No. 09-11328

In The

Supreme Court of the United States

WILLIE GENE DAVIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

REPLY BRIEF FOR PETITIONER

The availability of the exclusionary rule to enforce newly-announced rules of criminal procedure traditionally has been considered a question of retroactivity law. Since *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court has followed a simple approach: The exclusionary rule is available to enforce the new rule in all cases not yet final – including the case announcing the new rule – but generally is not available after convictions have become final. This case should be decided by a routine application of that settled doctrine. Because Petitioner's conviction was not yet final when the Court handed down *Arizona v. Gant*, 129 S.Ct. 1710 (2009), the exclusionary rule should be available to enforce *Gant* in Petitioner's case.

The government contends that the Court should reject this traditional approach under the logic of the good-faith exception to the exclusionary rule recognized in *United States v. Leon*, 468 U.S. 897 (1984). According to the government, the exclusionary rule should not be available, either in the case announcing the new rule or in other cases on direct review, when the police reasonably rely on precedent at the time of the search. When reviewing challenges to Fourth Amendment precedent, the Court should announce new rules purely prospectively in the form of decisions that do not impact any pending cases.

The government's proposal should be rejected because it is a retroactivity argument disguised as a good-faith argument. The good-faith exception was

never meant to apply to errors in the judicial interpretation of the Fourth Amendment; that has always been the province of retroactivity doctrine. As a retroactivity argument, the government's proposal is flawed for the same reason all arguments for purely prospective decisionmaking are flawed. First, Article III does not permit prospective decisionmaking. The Constitution does not permit the Court to hand down new rules in advisory opinions. Second, purely prospective decisionmaking eliminates the incentives to challenge existing law upon which the adversary system rests.

Viewing the government's proposal as an application of the good-faith exception leads to the same result. The exclusionary rule to enforce new legal decisions "pays its way" because it achieves a significant deterrent benefit at a modest cost. The exclusionary rule deters constitutional violations by ensuring that the police have accurate rules to enforce. Its costs are modest because the Court has already created a long list of doctrines, such as inevitable discovery and plain error, that sharply limit the scope of the exclusionary rule when the Court overturns precedent. For these reasons, the Court should retain its traditional approach to the exclusionary rule and should reverse the Court of Appeals.

I. THIS IS A RETROACTIVITY CASE CONTROLLED BY *GRIFFITH V. KENTUCKY,* 479 U.S. 314 (1987).

Petitioner frames this case as a retroactivity case settled by *Griffith v. Kentucky,* 479 U.S. 314 (1987). The government frames it as a good-faith case governed by *United States v. Leon*, 468 U.S. 897 (1984). Resolving the disagreement requires understanding the difference between retroactivity and the good-faith exception. The difference explains why this is a retroactivity case governed by *Griffith*.

A brief history is helpful. In the 1960s, the Court invented the concept of "retroactivity" to blunt the impact of its new criminal procedure decisions that expanded constitutional protection. *See generally* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965). The doctrine of retroactivity, first introduced in *Linkletter v. Walker*, 381 U.S. 618 (1965), limited when "a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). By limiting the scope of the exclusionary rule when the Court expanded constitutional protection, retroactivity ensured that the Court could continue to expand constitutional rights with minimal disruption to the criminal justice system.

During the *Linkletter* era, from 1965 to 1987, the general rule was that criminal defendants in the

pipeline were not entitled to benefit from new decisions expanding Fourth Amendment rights. The exclusionary rule was justified only insofar as it deterred police wrongdoing, the Court reasoned, and the police could not be deterred by constitutional rules that were not yet recognized. *See United States v. Peltier*, 422 U.S. 531, 536-39 (1975); *Desist v. United States*, 394 U.S. 244, 250-52 (1969). As a result, the exclusionary rule would only upset criminal cases and was deemed unnecessary. *Peltier*, 422 U.S. at 542.

Retroactivity proved a jurisprudential disaster, however, which led to its abandonment. The problem was that there was no principled way to limit the scope of the exclusionary rule when precedents were overturned. The exclusionary rule had to be available in the case announcing the new rule to ensure that defense attorneys had incentives to challenge the law and to ensure that the law was not announced in advisory opinions. *See Stovall v. Denno*, 388 U.S. 293, 301 (1967). On the other hand, the Court could not devise a principled way to limit the exclusionary rule in other cases on direct review at the time of the new decision. *See Desist,* 394 U.S. at 256-59 (Harlan, J., dissenting). The Court eventually recognized that no principled distinctions could be drawn, and it adopted a bright-line rule in 1987 that the new rule could always be enforced on direct review. *See Griffith*, 479 U.S. at 320-28.

