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Resisting the Good-Faith Exception in Cases Involving Novel Types of Surveillance

I. Introduction

Too often, defendants have no remedy when police deploy novel surveillance tools in ways that violate the Fourth Amendment. Even when courts are willing to acknowledge that the surveillance was unconstitutional, they often decline to suppress the evidence based on the good-faith exception to the exclusionary rule.

The U.S. Supreme Court created the good-faith exception to allow evidence to be admitted when it was obtained by officers acting in objectively reasonable reliance on a judicially authorized search warrant later found to be constitutionally defective. Despite the Court's assurance that "it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued"[1] and appellate courts' proclamations that "[g]ood faith is not a magic lamp for police officers to rub whenever they find themselves in trouble,"[2] the good-faith exception at times appears to have swallowed the exclusionary rule whole.[3] It is particularly invidious in the context of novel types of searches, where the exception not only ratifies Fourth Amendment violations, but also allows police to experiment with constitutionally dubious surveillance tools with impunity, and allows courts to sidestep the most difficult and important Fourth Amendment questions.

Over the past decade, examples abound of how the good-faith doctrine perverts the law and harms criminal defendants who prevail in their substantive legal arguments challenging novel surveillance tactics. For example, district courts have applied the good-faith exception in refusing to suppress evidence obtained from "geofence warrants." These novel warrants identify a geographical area and then purportedly authorize law enforcement to negotiate with Google to obtain location and account information about any number of Google users who were in that area.[4] The Middle District of Alabama "s[aw] no need to journey into the quagmire of geofence search warrants because … the *Leon* good faith exception applie[d]."[5] The Eastern District of Virginia made an extensive journey into that quagmire and found it "difficult to overstate the breadth of [the geofence warrant at issue], particularly in light of the narrowness of the Government's probable cause showing," but nonetheless applied the good-faith exception.[6]

The good-faith exception has also been invoked to admit evidence from cell-site simulators, which are devices that mimic cell towers in order to capture large quantities of data about mobile phones in the area. In some cases, courts have applied the good-faith exception despite officers' failure to disclose that they intend to use cell-site simulators — much less explain how they work.[7]

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rant that most courts agreed was invalid. In 2015, the FBI obtained a warrant to deliver malware to any computer that connected to a child pornography website, Playpen. Unbeknownst to the user, the malware would collect identifying information from the computer and send it back to the FBI's server. The FBI termed this hack a "Network Investigative Technique" or "NIT." Defendants across the country challenged the validity of the Playpen NIT warrant on the grounds that it violated the Fourth Amendment's probable cause and particularity requirements, and that the magistrate judge lacked jurisdiction to issue it because it authorized searches of computers around the world.[8] Many courts considering the validity of the Playpen NIT warrant determined the warrant was not properly issued but still held that suppression was not required — because of the good-faith exception.[9]

Overcoming the good-faith exception is certainly an uphill battle, but this article offers three arguments defense attorneys can make when challenging its application in cases where officers deploy novel search technologies.

First, the Supreme Court's requirement that the good-faith inquiry remain objective serves an especially important function in cases involving novel surveillance techniques. In such cases, courts are often tempted to emphasize officers' subjective beliefs and good intentions because officers are "doing their best" in the face of new technologies and/or legal uncertainty. Defendants must remind the court that the good-faith exception requires *objectively* reasonable reliance on external authority so as to ensure that police maintain a reasonable understanding of what the Fourth Amendment demands. Where police have exempted themselves from living up to that responsibility, evidence should be suppressed.

Second, and relatedly, there should be a higher bar for demonstrating objective reasonableness in cases where officers rely on authorization to conduct novel types of surveillance because any reasonably well-trained officer would recognize that deploying new surveillance tools presents a heightened risk of infringing constitutional rights. Where courts have not yet considered how a new technology could be used to execute a constitutional search, officers must provide the magistrate with extra detail and specificity to understand precisely how the technology works; otherwise, magistrates will have no way of exercising independent judgment over whether the proposed search satisfies the Fourth Amendment's probable cause and particularity requirements.

Third, defense counsel should urge courts to decide whether the government violated the Fourth Amendment before proceeding to determine whether the good-faith exception applies. Doing so will press courts to seriously consider the Fourth Amendment issues in the case, and provide useful precedent for future defendants to argue against application of the good-faith exception in their cases. Deciding the underlying Fourth Amendment questions also provides much needed guidance to future officers and magistrates, and ensures that the law around surveillance and individual rights does not stagnate through repeated avoidance of substantive decisions on the merits.

II. The good-faith inquiry is an *objective* one that requires officers to maintain a reasonable knowledge of what the law prohibits.

Evidence collected in violation of the Fourth Amendment should ordinarily be suppressed.[10] But in *United States v. Leon*, the Supreme Court created an exception to the exclusionary rule where law enforcement officers rely in "good faith" on a judicially authorized, facially valid warrant later determined to be defective.[11] The Court has since expanded this good-faith exception to apply when an officer reasonably relies on a facially constitutional statute,[12] binding appellate precedent later overturned,[13] or computer records showing outstanding warrants that were later discovered to be inaccurate due to clerical employees' negligence in updating them.[14]

It is well established that, in order for the good-faith exception to apply in any situation, the officer's reliance on the external authority purportedly justifying the search must be "*objectively reasonable*."[15] But courts considering officers' conduct with respect to novel surveillance tools are especially prone to veering into subjective inquiries and disregarding the stated purpose of the objective inquiry: to "'retain[] the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment,'" and "require[] officers to have reasonable knowledge of what the law prohibits."[16] The first step in resisting application of the good-faith exception in cases involving novel surveillance techniques is to emphasize the objective nature of the good-faith inquiry and the need to incentivize knowledge of, and adherence to, Fourth Amendment principles.

