations Of Newly Announced Rights, Not Whether The Defendant Is Entitled To Relief

In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), this Court considered whether its then-recent equal-protection decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), should apply retroactively to cases on direct appeal. The Court explained that, under its former retroactivity doctrine originating in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the retroactivity of a new constitutional rule

of criminal procedure turned on the Court's consideration of three factors: the "purpose" served by the new constitutional standard; the "reliance" placed on the old constitutional standard by law-enforcement authorities; and the effect that retroactive application of the new standard would have on "the administration of justice." 479 U.S. at 320-321 (quoting *Linkletter*, 381 U.S. at 636). *Griffith* scrapped that analysis in favor of a new, uniform standard: A "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception." *Id.* at 326, 328.

Two considerations explained the Court's reformulation of retroactivity jurisprudence for criminal cases on direct review. First, this Court, unlike a legislature, does "not promulgate new rules of constitutional criminal procedure on a broad basis"; rather, in accordance with the "nature of judicial review," it expounds the law by "adjudicat[ing]" a specific case. *Griffith*, 479 U.S. at 322. But having announced that rule, the court explained, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 323. Second, the selective application of new rules based on the happenstance of which case was selected for their announcement "violates the principle of treating similarly situated defendants the same." *Ibid.*

Under *Griffith*, a criminal defendant whose case is pending on direct review will be eligible to *seek relief* for the government's earlier violation of a constitutional rule of criminal procedure. But retroactivity does not speak to the *remedy* (if any) that is appropriate for such a violation. As petitioner explains, *Powell* v. *Nevada*, 511 U.S. 79 (1994), "is a helpful example." Br. 13-14. In

Powell v. *Nevada*, the Court held that because Powell's conviction was not final when the Court announced its decision in *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), Powell was "entitle[d] * * * to rely on *McLaughlin*['s]" holding, namely, that the Fourth Amendment requires a judicial determination of probable cause within 48 hours of a warrantless arrest (absent extraordinary circumstances). 511 U.S. at 84. The Court emphasized that "[i]t does not necessarily follow, however, that Powell must 'be set free' or gain other relief" because, *inter alia*, the "appropriate remedy for [an unconstitutional] delay in determining probable cause (an issue not resolved by *McLaughlin*)" had yet to be determined. *Ibid.* (citation omitted).

Powell illustrates that a criminal defendant's ability to *rely* on a new rule does not automatically translate into a right to *relief* under the new rule. That principle explains why *Griffin*'s retroactivity holding does not assist petitioner in arguing for suppression as a remedy in this case: "Whether the exclusionary sanction is appropriately imposed in a particular case * * * is 'an issue *separate* from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Leon*, 468 U.S. at 906 (emphasis added; citation omitted); accord *Herring*, 129 S. Ct. at 700; *Hudson*, 547 U.S. at 591-592. *Griffith* establishes that a new rule applies on direct review; it does not speak to whether a court must provide any particular relief, such as exclusion of evidence.[7]

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[7] Petitioner's erroneous understanding of the relationship between retroactivity and the exclusionary rule also extends to his description of the rules that apply when a conviction is final and challenged on collateral review. Petitioner asserts (Br. 15) that under *Stone* v. *Powell*, 428 U.S. 465 (1976), "[t]he suppression remedy for Fourth Amendment

Petitioner suggests (Br. 17) that *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), indicates that "retroactivity is about remedies, not rights." *Danforth* does not assist petitioner's argument. That decision held that the Court's retroactivity rule announced in *Teague* v. *Lane*, 489 U.S. 288 (1989), under which new rules of criminal procedure generally cannot provide the basis for collateral relief in federal habeas-corpus proceedings, does not prevent state courts from providing collateral relief in their own courts for such new rules. 552 U.S. at 266. In the passage on which petitioner relies, *Danforth* stated that the Court's retroactivity jurisprudence determined, "not the temporal scope of a newly announced right," but whether a previous violation "will entitle a criminal defendant to the relief sought." *Id.* at 271; see *id.* at 271 n.5 (noting that "redressability" would have been a more accurate term than "retroactivity"). But the Court did not imply, let alone hold, that in every proceeding in which retroactivity jurisprudence permits a

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violations is not available in habeas or other collateral review proceedings." While petitioner is correct that *Stone* generally precludes application of the exclusionary rule in habeas proceedings, *Stone* is not a retroactivity decision. Rather, it is an exclusionary-rule decision in which the Court balanced incremental deterrence against costs. *Id.* at 489. The distinction is illustrated by the one avenue that *Stone* preserved for exclusionary-rule claims raised on habeas: cases in which the defendant was not "provided an opportunity for full and fair litigation of a Fourth Amendment claim." *Id.* at 494. When the State denies the defendant that opportunity, the defendant may invoke the exclusionary rule on habeas. *Id.* at 494 n.37. In that situation, the principle that prevents the defendant from invoking "new" Fourth Amendment rules, announced since his case became final, derives from this Court's retroactivity jurisprudence in *Teague* v. *Lane,* 489 U.S. 288 (1989). Thus, on collateral review as well as on direct review, this Court's retroactivity jurisprudence is distinct from its exclusionary-rule jurisprudence.

