No. 18-285

IN THE
Supreme Court of the United States

MISSOURI,
Petitioner,

v.

PHILLIP DOUGLASS & JENNIFER M. GAULTER,
Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. This case is a good vehicle, despite Respondents' objections. 1

II. Respondents' arguments demonstrate why the lower court split on severability leads to divergent outcomes. 6

III. The Petition's remaining questions presented are squarely raised by the opinion below. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Byrd v. United States,
138 S. Ct. 1518 (2018)... 3

Cassady v. *Goering*,
567 F.3d 628 (10th Cir. 2009).................... 1, 2, 7, 8

Florida v. Jardines,
569 U.S. 1 (2013).. 3, 6

Heien v. North Carolina,
135 S. Ct. 530 (2014).. 3

Huber v. *Huber*,
204 S.W.3d 364 (Mo. Ct. App. 2006) 2

Hudson v. *Michigan*,
547 U.S. 586 (2006)... 11

In re Contest of Primary Election Candidacy of Fletcher,
337 S.W.3d 137 (Mo. Ct. App. 2011) 2

Michigan v. *Long*,
463 U.S. 1032 (1983)... 6

Nelson v. *Adams USA, Inc.*,
529 U.S. 460 (2000)... 4

United States v. *Christine*,
687 F.2d 749 (3d Cir. 1982) 4, 5

United States v. *Embry*,
625 F. App'x 814 (9th Cir. 2015)............................ 7

United States v. *Freeman*,
685 F.2d 942 (5th Cir. 1982) 7

United States v. *Galpin*,
720 F.3d 436 (2d Cir. 2013) 4, 5, 6, 7

United States v. *Greene*,
250 F.3d 471 (6th Cir. 2001) 7

United States v. Grubbs,
547 U.S. 90 (2006) 3, 9

United States v. *Leon*,
468 U.S. 897 (1984) 10

United States v. *Morris*,
977 F.2d 677 (1st Cir. 1992) 7

United States v. *Sells*,
463 F.3d 1148 (10th Cir. 2006) 5, 7

Statutes

Mo. Rev. Stat. 27.050 2

Mo. Rev. Stat. 542.286 6

Mo. Rev. Stat. 547.200 3

INTRODUCTION

By adopting the minority rule for the severability of a search warrant, the divided decision below widened a split among the lower courts and suppressed evidence discovered pursuant to indisputably valid portions of the warrant. Respondents do not seriously dispute that there is a significant split of authority on the standard for severing a search warrant, or that this difference was outcome-determinative in this case. *See* Br. in Opp. 18-19. Instead, they rely principally on putative vehicle problems that have no basis in fact or law. There is no "sound reason" for either the rule or the outcome adopted below. *Cassady* v. *Goering*, 567 F.3d 628, 657 (10th Cir. 2009) (McConnell, J., dissenting). This Court should grant review and resolve the split.

I. This case is a good vehicle, despite Respondents' objections.

Respondents argue that this case presents a "bad vehicle" to review the questions presented, Br. in Opp. 5-15, but the vehicle problems they identify are all illusory.

First, Respondents argue that the case has become moot because the local prosecutor filed—and then withdrew, with Respondents' express consent—an abortive *nolle prosequi* while the appeal was still pending. *See* Br. in Opp. 5-9. This argument has no merit. After the Missouri Supreme Court issued its opinion—but before it issued its mandate and while the State's motion for rehearing in the Missouri Supreme Court was pending—the local prosecutor filed a *nolle prosequi* in the trial court to dismiss the case. *See* Resp. App. 2 A8. The prosecutor then asked for leave to withdraw the *nolle prosequi* a few weeks

later. *Id.* Because the Missouri Supreme Court's mandate had not issued, the motion explained, the trial court had no jurisdiction to dismiss the case, *Huber* v. *Huber*, 204 S.W.3d 364 (Mo. Ct. App. 2006), and the local prosecutor had no authority to act because the State of Missouri was still represented exclusively by the Office of the Attorney General, as it is to this day. *See* Mo. Rev. Stat. 27.050.

Respondents concede that they "consented" to the prosecutor's motion to withdraw the *nolle prosequi*, and that they did so for strategic reasons—because they "hop[ed] that the Opinion in the underlying case would bind the retrial of their action such that the evidence would be suppressed." Br. in Opp. 8. The trial court granted the motion to withdraw without opposition. Resp. App. 2 A8. The Missouri Supreme Court did not rule on the State's motion for rehearing until several weeks after. *See* Pet. App. A1. The trial court case remains open today. *See* Resp. App. 2 A8 (listing a March 2019 status conference).