In crafting the good-faith exception, the *Leon* Court recognized that "[m]any objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers."[17] The Court responded to those objections by clarifying: "the standard of reasonableness we adopt is an objective one."[18] But courts have since recognized that, for an objective inquiry, "good faith" can be a misleading, "inaccurately named"[19] term — even a "misnomer."[20] The "good faith" label is "perhaps confusing[]," because an officer's subjective good faith is actually irrelevant to the inquiry.[21] Instead, the inquiry is "confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal in light of all of the circumstances."[22] Courts must "strive to maintain … focus on the objective nature of the inquiry and to avoid slipping into consideration of subjective factors, a danger perhaps created by the misleading 'good faith' label."[23]

Courts confronting novel surveillance issues sometimes implicitly stray from these instructions and latch onto a narrative that applying the exclusionary rule would unfairly punish police officers who are merely doing their best in difficult situations. For example, the Eastern District of Virginia recently found that a geofence warrant "*plainly* violate[d] the rights enshrined in [the Fourth] Amendment,"[24] as it "lacked any semblance of [the required] particularized probable cause"[25] and demonstrated a "clear lack of particularity."[26] Yet, when it came time to determine whether the good-faith exception applied, the court excused the officer's reliance on the plainly deficient geofence warrant because "the permissibility of geofence warrants is a complex topic, requiring a detailed, nuanced understanding and application of Fourth Amendment principles, which police officers are not and cannot be expected to possess."[27] Reliance on the warrant was not unreasonable, the court contin-

ued, because "[i]n the face of … legal uncertainty, [the officer] relied on his past experience seeking geofence warrants — he had sought three before applying for this one," and he "sought 'advice from counsel before applying for the warrant.'"[28]

But the novelty of a surveillance technique does not render an officer's conduct "objectively reasonable" and excuse an illegal search. As explained below, much depends on whether the officer provided the magistrate with sufficient information to evaluate the lawfulness of the proposed search. But the first step in resisting application of the good-faith exception is to emphasize the objective nature of the good-faith inquiry, explain that it does not turn on the officer's subjective intentions or beliefs, and remind the court that applying the exception essentially ratifies the officer's conduct as objectively reasonable.

Courts confronting novel surveillance issues sometimes latch onto a narrative that applying the exclusionary rule would unfairly punish police officers who are merely doing their best in difficult situations.

This error is distressingly common. In considering a NIT warrant, the First Circuit held that the good-faith exception applied because "[f]aced with the novel question of whether a NIT warrant can issue — for which there was no precedent on point — the government turned to the courts for guidance" by applying for a warrant.[29] The court noted this situation was "distinct from one in which the government would request and somehow obtain a warrant to engage in conduct it knows to be illegal."[30] Likewise, the Eastern District of Michigan applied the good-faith exception to admit evidence obtained from a NIT warrant because "[t]he FBI should not be faulted for failing to correctly predict the outcome of an intricate, disputed question of federal jurisdiction," and the FBI did not "purposely avoid[] compliance with the law."[31]

And in considering a court order for a cell-site simulator, the Eastern District of Missouri reasoned that applying the exclusionary rule would "serve no useful deterrent purpose" because, "[d]espite the lack of clarity in the law regarding cellphone location surveillance, before employing a Cell Site Simulator in this case, [the officer] presented a sworn application for a court order authorizing the investigators to precisely locate [the defendant's] cellphone," and reasonably relied on the resulting facially valid court order.[32]

Without engaging in subjective inquiries outright, these courts have implicitly reasoned that officers are essentially doing their best in the face of difficult legal questions and absolved these officers of a duty to understand how Fourth Amendment principles apply when police seek authorization to deploy novel surveillance tools.

For example, in *United States v. Lyles*, the Fourth Circuit considered a warrant to search a home for evidence of marijuana possession based on police finding three marijuana stems in a trash pull.[33] In declining to apply the good-faith exception, the court noted that it was "not at all impugn[ing] the subjective good faith of the officer who ran the warrant application through review, including by his superior and a state prosecutor, before submitting it to the magistrate."[34] But the court concluded that "*Leon*'s standard is ultimately an 'objective' one. … And objectively speaking, what transpired here is not acceptable."[35]

To be sure, legal uncertainty around the use of a particular surveillance tool might evidence that an officer lacked subjective bad faith and did not set out intending to violate constitutional rights. But that alone is not enough to trigger the good-faith exception. The only way to ensure that police maintain reasonable knowledge of how to comply with Fourth Amendment principles as new surveillance tools develop is to suppress evidence when an officer violates those principles.

Further, if the novelty of a surveillance tool were always evidence of good faith, then police would have no incentive to adhere to Fourth Amendment requirements. As Justice Potter Stewart warned after his retirement, and before the good-faith exception was adopted, "[i]f the courts admit illegally obtained evidence" in situations "where the search at issue presents the occasion for the trial court to settle a previously unsettled question of Fourth Amendment jurisprudence," "there would be little reason for police officers to err on the side of caution where constitutional principles are unsettled."[36] Instead, officers could present warrant applications with just enough information to get the warrant approved, but not enough information to put the magistrate on notice that the officer was seeking authorization for a novel type of search that risks violating the Fourth Amendment.

By properly applying the objective element of the good-faith inquiry, courts play a crucial role in correcting for these incentives. Officers must still adhere to traditional Fourth Amendment principles when conducting novel types of searches, even when courts have not explicitly ruled on the nuances of how those principles would apply to a particular type of surveillance. When they fail to do so, even if unintentionally, suppressing evidence clarifies to officers what the Fourth Amendment requires and incentivizes caution and candor in future cases involving novel types of searches.

III. The bar for objective reasonableness is heightened where officers seek to use novel surveillance tools.

When seeking to use a novel type of surveillance tool, law enforcement officers must be particularly careful to provide sufficient context and detail to allow a magistrate judge to fully understand the proposed search, so that the magistrate can exercise independent judgment over whether the proposed search is supported by probable cause and, if appropriate, issue a warrant that is sufficiently particularized.

Defendants can urge courts to recognize that the bar for objective reasonableness is heightened in cases involving novel surveillance techniques by referring to basic Fourth Amendment principles that any reasonably well-trained officer should understand: (1) the officer owes a duty of candor to the magistrate who issues the warrant; (2) the officer must provide the magistrate with an opportunity to exercise independent judgment over whether the proposed search is constitutional; (3) the officer must include in the affidavit sufficient

indicia of probable cause to render belief in its existence reasonable; and (4) the warrant must particularize the place to be searched and the things to be seized. These four principles map on to the four situations in which the good-faith exception does not apply, as articulated in *United States v. Leon*, and demand even more from officers who seek authorization to deploy novel surveillance tools, as demonstrated in Table 1.

Each of these principles is discussed further below.

Table 1

Exception to the good-faith exception[37]	Officer's affirmative duty in all cases	Rationale for heightened duty when using novel surveillance tool
An affiant knowingly or recklessly included false information in an affidavit which misled the magistrate who issued the warrant	The officer owes a duty of candor the magistrate who issues the warrant	The magistrate starts with less baseline knowledge and context
The magistrate "wholly abandoned his judicial role" in issuing the warrant such that "no reasonably well-trained officer should rely on the warrant"	The officer must provide the magistrate with an opportunity to exercise independent judgment over whether the proposed search is constitutional	There is likely to be more involvement of non-judicial actors, i.e., those operating the technology, who, like officers, are inadequately incentivized to adhere to constitutional requirements
The warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"	The officer must include in the affidavit sufficient indicia of probable cause to render belief in its existence reasonable	Officers will be tempted to limit the search not based on probable cause but on the surveillance tool's technical capabilities
The warrant is "so facially deficient — i.e., in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid"	The warrant must particularize the place to be searched and the things to be seized	Magistrates will not have a sufficiently precise idea of exactly how/where/on what the search is conducted, and what results from it; it is the officer's responsibility to eliminate any ambiguity in the warrant

1. The officer owes the magistrate a heightened duty of candor because the magistrate is starting with less baseline knowledge and context.

