No. _____

IN THE

Supreme Court of the United States

JONATHAN HAYHOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 17, 2018

QUESTION PRESENTED

1. Whether conduct by law enforcement in securing a *void in initio* warrant in violation of the Fourth Amendment was grossly negligent, thereby precluding application of good-faith exception established by this Court in *United States v. Leon*, 468 U.S. 897 (1984).

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished decision of the court of appeals appears at pages 1a – 5a of the appendix to this petition and is electronically available at *United States v. Hayhoe*, __ F. App'x __, 2018 WL 1377566 (4th Cir. Mar. 19, 2018). The court of appeals rejected Petitioner's appeal based upon its decision in *United States v. McLamb*, 880 F.3d 685 (4th Cir. 2018), *pet'n for cert filed* (U.S. June 8, 2018) (No. 17-9341). That opinion appears at pages 6a-12a of the appendix to this petition.

JURISDICTION

The district court in the District of South Carolina had jurisdiction under 18 U.S.C. § 3231 and § 2252A(a)(5)(B). The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court entered its opinion and judgment on March 19, 2018. Petitioner did not seek rehearing.

Petitioner sought and was granted an extension of time in which to file this petition for writ of certiorari through July 20, 2018. See *Hayhoe v. United States*, No. 17A1312 (U.S. May 23, 2018). It is therefore timely under Supreme Court Rule 13.5. Jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

28 U.S.C. § 636

> (a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law . . . .

Criminal Rule of Procedure 41(b) (2015)

> At the request of a federal law enforcement officer or an attorney for the government:
>
> (1) a magistrate judge with authority in the district -- or if none is reasonably available, a judge of a state court of record in the district -- has authority to issue a warrant to search for and seize a person or property located within the district;
>
> (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;
>
> (3) a magistrate judge--in an investigation of domestic terrorism or international terrorism--with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;
>
> (4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both;

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises--no matter who owns them--of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

INTRODUCTION

Petitioner's indictment arose as a result of the seizure by the Federal Bureau of Investigation ("FBI") of the "Playpen" internet website on February 20, 2015. The Playpen website, a "hidden service" website on the Tor network, was a "message board website whose primary purpose [was] the advertisement and distribution of child pornography." C.A.J.A. 51 at ¶ 11. The "Tor" network protects users' anonymity by masking their Internet Protocol ("IP") addresses. See C.A.J.A. 49 at ¶ 8.[1] While originally designed and implemented to protect United States Government communications, the Tor network is now publicly available software. *Id.* at 48 at ¶ 6. The Tor network bounces users' communications "around a distributed network of relay computer," to mask a user's actual IP address. C.A.J.A. 49 at ¶ 8.

Based upon information received from a foreign law enforcement source, the FBI seized a computer server running a copy of the "Playpen" website in early 2015. C.A.J.A. 60 at ¶ 28. Rather than immediately shutting the website down, agents elected to operate the website out of the Eastern District of Virginia for several weeks in order to catch users of Playpen. C.A.J.A. 60 at ¶ 28. To this end, on February 20, 2015, the government obtained an order and warrant pursuant to 18 U.S.C. § 2518 from a district judge in the Eastern District of Virginia. C.A.J.A. 182-87. On that same day, the FBI obtained a search warrant from a United States magistrate judge, also in the Eastern District of Virginia. C.A.J.A. 35, 36-73. This warrant and its

[1] "C.A.J.A" refers to the joint appendix filed in the court of appeals.

constitutionality has been the focus of numerous cases around the county, including Petitioner's.

The magistrate judge authorized a search "of the following persons or property *located in* the Eastern District of Virginia" (emphasis added), referencing "Attachment A" to the warrant. C.A.J.A. 72. The search was authorized to "obtain[ ] information" from "'activating' computers," C.A.J.A. 70, defined as computers "of any user or administrator who logs into" Playpen. *Id.* "Activating computers" included computers outside the Eastern District of Virginia. See C.A.J.A. 84 ("Agent Macfarlane[2] knew the NIT would deploy to computers outside the Eastern District of Virginia.").

The search requested by the FBI was to be accomplished via a "network investigative technique" (NIT). C.A.J.A. 70. The NIT was malware developed by law enforcement which allowed the FBI to covertly "augment" content downloaded by Playpen's users with "additional computer instructions." C.A.J.A. 62 at ¶ 33. Once these computer instructions reached the user's computer—wherever located—the NIT searched the user's computer and then communicated back to a government-operated server (also located in the Eastern District of Virginia), providing several pieces of identifying information, including a user's IP address. See C.A.J.A. 62-64.