Thus, Respondents' mootness argument has no merit. The local prosecutor lacked authority to file the *nolle prosequi*, the trial court lacked jurisdiction to grant it, Respondents did not oppose its withdrawal, and Respondents should not now be allowed to dispute the withdrawal to which they expressly consented for admittedly strategic reasons. *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 146 (Mo. Ct. App. 2011) ("Missouri courts in particular have consistently refused to allow litigants to take contrary positions"). The criminal case is still pending, awaiting the final outcome of this appeal from the suppression hearing. The case is not moot.

Second, Respondents argue that "the State's interest is speculative and may become moot" because no trial has yet occurred and Missouri's appeal from the suppression order is interlocutory. Br. in Opp. 9-10. This argument is also meritless. Respondents concede that "Missouri authorizes interlocutory appeals of the pre-trial suppression of evidence." *Id.* at 9 (citing Mo. Rev. Stat. 547.200). Instead, Respondents suggest that this Court should not entertain this appeal in an interlocutory posture, but should require the State to appeal only after "refil[ing] the burglary charge" and "los[ing] that case" at trial. *Id.* at 10. But, as Respondents effectively concede, a criminal trial almost certainly is not feasible absent this Court's review of the suppression order, because critical inculpatory evidence has been suppressed. *See id.* at 8. In fact, the prosecutor's unauthorized *nolle prosequi* filing strongly suggests that the suppression ruling will effectively dispose of the case as a whole, because it implies that the prosecutor does not believe there is sufficient evidence to pursue the case if the erroneous suppression ruling is not overturned. *See* Br. in Opp. 9-10. For this reason, this Court commonly reviews suppression orders in exactly the same procedural posture as this case. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1523 (2018); *Heien v. North* Carolina, 135 S. Ct. 530, 535 (2014); *Florida v. Jardines*, 569 U.S. 1, 5 (2013); *United States v. Grubbs*, 547 U.S. 90, 93 (2006).

Third, contrary to Respondents' mistaken assertions, *see* Br. in Opp. 10-12, the State fully preserved its severance argument below. A party must preserve "the substance of the issue" presented in a petition for writ of certiorari, but it does not have to "raise [a split] in the lower court." Br. in Opp. 11. "[Preservation] does not demand the incantation of

particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Thus, nothing "prevents [this Court] from declaring what [the Fourth Amendment] requires in this case, for that matter was fairly before" the lower court. *Id*.

Missouri took the same position below that it takes in its Petition here: Because the warrant is severable, evidence obtained pursuant to the valid parts of the warrant should be admissible, and only evidence obtained pursuant to the invalid parts of the warrant should be suppressed. *See* Resp. App. 5 A35 (arguing severance should apply "where a failure to redact the warrant would result in suppression of evidence . . . validly seized"); *id*. at A33 & n.6 (arguing that only evidence "seized pursuant to the invalid clause of the warrant" should be suppressed and there "was no evidence seized pursuant to the invalid clause"); *id*. at A39 (arguing that evidence "seized pursuant to the valid portions" should not be suppressed). In doing so, the State relied on cases that did not follow the erroneous "greater part" test, such as *United States* v. *Christine*, 687 F.2d 749, 754 (3d Cir. 1982) (severing "phrases and clauses that are invalid" while "preserving those . . . that satisfy the Fourth Amendment"), and *United States* v. *Galpin*, 720 F.3d 436, 448-49 (2d Cir. 2013). *See* Resp. App. 5 A33, A34, A35, A36, and A43. Respondents fault the State for arguing that severance was appropriate even under the Tenth Circuit's test. Br. in Opp. 11. But any merits brief would do the same in an effort to show that the search was valid under any test, and doing so was not a "waiver" of the present argument that the Tenth Circuit's test, as applied by the Missouri Supreme Court, is legally erroneous.

In fact, the Missouri Supreme Court rejected the State's Fourth Amendment severance argument for the very reason that it was inconsistent with the "greater part" test adopted by the Tenth Circuit in *United States* v. *Sells*, 463 F.3d 1148 (10th Cir. 2006). The court explained: "The State suggests no harm resulted" because "the items seized were those for which probable cause existed" and which were particularly described "in the valid portions" of the warrant. Pet. App. A22. "But," the court held, "such argument has no relevance under the severance doctrine." *Id*. (citing *Sells*, 463 F.3d at 1159). The court reasoned that "[t]he severance doctrine cannot be used to save a general warrant and is, therefore, inappropriate in this case." Pet. App. A21-A22 (citing *Sells*, 463 F.3d at 1158). The State disagrees with the lower court's reading of the Fourth Amendment and seeks review. *See* Pet. 11.