Any reasonably well-trained officer who has been adequately incentivized to comply with the Fourth Amendment will be especially careful to provide the magistrate with as much detail as possible when seeking authorization to use a novel surveillance tool. To establish good faith, an officer must have "reasonable grounds" to believe that a magistrate made a probable cause determination and "properly issued" the warrant.[38] In order for an officer's reliance on the magistrate's determination to be objectively reasonable, the officer must have supplied the magistrate with information "sufficient for a judge to exercise his independent judgment on issuing a search warrant."[39]

Warrant proceedings, which are conducted *ex parte*, always demand a heightened duty of candor from law enforcement because the magistrate only hears from one party — namely, "the officer engaged in the often competitive enterprise of ferreting out crime."[40] There is no adversarial process to bring to light "the information that may contradict the good faith and reasonable basis of the affiant's allegations."[41] Because the magistrate is only getting law enforcement's perspective, that perspective must include a thorough, detailed presentation of facts.

When law enforcement officers seek authorization to conduct surveillance using novel and complex technologies that magistrates are likely unfamiliar with, the already-high bar for candor should be even higher. In order for magistrates to be able to exercise independent judgment as to whether the proposed search would violate the Fourth Amendment, they must be given enough information (including highly technical information, provided in understandable terms) to understand precisely how the search will be conducted and the nature and form of the items to be seized. For example, if the proposed search consists of obtaining data about devices that were in a specified area during a specified time, the magistrate's ability to determine whether this proposed geofence search comports with the Fourth Amendment depends on the officer informing the magistrate of myriad facts that she has no other basis for learning — e.g., the nature and scope of the data, how it will be determined which devices were in that area, the potential for sweeping in unrelated devices, etc.

"By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw."[42] If an affiant "deliberately or recklessly" omits material facts from the warrant application, then the reliance on the warrant is objectively unreasonable.[43]

For example, a Maryland court declined to apply the good-faith exception where the government "submitted an overreaching pen register\trap & trace application that failed to clearly articulate the intended use, i.e., to track [the defendant's] cellphone using an active cell site simulator."[44] The court explained that it "cannot say the [Baltimore Police Department] officers in this case reasonably relied on the warrant obtained through their own misleading order application and unconstitutionally intrusive conduct," because "[t]o do so would allow law enforcement to insulate its own errors merely by presenting limited information to a magistrate, obtaining a warrant post-intrusion, and then re-entering the place to be searched."[45]

The same is true when officers fail to provide the magistrate with facts about the nature of the area to be searched — whether traditional or novel. For example, in *United States v. Reilly*, the Second Circuit held that the good-faith exception did not apply where officers submitted an affidavit

that failed to provide the magistrate with sufficient information about the property at which the search would occur — and which the officers had already searched prior to obtaining the warrant.[46] While the affidavit included a photograph of the property, "the photocopy [wa]s of such poor quality that it would do Rorschach proud."[47] The failure to provide "information about the distances involved, the layout, conditions, and other like particulars of Reilly's land was crucial" to assessing the legality of the search.[48] "Without it, the issuing judge could not possibly make a valid assessment of the legality of the warrant that he was asked to issue."[49] The court held "that recklessness may be inferred when omitted information was 'clearly critical' to assessing the legality of a search,"[50] and found that "[t]he officers' failure in the case before us to provide the issuing judge with information about their search precludes a finding of good faith on their part."[51]

A cursory description of a digital space that will be searched is even more likely to mislead a magistrate than a fuzzy photograph because the magistrate is starting with even less baseline knowledge. If an officer fails to thoroughly explain the proposed search to a magistrate, then the magistrate has an impossible task of double-checking every fact, and every omission of fact, to assess whether the officer has additional information relevant to the magistrate's constitutional task.[52]

Candor about every part of a search is especially crucial when police seek authorization to conduct a novel type of surveillance. Facts about the surveillance tool and how it works are clearly critical to understanding the degree of the privacy invasion at issue and ensuring that the search does not run afoul of the Fourth Amendment's requirements. For example, if an officer fails to disclose that a tool operates with a margin of error that could lead to the collection of information about innocent third parties, then the magistrate has no reason to insist that the officer take steps to narrow the search. If the officer fails to disclose that the tool might reach people in their homes or other protected spaces, then the magistrate is missing information critical to understanding the reasonableness of the search. Officers should reasonably know when they are asking magistrates to approve novel types of searches, so their omission of any facts about how the search will be conducted is necessarily reckless.

2. The officer must provide the magistrate with an opportunity to exercise independent judgment over whether every aspect of the proposed search is constitutional.

The *Leon* Court determined that the good-faith exception should "not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo–Ji Sales*," reasoning that "in such circumstances, no reasonably well trained officer should rely on the warrant."[53] In *Lo-Ji Sales*, an investigator purchased films from an adult bookstore, concluded that the films violated obscenity laws, and then took the films to the Town Justice to obtain a warrant to search the store.[54] The investigator requested that the Town Justice accompany him to the store in order "to allow the Town Justice to determine independently if any other items at the store were possessed in violation of law and subject to seizure."[55] The Court held that the Fourth Amendment does not "countenance open-ended warrants, to be completed while a search is being conducted and items seized or after the seizure has been carried out."[56]

Warrants authorizing complex surveillance processes might fall under this exception to the good-faith exception if the search involves decisions that must be made after the warrant issues. For example, geofence warrants typically specify a geographical area and authorize law enforcement officers to obtain from Google anonymized information about all devices within the area during a specified time. But once officers have obtained that information, they proceed to request from Google additional information about a subset of the devices, and eventually, de-anonymized information about those devices which law enforcement deems most relevant to their investigation — without any further judicial review. These types of warrants force magistrates to cede their role to law enforcement officers. A Virginia court explained:

> The police want to unilaterally tell Google which cellphones it wants to unmask to obtain the owner's personal information. The Court may not give police this judicial discretion. Rather, the Court must be the entity to approve or deny the unmasking and disclosure of the personal identifying information of people to be searched. It can only do this after it makes a probable cause and particularity determination with full information. It cannot delegate this duty to the police.[57]

At first blush, authorizing this type of process might seem distinguishable from the judicial conduct in *Lo-Ji Sales* because there, the Town Justice "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation."[58]

But *Lo-Ji Sales* stands for the broader proposition that "a warrant authorized by a neutral and detached judicial officer is 'a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.'"[59] Such hurried judgment becomes particularly dangerous when armed with powerful, novel surveillance tools — especially those created and/or operated by private companies that generally have no obligation to adhere to Fourth Amendment principles.