new rule to be asserted, a violation must be remedied by the reversal of a conviction. When read in context, *Danforth* made two points: First, this Court's *announcement* of the right does not mean that the right did not previously exist; rather, "the underlying right necessarily pre-exists our articulation of the new rule." *Ibid.* Second, retroactivity concerns whether a criminal defendant is *eligible to seek relief* based on the government's violation of a new rule. Retroactivity thus concerns "the availability or nonavailability of remedies." *Id.* at 291.

Danforth could not have meant that a rule's retroactivity mandates relief, notwithstanding all other remedial doctrines. If a court finds a constitutional violation, it does not mean (with limited exceptions for preserved claims of structural error) that the defendant is "entitle[d]" to any relief, as petitioner acknowledges. See Br. 50. Even on direct review, the error may be harmless and, if not timely raised below, may not qualify as reversible plain error. Br. 57-58. Similarly, as petitioner admits (Br. 53-54), even when the exclusionary rule is generally available, a defendant is not entitled to relief for an unconstitutional search where the evidence would have been inevitably discovered by the government. Those rules, like the good-faith exception, may bar relief even when a defendant may rely on a new rule to establish a violation. *Danforth* cannot have meant to displace those basic rules.

Equally unfounded is petitioner's contention (Br. 12-13) that the Court's disposition in *Gant* means that the exclusionary rule must be available in the case that announces the new Fourth Amendment rule and that retroactivity jurisprudence then requires application of the exclusionary rule to all other cases on direct review.

The Court had no occasion to address any exclusionary-rule issue in *Gant* because the question presented there addressed only the underlying Fourth Amendment issue governing the constitutionality of the vehicle search. See Pet. at i, *Gant*, *supra* (No. 07-542). The State's briefs on the merits thus focused entirely on that constitutional question, and it did not suggest, much less argue as an alternative, that the good-faith exception would warrant reversal. See Pet. Br. at 15-44, *Gant*, *supra*; Reply Br. at 1-30, *Gant*, *supra*. Unsurprisingly, in the absence of briefing on the point, the Court in *Gant* did not address the good-faith exception or any other remedial issue.

B. Application Of The Good-Faith Exception Here Would Not Return To Now-Superseded Retroactivity Decisions

1. Petitioner argues (Br. 20-21) that the court of appeals' rule simply applies "a modified version of the discredited *Linkletter* retroactivity test" and revives an argument that this Court rejected in *United States* v. *Johnson,* 457 U.S. 537 (1982). Petitioner is incorrect.

Under the retroactivity doctrine pioneered in *Linkletter*, the Court evaluated, among other considerations, the "purpose to be served by the new constitutional rule" in order to decide whether to give it retroactive effect. See *Desist* v. *United States*, 394 U.S. 244, 248-249 (1969); *Stovall*, 388 U.S. at 297; *Linkletter*, 381 U.S. at 629. Thus, decisions under the prior doctrine that considered the "retroactivity problem in the context of the exclusionary rule" took into account the purpose and effect of suppression in deciding whether to apply a new rule to prior conduct. *Peltier*, 422 U.S. at 535-536. That analysis did not survive the Court's later decision in *Griffith*, which jettisoned consideration of the purpose

of a new rule, and instead applied a uniform analysis grounded in the nature of the judicial process and the interest in similar treatment of similarly situated individuals. See pp. 43-44, *supra*.[8]

But *Peltier*'s analysis of the purpose of the exclusionary rule did not vanish from this Court's jurisprudence when retroactivity law changed. Instead, *Peltier*'s reasoning played a critical role in shaping the Court's decision in *Leon*, which created the good-faith exception to the exclusionary rule. See pp. 13-15, *supra*. *Leon* made clear that, although prior Fourth Amendment retroactivity decisions like *Peltier* did "not involv[e] the scope of the [exclusionary] rule itself," they did shed light on the "purposes underlying the exclusionary rule," 468 U.S. at 911, and provided "strong support" for the newly adopted good-faith exception. *Id.* at 913. Thus, rather than reviving the "discredited *Linkletter* retroactivity test" (Br. 20), a test that asks whether the exclusionary rule's purpose would be served by suppressing evidence from a search conducted in objectively reasonable reliance on appellate precedent fully accords with modern exclusionary-rule analysis under *Leon*.