The dissent below disagreed with both the majority's test and its holding, which confirms that the questions raised in the Petition were fairly before the lower court. The dissent asked "[i]f the *invalid* portions make up the greater part of the search warrant," where *Sells* asked whether the *valid* portions make up the greater part of the warrant. Pet. App. A43 (emphasis added). This different framing was not accidental or semantic. The dissent justified its rule by quoting extensively from *Christine*, 687 F.2d at 753, and *Galpin*, 720 F.3d at 450—the same cases cited by the briefing below. Pet. App. A43-44. Indeed, the dissent quoted *Galpin*'s articulation of the majority rule: Severance should apply so long as "'the valid portions comprise more than an insignificant or tangential part of the warrant.'" Pet. App. A44 (quoting *Galpin*, 720 F.3d at 450). The dissent then concluded that (a) the invalid part did not constitute

"the greater part of the search warrant," and in fact (b) the invalid part was "de minimis compared to the valid portions of the warrant." Pet. App. A45.

Fourth, there was no independent and adequate state ground for the lower court's ruling. Br. in Opp. 12-15. Respondents say the property searched was in Blue Springs, Missouri, and outside the Kansas City officer's jurisdiction. *Id*. at 12 (citing Mo. Rev. Stat. 542.286). But they agree that no lower court decided this issue, *id*., and the hearing transcript shows that Blue Springs officers led the search, *see* Tr. 14; Resp. App. 6 A64-65. In any event, Respondents cite no authority indicating that any such jurisdictional issue, if it existed, would provide a basis for suppression of evidence. Respondents also say the warrant is invalid under the Missouri Constitution. Br. in Opp. 12-13. But they acknowledge that the ruling below did not rely on the Missouri Constitution, *id*., and they admit that the Missouri Supreme Court has held that the Missouri Constitution's prohibition against unreasonable searches is "'co-extensive with the Fourth Amendment,'" *id*. (citation omitted). A decision must actually be "based on" state law for that ground to be "adequate and independent." *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983).

II. Respondents' arguments demonstrate why the lower court split on severability leads to divergent outcomes.

Respondents next assert that "[t]here is no 'conflict,'" Br. in Opp. 15-20, but their arguments lack merit.

As the Petition explained in detail, Pet. 8-15, most courts treat severance as the default rule when a search is conducted pursuant to valid portions of the

warrant. *United States* v. *Embry*, 625 F. App'x 814, 817 (9th Cir. 2015); *Galpin*, 720 F.3d at 449-50; *United States* v. *Greene*, 250 F.3d 471, 477 (6th Cir. 2001); *United States* v. *Morris*, 977 F.2d 677, 682 (1st Cir. 1992); *United States* v. *Freeman*, 685 F.2d 942, 952 (5th Cir. 1982). But the Missouri Supreme Court and the Tenth Circuit apply severance only if the valid portions of the warrant make up the greater part of the warrant. Pet. App. A20; *Sells*, 463 F.3d at 1151. Respondents fail to reconcile this split.

First, Respondents mistakenly say that the opinion below "was not decided under" the severance doctrine, Br. in Opp. 15-17, because the court did not in fact sever the warrant. On the contrary, the majority below spent the bulk of its opinion analyzing severance. *See* Pet. App. A8-A27. Respondents seem to argue that this analysis was unnecessary because the warrant was supposedly a "general warrant." Br. in Opp. i, 15-18. This argument puts the cart before the horse. It was *Sells*'s erroneous "greater part" test that led the majority of the Missouri Supreme Court to conclude that the warrant was a non-severable, "general warrant." *See* Pet. App. A20-A21. Had the court severed the invalid parts of the warrant, the remainder would have been valid and particularized.

Indeed, Respondents concede that "the reasoning of the Missouri Supreme Court" mirrors that of the panel in *Cassady*, 567 F.3d 628. Br. in Opp. 17. *Cassady* directly implicated the circuit split on the proper standard for severance, as Judge McConnell carefully outlined in dissent. 567 F.3d at 656 ("The crucial point is that other courts have often concluded that severance is appropriate even when the overbroad portion of the warrant authorizes a general search and seizure—the precise scenario before us

here."). Respondents repeat these same arguments in a later section addressing the merits, Br. in Opp. 21-22, and they are mistaken there for the same reasons.