"[O]ur basic constitutional doctrine" holds that "individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government."[60] Thus "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police … so that an objective mind might weigh the need to invade that privacy in order to enforce the law."[61] Whether the magistrate joins in the search as a law enforcement officer, or delegates the constitutional review and probable cause determinations to law enforcement officers and/or private actors, Fourth Amendment protections are obviously eroded in a way that any reasonably well-trained officer should recognize.

3. Warrants must be limited by the existence of probable cause to search — not expanded by the search tool's technical capabilities.

The *Leon* Court held that suppression is generally unwarranted where police rely on a warrant that is later found to be unsupported by probable cause, because "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause."[62] Given that independent magistrates might — on the same facts — reach different conclusions as to whether an affidavit establishes probable cause for the proposed search, deference

should be given to the magistrate's determination. In other words, "on close calls second guessing the issuing judge is not a basis for excluding evidence."[63]

Defendants should therefore concentrate the court's attention on obvious disconnects between portions of the place to be searched and the facts presented to establish probable cause. Obvious disconnects — as opposed to more complicated and technical ones — are more likely to lead the court to find that an affidavit was *so* lacking in indicia of probable cause as to render reliance upon it unreasonable.

That is because any reasonably well-trained officer knows that the proper scope of a search must be determined with reference to the facts establishing probable cause. When an officer seeks to use a surveillance tool that will capture vast amounts of information, there must be facts establishing probable cause to collect that vast amount of information. It is not enough to establish that probable cause exists to collect some sliver of it.[64]

Some courts considering applications for geofence warrants have recognized that they fail to meet the Fourth Amendment's probable cause requirement because they gather data about many devices that have nothing to do with the alleged crime. The District of Kansas found, in rejecting a geofence warrant application, that "[i]f a geofence warrant is likely to return a large amount of data from individuals having nothing to do with the alleged criminal activity … the sheer amount of information lessens the likelihood that the data would reveal a criminal suspect's identity, thereby weakening the showing of probable cause."[65] And the Northern District of Illinois determined that, because geofence warrants seek "to cause the disclosure of the identities of various persons whose Google-connected devices entered the geofences, the government must satisfy probable cause as to those persons."[66] The geofence warrant there could not pass constitutional muster because "the government ha[d] not established probable cause to believe that evidence of a crime will be found in the location history and identifying subscriber information of persons *other than [one] Unknown Subject*."[67]

But other cases considering applications for geofence warrants have approved them, finding that they are similar to more traditional types of searches that also sweep in items unrelated to the alleged crime. The District Court for the District of Columbia, for example, noted that an officer searching a business's filing cabinet will likely see some innocuous documents.[68] The court reasoned that "[t]he Fourth Amendment was not enacted to squelch reasonable investigative techniques because of the likelihood — or even certainty — that the privacy interests of third parties uninvolved in criminal activity would be implicated."[69] With respect to the geofence search at issue, the court observed that "it appears physically impossible for the government to have constructed its geofence to exclude everyone but the suspects."[70] In other words, the geofence technique necessarily captures information about devices for which there was no probable cause.

Importantly, the fact that a surveillance tool cannot be deployed in a way that would search only places for which there is probable cause to believe evidence will be found, and seize only items specified in the warrant, should not mean that police can use that tool with impunity. To the contrary, "the Supreme Court has made clear that the good-faith exception applies only if the officers had an objectively reasonable belief that their conduct was *lawful*, and not merely preferable or more expedient than complying with the Fourth Amendment."[71] Officers must take care to ensure that each aspect of the search they seek to conduct comports with longstanding Fourth Amendment principles.

Where the government's good-faith argument implicitly rests on the notion that those principles are harder to follow because of the mechanics of the novel surveillance tool it seeks to use, defense attorneys can urge the court to reaffirm that, as technology continues to develop, courts will "assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[72] While both the good-faith exception and the exclusionary rule itself are relatively modern judicial inventions, the probable cause requirement is not.[73] It is objectively unreasonable for an officer to believe the probable cause requirement loosens merely because police have access to novel surveillance technologies that make the probable cause requirement more difficult to satisfy.

For example, the Ninth Circuit has held that the good-faith exception does not apply to warrants that "authorize wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide no guidelines to distinguish items used lawfully from those the government had probable cause to seize."[74] In considering a warrant that "authorize[d] the seizure of essentially every business record" in a company's offices, the court found that "[d]espite its length and complexity [the] affidavit did not establish the probable cause required to justify the widespread seizure of documents authorized by the warrant in this case."[75] "[W]hen a warrant is facially overbroad, absent *specific assurances* from an impartial judge or magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails."[76]

These principles articulated by the Ninth Circuit apply equally as surveillance techniques develop. The good-faith exception should not apply when a warrant purportedly authorizes a broad search of all information that a surveillance tool is technically capable of gathering, without establishing probable cause to justify the search's breadth.

4. Every place to be searched and item to be seized should be articulated on the face of the warrant.

Where a warrant application seeks authorization for a novel type of search, the particularity requirement is a primary safeguard to ensure that the magistrate is authorizing the actual search that the officer will conduct. The particularity requirement "ensures that the magistrate issuing the warrant is fully apprised of the scope of the search and can thus accurately determine whether the entire search is supported by probable cause."[77] And it serves to "minimize the discretion of the executing officer."[78] "As an irreducible minimum, a proper warrant must allow the executing officers to distinguish between items that may and may not be seized."[79]

In reviewing a NIT warrant application, courts noted the level of detail provided about the investigatory process. For example, the Fourth Circuit commended an officer for "devot[ing] several pages to describing the mechanics of the NIT."[80] And a judge in the Central District of Illinois remarked that "the government's efforts in establishing probable cause and obtaining the NIT warrant were unusually detailed and specific. Such efforts are to be lauded, not deterred."[81] This is not to suggest that it was appropriate to apply the good-faith exception in those cases, but only to establish that, at a minimum, an officer must thoroughly describe the mechanics of the search for which he

seeks authorization such that the warrant would not facially authorize any deviation from the procedure the magistrate approved.

Reliance on the warrant is objectively unreasonable if, in executing the warrant, it becomes ambiguous whether the warrant authorized any aspect of the search.