Just before the *Linkletter* experiment came to a close, however, its principles inspired a newly-recognized good-faith exception to the exclusionary

rule. *See United States v. Leon*, 468 U.S. 897 (1984). The good-faith exception limits the scope of the exclusionary rule when the police rely on defective warrants, improper statutory authorizations, and erroneous database entries. *See id*. (warrants); *Illinois v. Krull*, 480 U.S. 340 (1987) (statutes); *Herring v. United States*, 129 S.Ct. 695 (2009) (database entries). At its inception, the good-faith exception drew explicitly from *Linkletter* retroactivity doctrine that pioneered the idea of limiting the exclusionary rule to the extent needed to deter violations. *See Leon,* 468 U.S. at 912-14.

Unlike retroactivity, the good-faith exception has thrived over time. The key difference is that the good-faith exception does not implicate the puzzling jurisprudential problems raised when the Supreme Court expands constitutional protection. The state of appellate caselaw is always fixed in good-faith cases, which permits the Court to use the standard of a "reasonably well trained officer" as a reference point to narrow the scope of the exclusionary rule. *Leon*, 468 U.S. at 922 n.23. The good-faith exception applies to reliance on minor errors that an officer with "reasonable knowledge of what the law prohibits" could miss, *id.* at 919 n.20, while it does not apply to reliance on major defects, such as warrants that contain obvious errors, that an officer with reasonable knowledge of what the law prohibits would recognize. *Id.* at 922-23. This principled limitation solves the jurisprudential problems that bedeviled retroactivity doctrine. It limits the exclusionary rule appropriately;

it provides the needed incentives to challenge police conduct; and it ensures that decisions are not handed down in advisory opinions.

This history explains why the government's position is a thinly-disguised retroactivity argument. The government's case is about the scope of the exclusionary rule when the Supreme Court overturns precedents. That is the classic question of retroactivity. While the government's position draws from principles of the good-faith exception, that is true only because the good-faith exception itself was based on *Linkletter*-era retroactivity precedents. No wonder that the government relies significantly on *Linkletter*-era retroactivity caselaw, such as *Peltier*, in its brief. U.S. Br. 48-54. The government is making a retroactivity claim based on *Linkletter* retroactivity cases and other doctrines that are themselves based on *Linkletter* retroactivity cases. It is a *Linkletter* retroactivity argument in all but name.[1]

The striking similarity between the government's brief and its brief in a *Linkletter*-era retroactivity case, *United States v. Johnson*, 457 U.S. 537 (1982),

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[1] Without citing any authority, the government contends that retroactivity merely concerns a criminal defendant's right to "seek" relief, whereas the exclusionary rule concerns whether relief may potentially be available. U.S. Br. 42-43. The distinction is meaningless. A rule that defendants may "seek" relief that is categorically unavailable is identical to a rule that defendants may not seek relief at all. In any event, the government's argument is foreclosed by *Danforth*, 552 U.S. at 271.

illustrates the point. *Johnson* presented the question of "[w]hether the exclusionary rule requires the suppression of evidence . . . where the entry occurred prior to . . . this Court's decision in *Payton v. New York*, 445 U.S. 573 (1980)." Brief of United States in *United States v. Johnson* at i, *available at* 1981 WL 390084. The government's argument for why the exclusionary rule should not apply – in other words, why *Payton* should not apply retroactively – was the same argument it makes in this case. "The exclusionary rule is not a personal right but a procedural safeguard designed to deter *future* violations," the government reasoned. *Id*. at 11 (emphasis in original). Because the costs of exclusion are "extremely high," *id.* at 9, the exclusionary rule should not apply when officers act "in good faith compliance with then-prevailing constitutional norms." *Id.* (citing *Peltier*). "The deterrent purpose of the rule would not be served by suppressing evidence seized as the result of warrantless arrest entries that occurred prior to the announcement in *Payton*," the government reasoned. *Id.* at 11. "[A]ll that would be accomplished is the discharge of a wrongdoer." *Id*.