Second, the Tenth Circuit's rule, adopted below, leads to substantively different outcomes than the rule adopted by the majority of courts. Respondents concede that other circuit courts use "different language" to define severance, but they assert that it "makes no difference." Br. in Opp. 18-19. But the different language is "not merely semantic." *Cassady*, 567 F.3d at 650 (McConnell, J., dissenting). The two tests lead to different outcomes in at least two scenarios: when a search and seizure is valid under a part of the warrant that is not the "greater part" of the warrant, and when a warrant contains mistaken "catchall" language. *See* Pet. 10-11. Respondents assert, without any explanation, that the valid parts of the warrant here were "insignificant" or tangential. Br. in Opp. 19. But those valid portions describe in specific detail the place to be searched and the exact items that were to be found there, *see* Pet. App. A58 (search warrant). Respondents' implausible position illustrates why the split of authority leads to different outcomes: The warrant's detailed descriptions are significant enough to authorize the search and seizure standing alone, so they easily satisfy the severability rule followed by most courts.

III. The Petition's remaining questions presented are squarely raised by the opinion below.

Respondents separately assert that this case does not squarely present the Petition's questions about probable cause and particularity (the second question presented), or the exclusionary rule and a court-

approved legal mistake (the third question presented). They are mistaken on both points.

The Court should grant review because the opinion below conflicts with *United States* v. *Grubbs*, 547 U.S. 90, 97 (2006). *See* Pet. 15-23. The warrant form used in this case had three parts: (1) a "probable cause" section with a series of checkboxes, (2) a "to be searched" section that had to be filled in with text, and (3) a "to be searched for and seized" section that also had to be filled in with text. Pet. App. A58. Respondents say that the "checkbox" part of the warrant is really about the things to be seized, not about probable cause. *See* Br. in Opp. 11-12; 13-14; 19-20. That argument plainly misreads the form. Pet. App. A58. Indeed, if Respondents were right, then the warrant forms issued by the U.S. Courts suffer from the same "error." *See* U.S. Courts, Forms AO106 and AO093, *available at* https://www.uscourts.gov/sites/default/files/ao106.pdf and https://www.uscourts.gov/sites/default/files/ao093.pdf. The standard federal warrant application, for example, uses a very similar "checkbox" format to identify the probable-cause categories in general terms—including "evidence of a crime" and "contraband, fruits of crime, or other items illegally possessed"—while the warrant form itself provides text boxes for the law enforcement official to provide specific descriptions of the place to be searched and the items to be seized. *See id.*

At any rate, the State's point is a narrower one: *Sells* led the Missouri Supreme Court to mistakenly apply the particularity requirement to all three parts of the warrant—including the probable cause section. *See* Pet. App. A14 ("[T]he application of the severance doctrine ***requires*** this Court to examine the search warrant ***in its entirety***.") (bold and italics in

original). Thus, the Missouri Supreme Court's severance analysis conflicts with *Grubbs*, as petitioner argued in its motion for rehearing. In fact, the Missouri Supreme Court's reasoning in this case—which relied on general descriptions in the probable-cause section to conclude that the form created a "general warrant"—implies the invalidity of the standard form for search warrant applications promulgated by the federal courts and used by U.S. Attorneys' Offices throughout the United States.

The Court should also grant review to decide whether the exclusionary rule was proper in a case where a neutral judicial officer ratified the error in the warrant. As explained in the Petition, Pet. 23-28, the "corpse clause" box was checked on the officer-drafted but *court-signed* warrant, not on the supporting application, so the exclusionary rule should not apply at all. *See United States* v. *Leon*, 468 U.S. 897, 916 (1984) ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."). Respondents say that the Missouri Supreme Court never decided whether the police officer acted in good faith when he checked the "corpse clause" box. Br. in Opp. 14-15, 23-24. But the court *did* decide the relevant question—whether the exclusionary rule should apply at all. The officer's warrant application and affidavit did not assert, and had no reason to assert, probable cause for finding a fetus or corpse on the scene—and thus there certainly was no "lie" to the Court. Pet. App. A56-57. Whether there was probable cause to search for a corpse is not at issue. The question is whether, under *Leon*, the federal Constitution requires States to apply the exclusionary rule to a legal mistake found only on the court-signed warrant. The court below applied the exclusionary rule, contrary to *Leon* and contrary to

the principle that the exclusionary rule should be "our last resort, not our first impulse." *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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