Cases involving more traditional searches provide useful illustrations of this point. In *United States v. Fahey*, the Northern District of Illinois held that the good-faith exception did not apply where "the officers (1) executed a warrant they knew to be facially ambiguous prior to the execution of the warrant and (2) circumvented the magistrate judge and resolved the ambiguity amongst themselves based on information that was not disclosed to the magistrate who issued the warrant."[82] Special Agent Thomas obtained a search warrant to search "the premises located at 230 Crystal Street, Apartment D … being described as a multi-tenant, two-story apartment complex consisting of four apartments … with apartment D on the left at the top of the stairs with the letter D affixed to the door."[83] But when officers went to execute the warrant, they saw that Apartment D was on the *right*, and Apartment C was on the left. They requested Thomas, who entered the lobby and pointed to the door on the left: Apartment C. The officers then searched Apartment C. The court held that the good-faith exception could not apply because "the officers circumvented the magistrate judge and resolved the warrant's ambiguity based on information that was not disclosed to the magistrate who issued the warrant — conduct that constitutes 'a violation of clearly-established, constitutional rights.'"[84] Similarly, in *United States v. Alcazar-Barajas*, the Ninth Circuit affirmed a district court's decision that, where a warrant had authorized the search of a "gray mobile home type structure," but there were two mobile homes next to each other and neither the warrant nor the warrant affidavit indicated which mobile home was to be searched, "officers 'should have known' that additional authorization was required prior to searching both mobile homes."[85]

These cases demonstrate that, if any ambiguity arises before or during the course of the search, a reasonable officer cannot in good faith rely on a warrant that did not contemplate that ambiguity. Such ambiguity is especially likely to present itself when officers seek to use novel surveillance technologies that require human input in order for the technology to return an output. Where officers submit a warrant application that presents an opportunity for ambiguity to arise, and then decide amongst themselves how the ambiguity should be resolved without further judicial involvement, their reliance on the warrant is objectively unreasonable and the good-faith exception should not apply.

IV. Courts should address the underlying Fourth Amendment question before proceeding to the good-faith inquiry.

One of the most troubling aspects of the good-faith doctrine is that its mere availability leads courts to avoid difficult Fourth Amendment questions that need answering, and thereby keeps the law frozen in time even as technology rapidly advances. In cases involving novel surveillance techniques, it is particularly important that courts decide the underlying Fourth Amendment issue on the merits before deciding whether the good-faith exception

applies. While this argument might not benefit the defendant in one particular case, it will benefit future defendants and the public by ensuring that precedent exists to guide police officers and magistrate judges in determining the permissibility of searches.

Courts considering novel types of surveillance have skirted Fourth Amendment questions in order to resolve difficult cases solely on the good-faith issue. The good-faith exception allowed the Tenth Circuit to "assume (without deciding) that the extraction of data from a user's computer in another district would violate the Federal Magistrates Act and the Federal Rules of Criminal Procedure."[86] The Eastern District of Missouri declined "to affirmatively decide the question of whether and under what circumstances, law enforcement officers would be required to obtain a warrant before employing a Cell Site Simulator to locate a suspect's cellular device."[87] And the Middle District of Alabama invoked the good-faith exception to avoid a "journey into the quagmire of geofence search warrants."[88]

This is not what the Supreme Court originally intended. In developing the good-faith exception, the Supreme Court has been careful not to "jeopardiz[e] [the exclusionary rule's] ability to perform its intended function[]," [89] namely "to deter police misconduct."[90] The *Leon* Court determined that "[i]f the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue" and recognized that "it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue."[91] In fact, "a close reading of *Leon* reveals that, while the Supreme Court intended to vest lower courts with discretion, the preferred sequence is to address the Fourth Amendment issues before turning to the good-faith issue unless there is no danger of 'freezing' Fourth Amendment jurisprudence or unless the case poses 'no important Fourth Amendment questions.'"[92]

The Supreme Court's preference for addressing constitutional issues before addressing the good-faith exception was reflected in the Court's qualified immunity jurisprudence. The objective test for good faith was adopted directly from *Harlow v. Fitzgerald*,[93] which eliminated the subjective component of the qualified immunity inquiry and held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[94] In *Saucier v. Katz*, the Supreme Court instructed lower courts deciding qualified immunity cases "to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found."[95] This was the proper procedure because it would "permit[] courts in appropriate cases to elaborate the constitutional right with greater degrees of specificity."[96] "The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[97]

To be sure, that two-step sequence is no longer "regarded as mandatory in all cases."[98] And the Supreme Court has recently stressed that "lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim."[99] Still, while recognizing avoidance of the underlying constitutional question as the "regular policy," the Supreme Court warned that this policy sometimes "threatens to leave standards of official conduct permanently in limbo."[100] Deciding the underlying constitutional question thus remains "beneficial" when it will "'develop[] constitutional precedent' in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense."[101]

Officers who have deployed novel surveillance techniques in violation of the Fourth Amendment will nearly always argue that the good-faith exception applies. And skipping straight to the good-faith exception will most certainly leave law enforcement in limbo as to what is required when officers seek to conduct similar searches in the future. Courts "should resist the temptation to frequently rest [their] Fourth Amendment decisions on the safe haven of the good-faith exception, lest the court[] fail[s] to give law enforcement and the public the guidance needed to regulate their frequent interactions."[102] Otherwise, "police officers might shift the focus of their inquiry from 'what does the Fourth Amendment require?' to 'what will the courts allow me to get away with?'"[103] Indeed, this is precisely what happened after the Court's opinion in *Alderman v. United States*, which held that only the person whose constitutional rights were violated could bring a Fourth Amendment claim.[104] After that opinion, "'the Government affirmatively counsel[ed] its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties.'"[105]

All federal courts of appeals have recognized that, at least in some cases, "a reviewing court may proceed to the good-faith exception without first deciding whether the warrant was supported by probable cause."[106] But as the Sixth Circuit has recognized, "[i]f every court confronted with a novel Fourth Amendment question were to skip directly to good faith, the government would be given *carte blanche* to violate constitutionally protected privacy rights."[107] "[I]f the exclusionary rule is to have any bite, courts must, from time to time, decide whether statutorily sanctioned conduct oversteps constitutional boundaries."[108]