2. Petitioner also errs (Br. 20-22) in suggesting that applying the good-faith exception here would embrace an argument that the Court rejected in *Johnson*. Be-

[8] *Griffith*'s analysis reveals petitioner's error in asserting (Br. 17) that this Court's retroactivity jurisprudence is simply a "specific application of the usual balancing test for the scope of the exclusionary rule." *Griffith* involved the retroactivity of a new equal-protection ruling, not a Fourth Amendment ruling. And to support his view, petitioner cities only three pre-*Griffith* cases. Br. 17-18 (citing *Peltier*, *Powell*, *Leon*). Modern jurisprudence has grounded retroactivity in entirely distinct considerations and does not balance policies in the manner that determines the exclusionary rule's scope. See pp. 43-44, *supra*.

cause the good-faith exception had not yet been adopted as of *Johnson*, see *Leon*, 468 U.S. at 913 ("As yet, we have not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule."), that argument is curious on its face. But even examining the arguments about exclusionary policy made in *Johnson*, petitioner's argument fails. To understand why, *Johnson* must be understood in light of the Court's prior holding in *Peltier*, which *Johnson* left undisturbed. 457 U.S. at 562.

a. Even before this Court modified the exclusionary rule in 1984 by establishing the good-faith exception, it recognized in *Peltier* that the exclusionary rule should not apply in circumstances similar to those presented in this case. Before 1973, the Border Patrol conducted roving searches of vehicles near the border under the authority of a statute that authorized agents to conduct such searches "without [a] warrant" within a "reasonable distance" of the border and a regulation that fixed that distance at 100 miles. See *Peltier*, 422 U.S. at 539-540 & n.6 (citations omitted). Neither the statute nor the regulation addressed whether probable cause was necessary to search, see *ibid.*, and the Border Patrol conducted such searches without probable cause. In *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), the Court invalidated such a search based on its conclusion that probable cause was necessary to conduct a roving-patrol search roughly 25 miles from the Mexican border.

Although *Almeida-Sanchez* resolved the merits of that constitutional issue, the Court did not address the exclusionary rule. See *Peltier*, 422 U.S. at 542 n.12. Two years later, *Peltier* held that evidence from searches conducted before *Almeida-Sanchez* should not be

suppressed. *Id.* at 535-542. *Peltier* found it significant that, until *Almeida-Sanchez*, the Border Patrol's roving searches had been "'consistently approved by the judiciary'" and "upheld repeatedly against constitutional attack" in decisions by the Fifth, Ninth, and Tenth Circuits. *Id.* at 540-541 & n.8 (citation omitted). The Court explained that the "deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct"; that this "deterrence rationale loses much of its force" if "the official action was pursued in complete good faith," *id.* at 539 (citation omitted); and that, therefore, evidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542; accord *Herring*, 129 S. Ct. at 701-702; *Krull*, 480 U.S. at 348-349; *Leon*, 468 U.S. at 919. The Court accordingly held that suppression was unwarranted given "the purpose of the exclusionary rule" and the "uniform treatment of roving patrol searches by the federal judiciary" at the time of the search, even though *Almeida-Sanchez* overturned that circuit precedent. 422 U.S. at 542. *Peltier* explained that "we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm" "unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court." *Ibid.*

Peltier also emphasized that the considerations underlying the exclusionary rule—which suppresses "relevant evidence * * * in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process"—distinguished the case from others

involving "new constitutional doctrines" designed to overcome practices that impair the "truth-finding function" and "raise[] serious questions about the accuracy of guilty verdicts." 422 U.S. at 535 (citation omitted). "*[I]n every case* in which the Court has addressed the retroactivity problem in the context of the exclusionary rule," *Peltier* explained, it "has concluded that any such *new* constitutional principle would be accorded only prospective application." *Ibid.* (emphases added); see *id.* at 535-537 (discussing cases). The Court endorsed that result, notwithstanding the argument that failing to apply a suppression remedy in *Peltier* would "stop dead in its tracks judicial development of Fourth Amendment rights." *Id.* at 543 n.13 (citation omitted).

That analysis strongly supports the application of the good-faith exception here. Indeed, the Court in *Leon* directly adopted much of *Peltier*'s rationale in establishing the good-faith exception. See, *e.g.*, *Leon*, 468 U.S. at 919 (exclusionary rule's deterrence function under *Peltier* warrants good-faith exception); *id.* at 920 n.20 (citing *Peltier*, 422 U.S. at 542, to explain that officers must "have a reasonable knowledge of what the law prohibits"); see also *Peltier*, 422 U.S. at 542 (denying suppression where officers followed "the *prevailing* statutory or constitutional norm") (emphasis added).

b. In *Johnson*, the Court moved away from *Linkletter*'s retroactivity doctrine. *Johnson* held *Payton* v. *New York*, 445 U.S. 573 (1982), to be retroactive in cases on direct review by adopting in part the rationale that later found favor in *Griffith*. 457 U.S. at 554-556. But it preserved the Court's preexisting exceptions to retroactivity—notably, for new rules that represented a "clear break with the past," a category that covered *Peltier*. *Id.* at 549, 558, 562 (citation omitted).