This argument should sound familiar, as it is the same argument the government makes today. When the Court rejected this argument almost 30 years ago, the Court described it as "an absurdity" that would "automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application." *Johnson*, 457 U.S. at 560 (emphasis in original). That characterization remains true.

II. THE GOVERNMENT'S POSITION OF TOTAL PROSPECTIVITY IS INCONSISTENT WITH MANY PRECEDENTS OF THIS COURT.

Because the government's position is a retroactivity argument in disguise, it helps to situate it within retroactivity law. As Justice Souter explained in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the Court can take three basic positions on retroactivity: *full retroactivity*, in which the exclusionary rule is available in the first case and all other cases on direct review*; selective prospectivity*, in which the exclusionary rule is available in the first case but not other cases on direct review; and *pure prospectivity*, in which the exclusionary rule is not available in any cases. *Id*. at 535-38 (Opinion of Souter, J.). During the *Linkletter* era, the Court adopted selective prospectivity in criminal cases. In *Griffith*, however, the Court "abandoned the possibility of selective prospectivity . . . in favor of completely retroactive application of all decisions to cases pending on direct review." *Id*. at 538 (Opinion of Souter, J.).

Viewed in this light, the government is advocating a rule of pure prospectivity. When the Court overturns circuit or Supreme Court Fourth Amendment precedent, the government contends, the exclusionary rule should not be available *in any case at all*. U.S. Br. 7-8. The exclusionary rule should not be available either in the case announcing the new rule

or in other cases on direct review. U.S. Br. 20. Not only should Petitioner not benefit from *Arizona v. Gant*, 129 S.Ct. 1710 (2009), but neither should Gant himself. U.S. Br. 48. Admittedly, this approach solves the problem of treating the first case differently from other cases. No defendant is singled out when all defendants lose.

On the other hand, pure prospectivity raises two problems that had led the Court to reject pure prospectivity during the *Linkletter* era. The first problem is "the necessity that constitutional adjudications not stand as mere dictum . . . rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies," and the second problem is "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law." *Stovall*, 388 U.S. at 301. The government contends that these concerns can be ignored. It characterizes them as dicta from a single Sixth Amendment case decided long ago. U.S. Br. 25-26. But these two concerns appear in many decisions, including several Fourth Amendment decisions, both during and after the *Linkletter* era. Those precedents show that the Court has repeatedly rejected the government's proposed rule of total prospectivity.

Consider the Fourth Amendment rule announced in *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the Government argued that the agents' reliance on precedents *Katz* overturned should excuse the agents' unconstitutional search. The Court disagreed, applied the new rule to Katz's case, and reversed his

conviction. *See id*. at 356, 359. Two years later, in *Desist v. United States*, 394 U.S. 244 (1969), the Court ruled that *Katz* did not apply retroactively to other cases on direct review when *Katz* was decided. *Desist* then reaffirmed *Stovall*'s instruction that the exclusionary rule was available in the first case to announce the new rule. *Id.* at 254 n.24. Although "Katz himself benefited from the new principle" announced in his case, and "to that extent the decision has not technically been given wholly prospective application," giving Katz the benefit of the new rule was "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Id.* (quoting *Stovall*, 388 U.S. at 301). *See also Mackey v. United States*, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in part and dissenting in part) (noting that prospective rulemaking can deter defendants "from asserting rights bottomed on constitutional interpretations different from those currently prevailing").

The Court reiterated the point in *United States v. Peltier*, 422 U.S. 531 (1975), a case the government considers "strong support[ ]" for its position. U.S. Br. 52. After holding that Peltier was not entitled to the benefit of the new Fourth Amendment rule announced in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), the Court addressed the dissent's argument that it was wrong to treat Peltier and Almeida-Sanchez differently. The Court repeated *Stovall*'s conclusion that the exclusionary rule had to be available in the case announcing the new rule:

"[W]here it has been determined, as in a case such as *Linkletter*, that an earlier holding such as *Mapp* is not to be applied retroactively, it has not been questioned that Mapp was entitled to the benefit of the rule enunciated in her case." *Peltier*, 422 U.S. at 542 n.12 (citing *Stovall*, 388 U.S. at 300-01).