Additionally, deciding the underlying constitutional question is essential to ensure robust development of Fourth Amendment law, which in turn is essential to ensure that constitutional rights remain protected as law enforcement techniques evolve. The development of case law on whether a warrant is required to collect location information over a period of time exemplifies the importance of reaching the merits of a Fourth Amendment question rather than resolving the case solely on good-faith exception grounds. In *United States v. Carpenter*, the Sixth Circuit faced a situation where law enforcement had obtained cell-site location information (CSLI) from wireless carriers. One judge believed it was "unnecessary to reach a definitive conclusion on the Fourth Amendment issue," as "some extension of the good-faith exception to the exclusionary rule would be appropriate."[109] But the Sixth Circuit's majority opinion squarely addressed the Fourth Amendment issue and held that the government's collection of CSLI was not a search, thereby presenting the Supreme Court with the opportunity to determine "whether the Government conducts a search under

the Fourth Amendment when it accesses historical cellphone records that provide a comprehensive chronicle of the user's past movement."[110]

The Supreme Court would likely have been much delayed in answering this question if lower courts had routinely refrained from deciding whether CSLI collection was a Fourth Amendment search. By the time the Supreme Court agreed to hear *Carpenter v. United States*, five federal courts of appeals had addressed whether police acquisition of historical CSLI is a search requiring a warrant[111] even though the good-faith exception was a live issue in three of those cases.[112] Without the thorough development of the issue in lower courts, it is unlikely the Supreme Court would have granted certiorari and provided necessary guidance to law enforcement and magistrate judges in its seminal opinion, *Carpenter v. United States*.[113]

Where a case presents the opportunity to analyze whether a Fourth Amendment violation occurred, defense attorneys should urge the Court to take that opportunity in order to contribute to Fourth Amendment doctrine in a way that provides meaningful guidance to law enforcement agents and future litigants.[114]

V. Conclusion

In order to prevent police from deploying novel surveillance tools with impunity, courts must apply the exclusionary rule when officers have inadequately explained the contours of their proposed searches to magistrates and relied on warrants that obviously violate Fourth Amendment principles. The novelty of a particular surveillance tool that an officer seeks to deploy only heightens the need for officers to inform magistrates about their searches with utmost candor and provide magistrates with an opportunity to exercise independent judgment over every aspect of the proposed search before it occurs. As surveillance technologies develop, officers must scrupulously adhere to traditional Fourth Amendment rules requiring that searches be based on a showing of probable cause and a particularized warrant. Regardless of how subjectively well-intentioned officers are, the exclusionary rule should apply when it would incentivize officers to proceed with candor and caution when seeking to use novel surveillance techniques and help them maintain a working understanding of how to comply with the Fourth Amendment as surveillance techniques develop.

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Notes

1. United States v. Leon, 468 U.S. 897, 922–23 (1984) (footnote omitted).

2. United States v. Reilly, 76 F.3d 1271, 1280 (2d Cir. 1996), *aff'd on reh'g*, 91 F.3d 331 (2d Cir. 1996) (per curiam); United States v. Zimmerman, 277 F.3d 426, 438 (3d Cir. 2002); United States v. Watson, 498 F.3d 429, 434 (6th Cir. 2007); United States v. Goody, 377 F.3d 834, 837 (8th Cir. 2004).

3. *See* Davis v. United States, 564 U.S. 229, 258 (2011) (Breyer, J., dissenting) ("[I]f the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was 'deliberate, reckless, or grossly negligent,' then the 'good faith' exception will swallow the exclusionary rule.").

4. United States v. Chatrie, 590 F. Supp. 3d 901 (E.D. Va. 2022) (holding the warrant violated the Fourth Amendment but the good-faith exception applied), *appeal docketed*, No. 22-4489 (4th Cir. Aug. 29, 2022); United States v. Davis, No. 2:21-CR-101-MHT-JTA, 2022 WL 3009240, at *9 (M.D. Ala. July 1, 2022), *report and recommendation adopted,* No. 2:21CR101-MHT, 2022 WL 3007744 (M.D. Ala. July 28, 2022) (applying the good-faith exception without deciding the underlying Fourth Amendment question).

5. *Davis*, 2022 WL 3009240, at *9.

6. *Chatrie*, 590 F. Supp. 3d at 930, 941.

7. United States v. Ellis, 270 F. Supp. 3d 1134, 1154 (N.D. Cal. 2017); United States v. Temple, No. S1415CR2301JARJMB, 2017 WL 7798109, at *33 (E.D. Mo. Oct. 6, 2017), *report and recommendation adopted,* No. 4:15-CR-230-JAR-L, 2018 WL 1116007 (E.D. Mo. Feb. 27, 2018); State v. Copes, 454 Md. 581, 628 (2017).

8. *See, e.g.*, United States v. Matish, 193 F. Supp. 3d 585, 592 (E.D. Va. 2016); United States v. Michaud, No. 3:15-CR-05351-RJB, 2016 WL 337263, at *3 (W.D. Wash. Jan. 28, 2016); United States v. Werdene, 883 F.3d 204, 207 (3d Cir. 2018); United States v. McLamb, 880 F.3d 685, 688 (4th Cir. 2018); United States v. Acevedo-Lemus, 800 F. App'x 571 (9th Cir. 2020); United States v. Workman, 863 F.3d 1313, 1316 (10th Cir. 2017).

9. *See, e.g.*, United States v. Werdene, 883 F.3d 204, 214, 217 (3d Cir. 2018); United States v. Ammons, 207 F. Supp. 3d 732, 744 (W.D. Ky. 2016), *aff'd,* 806 F. App'x 378 (6th Cir. 2020); United States v. Broy, 209 F. Supp. 3d 1045, 1059 (C.D. Ill. 2016), *aff'd sub nom.* United States v. Kienast, 907 F.3d 522 (7th Cir. 2018); United States v. Horton, 863 F.3d 1041, 1052 (8th Cir. 2017); United States v. Henderson, 906 F.3d 1109, 1114, 1120 (9th Cir. 2018); United States v. Michaud, No. 3:15-CR-05351-RJB, 2016 WL 337263, at *6 (W.D. Wash. Jan. 28, 2016); United States v. Scarbrough, No. 3:16-CR-035, 2016 WL 5900152, at *2 (E.D. Tenn. Oct. 11, 2016); United States v. Kahler, 236 F. Supp. 3d 1009, 1022 (E.D. Mich. 2017).

10. Mapp v. Ohio, 367 U.S. 643, 648 (1961); United States v. Doyle, 650 F.3d 460, 466 (4th Cir. 2011) ("Ordinarily, when a search violates the Fourth Amendment, the fruits thereof are inadmissible under the exclusionary rule.").

11. *Leon*, 468 U.S. at 920–21.

12. Illinois v. Krull, 480 U.S. 340 (1987).

13. *Davis*, 564 U.S. at 241.

14. Arizona v. Evans, 514 U.S. 1, 4 (1995); Herring v. United States, 555 U.S. 135, 137 (2009).

15. *Leon*, 468 U.S. at 922 (emphasis added); *see also Krull*, 480 U.S. at 355 (1987) ("As we emphasized in *Leon*, the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers.").