In so holding, *Johnson* rejected the government's reliance on *Peltier* to oppose retroactivity for *Payton*. 457 U.S. at 557-562. While the government's arguments did rely on exclusionary-rule considerations, *Johnson* rejected different arguments than the argument currently advanced. The Court first rejected an argument that all Fourth Amendment rulings should be non-retroactive; it then rejected an argument that retroactivity should be denied *unless* the officer violated "settled" law; it next rejected an extension of *Peltier*'s retroactivity logic beyond new decisions that "worked a 'sharp break' in the law"; and it finally rejected an argument that retroactive application would serve no purpose but to free a wrongdoer. *Ibid.*

Significantly, however, *Johnson* did not reject the exclusionary-rule policy arguments embraced in *Peltier*. Rather, the Court distinguished *Peltier* as involving "a near-unanimous body of lower court authority" that had upheld the lawfulness of the Border Control's roving searches before this Court overturned those decisions in a "'clear break' with the past." 457 U.S. at 558. *Johnson* recognized that *Peltier*'s approach was supported by "several" of the Court's decisions, *id.* at 558-559, and it made clear that it left "undisturbed" such "existing retroactivity precedents." *Id.* at 562; see *id.* at 551, 554. The Court explained that, in contrast to *Peltier*, the relevant law of the circuit "where [Johnson] was arrested" was "'unsettled,'" *id.* at 553 n.15 (citation omitted), and that *Peltier*'s retroactivity analysis did not apply to a decision of this Court resolving a "previously unsettled point of Fourth Amendment law." *Id.* at 560.

In short, rather than rejecting the good-faith argument advanced here, *Johnson* addressed a significantly different issue, in at least two respects. First, it did not

address the yet-to-be-recognized good-faith exception, which was not created until *Leon*. Second, it left intact *Peltier*'s holding for cases (similar to this one, see pp. 19-20, *supra*) in which this Court had "overturned a longstanding practice to which the Court had not spoken, but which a near-unanimous body of lower court authority had approved." 457 U.S. at 558. Later, in *Griffith*, the Court adopted a new approach to retroactivity that did not turn on policies specific to the Fourth Amendment. But by then, the Court had already separately incorporated those policy considerations into its exclusionary-rule analysis in *Leon*, and shortly after *Griffith*, the Court confirmed its good-faith jurisprudence in *Krull*. *Krull* is particularly relevant here, because the dissenters believed that failing to provide the remedy of exclusion for evidence seized in reliance on a statute later declared unconstitutional would create tension with retroactivity as articulated in *Griffith*. *Krull*, 480 U.S. at 368 (O'Connor, J., dissenting). But the Court in *Krull* dismissed that concern even while recognizing that the good-faith exception's remedial focus "can result in having a defendant, who has successfully challenged the constitutionality of a statute, denied the benefits of suppression of evidence." *Id*. at 354-355 n.11. This Court, therefore, has already concluded that good-faith exceptions to the exclusionary rule do not conflict with its retroactivity jurisprudence.

C. *Leon*, *Krull*, And *Herring* Are The Applicable Precedents

Instead of the retroactivity cases on which petitioner relies, the applicable precedents are this Court's good-faith precedents. Petitioner would cabin the good-faith cases to "ensuring compliance with existing precedents

instead of correcting erroneous precedents." Br. 43. That approach is incorrect for two reasons.

First, *Leon*, *Krull*, and *Herring* rest on the more fundamental, and directly applicable, point about the purpose and costs of the exclusionary rule. Exclusion is unwarranted when the purpose of deterring police misconduct is not sufficiently served to outweigh the costs. That principle has ramifications far beyond the enforcement of existing law. See pp. 14-18, *supra*.

Second, it is certainly not true that those decisions "concern compliance with existing precedents rather than compliance with the Constitution." Br. 45. The Constitution can speak directly to a practice even if no precedent has examined the precise issue. Cf. *Groh* v. *Ramirez*, 540 U.S. 551, 563 (2004) ("Given that the particularity requirement is set forth in the text of the Constituition, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."); *id.* at 565 n.8 (noting that the same test applied for objective good faith under *Leon*).

The good-faith test therefore does not, as petitioner suggests, limit the exclusionary rule to "compliance with * * * fixed [case] law." Br. 45. Rather, in this context, its application would simply recognize that when an officer has obtained evidence "in objectively reasonable reliance" on then-binding appellate precedent, the "marginal or nonexistent benefits" of suppression "cannot justify the substantial costs." *Leon*, 468 U.S. at 922.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2011