Griffith made the same point when it ended the *Linkletter* era. *See Griffith*, 479 U.S. at 327-28 (recognizing that the defendant in the case announcing the new rule "receives the benefit of the new rule."). The point was repeated yet again in *Teague v. Lane*, 489 U.S. 288 (1989), soon after the *Linkletter* era ended. In *Teague*, the Court was asked to rule on a challenge to jury venire selection in criminal cases brought in a habeas proceeding. The plurality opinion of Justice O'Connor – joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy – acknowledged that the Court "would have to give petitioner the benefit of that new rule" if the Court "recognize[d] the new rule" in *Teague*. *Id*. at 315 (O'Connor, J., plurality opinion). Doing so was "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Id*. (quoting *Stovall*, 388 U.S. at 301).

Finally, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), five members of the Court wrote or joined opinions rejecting pure prospectivity. Justice Souter, joined by Justice Stevens, reasoned that in criminal cases, "retroactive application could hardly have been denied the litigant in the law-changing decision itself." *Id*. at 537 (Opinion of Souter, J.). He

continued: "A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether." *Id*. (Opinion of Souter, J.). Justice Scalia, joined by Justices Marshall and Blackmun, went further, concluding that both pure prospectivity and selective prospectivity are unconstitutional. *See id.* at 549 (Scalia, J., concurring in the judgment).

As these authorities indicate, the Court's rejection of pure prospectivity is deeply rooted in its jurisprudence. Even during the *Linkletter* era, the Court always enforced its new decisions with the exclusionary rule. Although the government presents its argument as a modest extension of the good-faith exception, its position is quite radical: It rejects a universal practice of this Court that has been repeatedly articulated over several decades and that has far-reaching implications.

III. IF THE EXCLUSIONARY RULE IS NOT AVAILABLE, THE LIMITS OF ARTICLE III WILL PROHIBIT THE COURT FROM ADJUDICATING DEFENSE CHALLENGES TO FOURTH AMENDMENT PRECEDENTS IN CRIMINAL CASES.

The government's proposed rule would require the Court to decide challenges to existing Fourth Amendment rules in advisory opinions. By seeking to

overturn precedent, the defendant would necessarily concede at the outset that he could not benefit from any change in the law sought. There would be no way for a defendant to obtain relief. If the Court upheld its controlling precedent, the defendant would lose on the merits; if the Court overturned its controlling precedent, the defendant would lose on the good-faith exception. The outcome of the litigation would always be the same.

Article III does not permit prospective decision-making for two reasons. First, "prospective decision-making is quite incompatible with the judicial power," and "courts have no authority to engage in the practice." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 106 (1993) (Scalia, J., concurring). Justice Scalia has been the strongest proponent of this view, and the Court recently indicated that it has commanded a majority of the Court and "should inform [the Court's] analysis of the issue[.]" *Danforth*, 552 U.S. at 287. *See generally* Br. 22-25.

The government does not address this argument. As *amici curiae*, the States respond only to extol the practical benefits of pure prospectivity. Pure prospectivity "would achieve the salutary objective of implementing change in law enforcement practices," the States contend, "while at the same time avoiding the harmful impact to the administration of justice." States Br. 18. However salutary that objective might be, "prospective decisionmaking is incompatible with the judicial role." *American Trucking Association v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment).

Article III does not permit such decisionmaking for a second reason. No case or controversy would exist under Article III to adjudicate such cases because any ruling by the Court would have no impact on the parties.[2] The absence of any impact would make the defendant's injury irredressable and eliminate Article III standing. Br. 25-27. The Government responds that if the application of the good-faith exception in *Leon* does not eliminate a case or controversy, then a good-faith exception here should not, either. U.S. Br. 33-34. This argument overlooks the critical difference between the good-faith exception of *Leon* and the significantly different rule the government advocates here.

As explained earlier, the Court has carefully limited the *Leon* good-faith exception to police reliance on minor errors, which permits defendants to obtain exclusion of the evidence if the errors were major ones. *See, e.g., Leon*, 468 U.S. at 923-34; *Krull*, 480 U.S. at 353-55. This limitation ensures a possibility of reversal on appeal because courts must make a judgment call of whether the error is sufficiently significant that "a reasonable officer should have

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[2] *Camreta v. Greene*, 09-1454, and *Alford v. Greene*, 09-1478, argued on March 1, raise similar issues in the qualified immunity context. The lack of case or controversy would be even clearer here, however. Criminal cases do not raise concerns from qualified immunity law that a lower court ruling against the government on the merits but for the government on immunity may act as the equivalent of an unreviewable injunction against the government.

known that the [warrant or] statute was unconstitutional." *Krull*, 480 U.S. at 355. In some cases, the chances of reversal will be significant. In others, they will be remote. Either way, a theoretical possibility of reversal always exists. Injuries can be redressed and a case or controversy exists.