16. *Leon*, 468 U.S. at 919 n.20 (quoting Illinois v. Gates, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring)).

17. *Id.* at 919 n.20.

18. *Id.*

19. United States v. Robinson, No. CR 12-01101 MMM, 2013 WL 12073461, at *5 (C.D. Cal. June 10, 2013) ("The good faith exception is somewhat inaccurately named, as the key consideration underlying the exception is not whether an officer acted in good faith, but whether the officer's reliance on an outside source of information or guidance regarding the constitutionality of his actions, e.g., a magistrate's approval of a warrant or a statute in force, was objectively reasonable."), *aff'd,* 623 F. App'x 855 (9th Cir. 2015).

20. United States v. Williams, No. 3:17-CR-00238, 2019 WL 4276992, at n.3 (M.D. Tenn. Sept. 10, 2019).

21. Herring v. United States, 555 U.S. 135, 142 (2009).

22. *Id.* at 145 (quoting *Leon*, 468 U.S. at 922 n.23); *see also* United States v. Savoca, 761 F.2d 292, 294 n.1 (6th Cir. 1985) ("[A]lthough the term 'good faith'

does not fully capture the objective nature of the inquiry which we must undertake, we will use that term as a 'short-hand description.'").

23. United States v. Potts, 586 F.3d 823, 833 n.10 (10th Cir. 2009).

24. *Id.* at 905 (emphasis added).

25. *Id.* at 927.

26. *Id.* at 934.

27. *Id.* at 938.

28. *Chatrie*, 590 F. Supp. 3d at 938 (quoting *McLamb*, 880 F.3d at 691).

29. United States v. Levin, 874 F.3d 316, 323 (1st Cir. 2017).

30. *Id.* at 323 n.6.

31. United States v. Kahler, 236 F. Supp. 3d 1009, 1022 (E.D. Mich. 2017).

32. *Temple*, 2017 WL 7798109, at *38–39.

33. United States v. Lyles, 910 F.3d 787, 790, 792 (4th Cir. 2018).

34. *Id.* at 796.

35. *Id.* at 797.

36. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1402 (1983).

37. *Leon*, 468 U.S. at 923.

38. *Id.* at 922–23.

39. United States v. Tate, 524 F.3d 449, 457 (4th Cir. 2008); *see also Reilly*, 76 F.3d 1271, 1280 (2d Cir.) ("For the good faith exception to apply, the police must reasonably believe that the warrant was based on a valid application of the law to the known facts. In the instant matter, the officers failed to give these facts to the magistrate."), *aff'd on reh'g,* 91 F.3d 331 (2d Cir. 1996) (per curiam); State v. Andrews, 227 Md. App. 350, 375 (2016) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)) ("To undertake the Fourth Amendment analysis and ascertain 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security,' … it is self-evident that the court must understand why and *how* the search is to be conducted.").

40. Johnson v. United States, 333 U.S. 10, 14 (1948).

41. Franks v. Delaware, 438 U.S. 154, 169 (1978).

42. United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985), *amended,* 769 F.2d 1410 (9th Cir. 1985).

43. Lombardi v. City of El Cajon, 117 F.3d 1117, 1126 (9th Cir. 1997).

44. *Andrews*, 227 Md. App. at 419.

45. *Id.* at 420.

46. *Reilly*, 76 F.3d at 1280.

47. *Id.* at 1280.

48. *Id.*

49. *Id.*

50. *Id.* (quoting Rivera v. United States, 928 F.2d 592, 604 (2d Cir.1991)).

51. *Id.* at 1283.

52. United States v. Glover, 755 F.3d 811, 820 (7th Cir. 2014) (finding that an officer's omission of information about a confidential informant's credibility "provide[s] sufficient circumstantial evidence to support a reasonable and thus permissible inference of reckless disregard for the truth," because "[t]o hold otherwise would place a substantial burden on magistrates to double-check the availability or lack of all relevant information every time an informant appears").

53. *Leon*, 468 U.S. at 923 (citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)).

54. *Lo-Ji Sales, Inc.*, 442 U.S. at 321.

55. *Id.*

56. *Id.* at 325.

57. In re the Search of Information Stored at the Premises Controlled by Google, No. KM-2022-79, 2022 WL 584326, at *9 (Va. Cir. Ct. Feb. 24, 2022).

58. *Lo-Ji Sales, Inc.*, 442 U.S. at 327.

59. *Id.* at 326 (quoting *Johnson*, 333 U.S. at 14).

60. United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div., 407 U.S. 297, 317 (1972).

61. McDonald v. United States, 335 U.S. 451, 455 (1948).

62. *Leon*, 468 U.S. at 914.

63. United States v. Morton, 46 F.4th 331, 338 (5th Cir. 2022), *petition for cert. filed* (U.S. Jan. 9, 2023) (No. 22-6489); *see also* KRL v. Est. of Moore, 512 F.3d 1184, 1190 (9th Cir. 2008) ("Our cases repeatedly emphasize this distinction between warrants with disputable probable cause and warrants so lacking in probable cause that no reasonable officer would view them as valid.").

64. *See In re Search*, 481 F. Supp. 3d at 744, 746, 751 (rejecting a geofence warrant, in part because "the government ha[d] not established probable cause to believe that evidence of a crime will be found in the location history and identifying subscriber information of persons *other than the Unknown Subject*," and yet "[t]he warrant s[ought] to gather evidence on potentially *all* users of phones in the geofence").

65. Matter of Search of Info. that is Stored at Premises Controlled by Google, LLC, 542 F. Supp. 3d 1153, 1157 (D. Kan. 2021).

66. Matter of Search of Info. Stored at Premises Controlled by Google, 481 F. Supp. 3d 730, 750–51 (N.D. Ill. 2020).

67. *Id.* at 751 (emphasis in original).

68. Matter of Search of Info. that is Stored at Premises Controlled by Google LLC, 579 F. Supp. 3d 62, 84–85 (D.D.C. 2021).

69. *Id.* at 84.

70. *Id.* at 85.

71. United States v. Rush, 808 F.3d 1007, 1012–13 (4th Cir. 2015) (citing *Davis*, 131 S.Ct. at 2427).

72. Kyllo v. United States, 533 U.S. 27, 34 (2001).

73. U.S. CONST. AMEND. IV.

74. United States v. Spilotro, 800 F.2d 959, 964, 968 (9th Cir. 1986); *accord* United States v. Embry, 625 F. App'x 814, 817 (9th Cir. 2015); United States v. Crozier, 777 F.2d 1376, 1381 (9th Cir. 1985).

75. United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995).

76. *Id.* at 429.