Under the government's proposed rule, however, there is no theoretical possibility of relief. The Question Presented in this case is limited to cases in which binding appellate precedent authorized the search. U.S. Br. i. Under the government's approach, relief is a logical impossibility in all such cases. Because reliance on binding caselaw will always be reasonable, U.S. Br. 7, the good-faith exception will always apply. The only conceivable options will be victory by the government on the merits or victory by the Government under the good-faith exception. The chance of a ruling for the defendant will be precisely zero, and everyone will know this at the outset. Article III does not permit such *faux* litigation.

IV. THE EXCLUSIONARY RULE MUST BE AVAILABLE TO ENSURE PROPER DEVELOPMENT OF THE LAW AND THEREFORE DETER CONSTITUTIONAL VIOLATIONS.

Assuming it is permitted by Article III, a regime of pure prospectivity is undesirable because it eliminates the only realistic way for the Court to correct constitutional errors. The possibility of suppression triggers defense challenges. Defense challenges permit the Court to reconsider circuit and Supreme

Court precedent. If the good-faith exception eliminates any possibility of relief to defendants who seek to challenge precedents, few if any challenges will be brought: The development of the law will become a one-way street in favor of expanded government powers. The availability of the exclusionary rule therefore deters constitutional violations by ensuring that the precedents upon which the police rely are themselves correct. Br. 30-43.

A. Incentives to Raise Arguments Are Properly Considered.

The government responds that the exclusionary rule is exclusively concerned with police incentives to follow existing law, and that incentives on defendants to raise challenges to that law cannot be considered. U.S. Br. 22-26. That is incorrect. Litigation incentives on defendants to challenge police action are longstanding concerns in exclusionary rule jurisprudence. *See, e.g., Stovall,* 388 U.S. at 301; *Leon*, 468 U.S. at 924, n.25; *Krull*, 480 U.S. at 353-54; *James B. Beam Distilling Co.*, 501 U.S. at 537 (Opinion of Souter, J.); *Mackey*, 401 U.S. at 680 (Harlan, J., concurring in part and dissenting in part); *Peltier*, 422 U.S. at 554-55 (Brennan, J., dissenting). *See also Garner v. Memphis Police Dept.*, 8 F.3d 358, 362 (6th Cir. 1993) (describing as "hornbook law" the rule that new standards are applied in the case announcing them because "[o]therwise parties would have no incentive to argue for such a rule because they would get no benefit from winning the case").

James v. Illinois, 493 U.S. 307 (1990), demonstrates the point. In *James*, the Court rejected an exception to the exclusionary rule permitting the use of evidence obtained in violation of the Fourth Amendment for impeachment of witnesses other than the defendant. The Court reasoned that the exception likely "would chill some defendants from presenting their best defense and sometimes any defense at all" given the realities of the criminal trial process. *Id.* at 314-15. If chilling effects on decisions to call witnesses at trial can determine the scope of the exclusionary rule, then surely chilling effects on making arguments the Court needs to interpret the law properly can do so as well.

B. An Exception For Reliance on Overturned Law Would Eliminate Incentives to Challenge Precedent.

The government contends that defendants would challenge existing precedents under its proposal because creative defense lawyers would distinguish their cases from binding precedents to avoid the bar on relief. U.S. Br. 29-30. This argument rests on a misunderstanding of the Question Presented as well as the nature of Fourth Amendment rules.

The Question Presented in this case is limited to searches authorized by binding precedent. Br. i; U.S. Br. i. If defense attorneys can distinguish a precedent, however, that precedent is not "binding." As a result, how defense attorneys might try to

distinguish precedents in other cases, when proper application of the law remains unclear, is irrelevant. The government's apparent misunderstanding is echoed in its acknowledgement, tucked away in a footnote, that its rule "might mean that direct challenges" to Supreme Court precedent "could not result in suppression of evidence even if this Court overruled the decision." U.S. Br. 32 n.6. The government dismisses such instances as a "singular situation," *id*., but its characterization is puzzling: That situation is the central scenario contemplated by the Question Presented.