77. United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986); *accord* Voss v. Bergsgaard, 774 F.2d 402, 404 (10th Cir.1985) ("The particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.").

78. United States v. Galpin, 720 F.3d 436, 445 n.5 (2d Cir. 2013).

79. *United States v. Leary*, 846 F.2d 592, 602 (10th Cir. 1988).

80. *McLamb*, 880 F.3d at 689.

81. United States v. Broy, 209 F. Supp. 3d 1045, 1058 (C.D. Ill. 2016), *aff'd sub nom.* United States v. Kienast, 907 F.3d 522 (7th Cir. 2018).

82. United States v. Fahey, No. 07 CR 239-8, 2008 WL 239152, at *5 (N.D. Ill. Jan. 29, 2008) (unreported).

83. *Id.* at *1.

84. *Id.* at *3 (quoting Jones v. Wilhelm, 425 F.3d 455, 465 (7th Cir. 2005)).

85. United States v. Alcazar-Barajas, 768 F. App'x 705, 707 (9th Cir. 2019).

86. United States v. Workman, 863 F.3d 1313, 1321 (10th Cir. 2017).

87. *Temple*, 2017 WL 7798109, at *30.

88. United States v. Davis, No. 2:21-CR-101-MHT-JTA, 2022 WL 3009240, at *9 (M.D. Ala. July 1, 2022), *report and recommendation adopted,* No. 2:21CR101-MHT, 2022 WL 3007744 (M.D. Ala. July 28, 2022).

89. *Leon*, 468 U.S. at 905.

90. *Id.* at 916.

91. 468 U.S. at 925.

92. United States v. Dahlman, 13 F.3d 1391, 1397 (10th Cir. 1993) (quoting *Leon,* 468 U.S. at 924–925).

93. 457 U.S. 800, 815-819 (1982).

94. *Harlow*, 457 U.S. at 817–818; *see also Malley v. Briggs*, 475 U.S. 335, 344 (1986) ("[T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon, supra,* defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest[.]").

95. 533 U.S. 194, 207 (2001).

96. *Id.*

97. *Id.* at 201.

98. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

99. D.C. v. Wesby, 138 S. Ct. 577, 589 n.7 (2018).

100. Camreta v. Greene, 563 U.S. 692, 706 (2011); *accord* Sabir v. Williams, 52 F.4th 51, 58 n.3 (2d Cir. 2022).

101. Plumhoff v. Rickard, 572 U.S. 765, 774 (2014) (quoting *Pearson*, 555 U.S. at 236).

102. United States v. Molina-Isidoro, 884 F.3d 287, 293 (5th Cir. 2018) (Costa, J., concurring).

103. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1403 (1983).

104. Alderman v. United States, 394 U.S. 165 (1969).

105. United States v. Payner, 447 U.S. 727, 730 (1980) (quoting United States v. Payner, 434 F. Supp. 113, 132–33 (N.D. Ohio 1977)).

106. United States v. Legg, 18 F.3d 240, 243 (4th Cir. 1994) (citing *Leon*, 468 U.S. at 925); *accord* United States v. Zayas-Diaz, 95 F.3d 105, 112 (1st Cir. 1996); United States v. Moore, 968 F.2d 216, 222 (2d Cir. 1992); United States v. Primo, 223 F. App'x 187, 189 (3d Cir. 2007); United States v. Maggitt, 778 F.2d 1029, 1033 (5th Cir. 1985); United States v. Chaar, 137 F.3d 359, 363 (6th Cir. 1998); United States v. Fairchild, 940 F.2d 261, 264 (7th Cir. 1991); United States v. Taylor, 119 F.3d 625, 629 (8th Cir. 1997); United States v. Odell, 49 F. App'x 730, 731 (9th Cir. 2002); United States v. Bishop, 890 F.2d 212, 216 (10th Cir. 1989); United States v. Williams, 177 F. App'x 914, 917 (11th Cir. 2006).

107. United States v. Warshak, 631 F.3d 266, 282 n.13 (6th Cir. 2010).

108. *Id.*; *see also* United States v. Esquivel-Rios, 725 F.3d 1231, 1239 (10th Cir. 2013) (encouraging district court on remand to address both the existence of a constitutional violation and the applicability of the good-faith exception).

109. United States v. Carpenter, 819 F.3d 880, 894 (6th Cir. 2016) (Stanch, J., concurring), *rev'd sub nom.*, Carpenter v. United States, 138 S. Ct. 2206 (2018).

110. Carpenter v. United States, 138 S. Ct. 2206 (2018).

111. *See* In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 613 (5th Cir. 2013); United States v. Davis, 785 F.3d 498, 511–13 (11th Cir. 2015) (en banc); United States v. Graham, 824 F.3d 421, 424–25 (4th Cir. 2016) (en banc); *Carpenter*, 819 F.3d at 890; In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't, 620 F.3d 304, 305 (3d Cir. 2010).

112. The courts in *Davis*, *Graham*, and *Carpenter* could have applied the good-faith exception without addressing the merits. *See, e.g.*, United States v. Carpenter, 926 F.3d 313, 318 (6th Cir. 2019) (on remand from the Supreme Court, holding the good-faith exception applied).

113. 138 S. Ct. 2206 (2018).

114. The ACLU has filed several amicus briefs making this argument. *See* Brief for the ACLU et al. as Amici Curiae Supporting Appellant, United States v. Chatrie, No. 22-4489 (2023), available at https://www.aclu.org/legal-document/brief-amici-curiae-aclu-aclu-virginia-and-eight-federal-public-defender-offices; Brief of the ACLU and the ACLU of Maryland as Amici Curiae Supporting Appellant, United States v. Stephens, 736 F.3d 327 (4th Cir. 2014) (No. 12-4625), available at https://www.aclu.org/sites/default/files/assets/filed_aclu_amicus_in_support_of_rehrg_petition_2.pdf; Brief for the ACLU, the ACLU of Florida & the Center for Democracy and Technology as Amici Curiae Supporting Appellant, United States v. Davis, 754 F.3d 1205 (11th Cir.) (No. 12-12928-EE), *vacated*, 573 Fed. App'x 925 (11th Cir. 2014) (en banc), available at https://www.aclu.org/sites/default/files/field_document/Q%20Davis%20en%20banc%20amicus%20ACLU%20CDT%20FILED.pdf; Brief for the ACLU & the ACLU of Kansas as Amici Curiae Supporting Appellant, United States v. Hohn, 606 Fed. App'x 902 (10th Cir. 2014) (No. 14-3030), available at https://www.aclu.org/sites/default/files/assets/hohn_aclu_amicus_brief_filed.pdf. ■

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