The government's assertion that defense attorneys can readily distinguish precedents also ignores the Court's strong preference for enforcing the Fourth Amendment with bright-line rules. *See New York v. Belton*, 453 U.S. 454, 458 (1981). Consider the law of routine traffic stops. Probable cause of a traffic violation *always* allows the stop. *Whren v. United States*, 517 U.S. 806, 818 (1996). Officers can *always* order drivers out of the car. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). Officers can *always* arrest the driver if a violation occurred. *City of Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001). Officers can *always* search the driver's person incident to arrest. *Robinson v. United States,* 414 U.S. 218, 235 (1973). And until *Gant*, officers could *always* search the passenger compartment of the car. *Belton,* 453 U.S. at 458. These bright-line rules are the bread-and-butter of Fourth Amendment law. By this Court's design, not even the most creative of defense attorneys can work

around them. The only realistic way to challenge them is to do so directly.

The government asserts that experience with *Leon* and *Krull* proves that good-faith exceptions do not eliminate incentives to challenge police conduct. U.S. Br. 30-31. Again, this claim overlooks the difference between the good-faith exception adopted in *Leon* and *Krull* and the quite different doctrine urged here. Officers can be expected to know existing law. As a result, *Leon* and *Krull* considered what a "reasonably well-trained officer" who had "reasonable knowledge of what the law prohibits" would do. *Leon*, 468 U.S. at 922 n.23, 919 n.20. The Court maintained incentives to challenge police practices by retaining the exclusionary rule whenever a reasonable officer "should have known that the [warrant or] statute was unconstitutional." *Krull*, 480 U.S. at 355. The exclusionary rule always remains a possibility. Indeed, the good-faith exception of *Leon* and *Krull* makes only a modest difference to the defendant's argument. Instead of arguing that a defect existed, the defendant must argue that a defect existed and was significant enough that a reasonably well-trained officer would notice. *Krull*, 480 U.S. at 354.

The same is not true for the government's proposed exception. Officers can be expected to know existing law, but they cannot be expected to know when binding appellate caselaw was wrongly decided. That is especially true when the Court eventually divides, 5-4, on what rule the Constitution requires. *See Gant*, 129 S.Ct. at 1725-26. If a reasonable belief

that a search is constitutional wards off the exclusionary rule, then binding appellate precedent allowing a search will always render suppression an impossibility. A defendant will have no path to relief, eliminating the incentive to challenge precedent.

The government also claims that precedents can be challenged because caselaw in some jurisdictions does not foreclose challenges to that caselaw brought in other jurisdictions. U.S. Br. 32. This argument precludes challenges to Supreme Court precedents, however, as the government appears to recognize. *Id*. at n.6. Further, if the police can reasonably rely on binding circuit precedent in federal court, it is unclear why the exception stops there. The government's proposed standard of objective reasonableness mirrors the language of qualified immunity law, *see Pearson v. Callahan,* 129 S.Ct. 808, 822 (2009), and yet qualified immunity law excuses liability unless illegality was clearly established – a standard that not only allows officers to rely on state courts and other circuits, but allows officers to avoid liability when no circuit has ruled or when circuits disagree. *Id.* at 822-23; *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Perhaps the government can explain how its standard differs from qualified immunity, but it has not done so.

C. Civil Suits Against Municipalities Cannot Provide A Substitute Remedy.

Responding to Petitioner's argument that alternative remedies are insufficient, Br. 39-43, the government

speculates that precedents could be challenged in civil actions against municipalities. U.S. Br. 34-37. The government does not cite a single case in which this has ever occurred. And no wonder: Enforcement of existing law cannot establish municipal liability. *See Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791-93 (7th Cir. 1991). Municipal liability requires a culpable decision either to fail to train or the adoption of an unlawful policy or practice, neither of which can be satisfied if the municipality simply follows binding law. *Id*. at 791 ("It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing . . . [the] law"); *Crowder v. Sinyard*, 884 F.2d 804, 830-31 (5th Cir. 1989).

Even if this barrier were overcome, bringing even one such action would require an unlikely string of fortuitous circumstances. The challenged practice would have to be one engaged in by local officers; the municipality would need to train its officers explicitly on that aspect of the law; counsel would need to be found to bring a suit with an extremely small chance of victory; innocent plaintiffs who were subjected to the challenged practice would need to be found to circumvent *Heck v. Humphrey*, 512 U.S. 477 (1994); the plaintiffs would need to bring suit against a municipality that followed existing law with knowledge that any damages would be minimal if not zero; busy trial judges would need to proceed to discovery even though binding precedent made the lawsuit

meritless; and the Supreme Court would need to grant review of what would likely be an unpublished one-page affirmance in order to reach out and reconsider the precedent. The chances this might happen, even just once, are remote.

V. THE COSTS OF THE EXCLUSIONARY RULE TO ENFORCE NEW PRECEDENTS ON DIRECT REVIEW ARE MODEST.

Availability of the exclusionary rule to enforce new legal decisions does not mean suppression will be common. Searches that predate the newly-announced rule often will satisfy it. Br. 51-53. Even when searches violate the newly-announced rule, evidence will be suppressed relatively infrequently. Doctrines such as inevitable discovery, independent source, attenuated basis, standing, plain error and harmless error sharply limit the impact of newly-announced rules. Br. 53-58. The *Belton* cases after *Gant* reveal the dynamic: In the significant majority of the known cases, the government won the case even without the good-faith exception it seeks here. Br. at 51-58. The benefits of the exclusionary rule are well worth these modest costs.

The government responds that the exclusionary rule imposes "grave" costs because suppression interferes with the truth-finding function of criminal trials. U.S. Br. 37-38. This abstract point is largely nonresponsive. Although suppression can be costly, its cost depends on how often convictions will be

overturned rather than its impact per overturned conviction. *See James*, 493 U.S. at 319-20 ("When defining the precise scope of the exclusionary rule, however, we must focus on systemic effects of proposed exceptions to ensure that individual liberty from arbitrary or oppressive police conduct does not succumb to the inexorable pressure to introduce all incriminating evidence, no matter how obtained, in each and every criminal case.").

The government replies that it is "difficult to estimate how often other legal doctrines might salvage cases," U.S. Br. 41, but such caution is misplaced. Full retroactivity has been in place since *Griffith* in 1987. The quarter-century of experience provides ample empirical evidence to gauge how often suppression results. *Belton* cases following *Gant* provide a particularly useful dataset: The wide availability of opinions in easily-searchable online databases makes estimates of how such cases fared unusually easy to make. In addition, the cost/benefit analysis required by exclusionary rule doctrine has never required mathematical precision. *United States v. Ceccolini*, 435 U.S. 268, 280 (1978).

Similarly unpersuasive is the government's claim that the exclusionary rule to enforce new decisions generates disrespect for the law. U.S. Br. 38-39. The public respects the law when courts act like courts and enforce the rules they announce. *See Griffith*, 479 U.S. at 322-23. In contrast, pure prospectivity provides an "ignoble shortcut to conviction" that reduces

the Constitution to "an empty promise." *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). Further, the exclusionary rule has been available on direct review since *Griffith* in 1987. The government offers no evidence that the public has disrespected the law as a result of *Linkletter*'s demise. Also, the exclusionary rule is full of holes already. Even when available in theory, it will be applied in practice only when necessary. Br. 51-58.

Finally, the government posits that fears of suppression may overdeter the police. U.S. Br. 39-40. According to the government, cops on the street may be so worried that the Court will expand constitutional protection that they "hedge against unknown future jurisprudential changes" and decline to protect the public. U.S. Br. 40. This speculation is absurd. The exclusionary rule has been available in every case on direct review since *Griffith* in 1987. There is no evidence – the government points to none – that any police officer has been frozen by fear that the Court might overturn binding law.

Common sense explains why. Expansions of Fourth Amendment protection are rare. When they occur, doctrines such as inevitable discovery, independent source, plain error, and harmless error sharply limit the exclusion of evidence. Br. 51-58. In the rare case suppression may result, qualified immunity ensures that officers never face personal liability for reliance on binding caselaw. *See Gant*, 129

S.Ct. at 1722 n.11. In these circumstances, rational officers rely on binding precedent without hesitation.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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