The circuit courts have determined that the magistrate judge in the Eastern District of Virginia lacked authority to issue the NIT warrant. *See United States v.*

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[2] Special Agent Douglas Macfarlane of the FBI was the FBI agent who prepared an affidavit in support of issuing the search warrant.

Werdene, 883 F.3d 204 (3d Cir. 2018);[3] *United States v. McLamb*, 880 F.3d 685 (2018), *pet'n for cert filed* (U.S. June 8, 2018) (No. 17-9341); *United States v. Horton*, 863 F.3d 1041 (8th Cir.), *cert. denied* 138 S. Ct. 1440 (2018); *United States v. Levin*, 874 F.3d 316 (1st Cir. 2017); *United States v. Workman*, 863 F.3d 1313 (10th Cir.), *cert. denied* 138 S. Ct. 1546 (2018). Assuming the resulting search was unconstitutional, these courts have found, for varying reasons, that the good faith exception set forth in *United States v. Leon*, 468 U.S. 897 (1984), applies to excuse this constitutional violation.

STATEMENT OF THE CASE

As a result of the investigation discussed above, the FBI issued an administrative subpoena to the Internet Service Provider (ISP) associated with the IP address for "icevanberg," a Playpen visitor. The FBI determined the physical address associated with that IP address, and as a result, a magistrate judge in South Carolina issued a search warrant for Petitioner's home. During the execution of the search warrant, Petitioner's computer was seized, and when interviewed, Petitioner admitted he had downloaded child pornography. C.A.J.A. 282-83 (Sealed).

Petitioner was indicted in the District of South Carolina for possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Count 1). C.A.J.A. 9. Petitioner filed a motion to suppress, to which the government responded. On October 27, 2016, the district court denied Petitioner's motion. C.A.J.A. 192-200. The order

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[3] Mr. Werdene has been granted an extension of time through July 23, 2018, in which to file a petition for writ of certiorari. See *Werdene v. United States*, No. 17A1243 (U.S. May 7, 2018).

relied on the order issued in *United States v. Knowles*, D.S.C. Cr. No. 2:15-875-RMG, (D.S.C. Sept. 14, 2016), ECF No. 62 (hereinafter "the Knowles Order"). C.A.J.A. 75-110. The scattershot Knowles Order found the NIT performed a search of the user's computer within the meaning of the Fourth Amendment, as an individual has a reasonable expectation of privacy in the contents of his or her personal computer. C.A.J.A. 90-91. Additionally, the Knowles Order found the warrant issued by the magistrate judge in the Eastern District of Virginia was invalid because the magistrate judge did not have authority under Rule 41(b) to issue a warrant for a search beyond her own judicial district. C.A.J.A. 93.

However, the district court concluded the warrant was not *void ab initio*, and that even if void, the good-faith exception applied. C.A.J.A. 95. Additionally, "[e]ven if the Government had learned Defendant was in South Carolina, exigent circumstances would have justified the NIT search without first obtaining a warrant in South Carolina." *Id.* The district court also found that the "ministerial violation of Rule 41 that occurred in this case" did not justify suppression of the evidence because the defendant was not prejudiced and because "the Government did not intentionally disregard the rule . . . ." *Id.* Finally, the district court found that "even if Defendant were prejudiced by a Virginia magistrate judge, rather than some other officer (such as a Virginia district judge), issuing the NIT search warrant, he would be estopped from asserting that prejudice because he caused it." C.A.J.A. 108.

On November 18, 2016, Petitioner entered into a plea agreement with the government, preserving his right under Federal Criminal Rule of Procedure 11(a)(2)

to appeal the district court's denial of the motion to suppress, C.A.J.A. 201-06, and on that same day, appeared with counsel before the district court and entered a plea of guilty to the indictment. On May 4, 2017, Petitioner was sentenced to twelve months and one day imprisonment, lifetime supervised release with standard and special conditions, and a $100 special assessment fee. Mr. Hayhoe appealed to the Fourth Circuit Court of Appeals.

On March 19, 2018, the Fourth Circuit affirmed Mr. Hayhoe's conviction and sentence in an unpublished opinion. Relying on its recent decision in *McLamb*, the court of appeals found that the *Leon* good faith exception applied and that the district court did not err in denying Mr. Hayhoe's motion to suppress.

On May 23, 2018, Mr. Hayhoe sought and was granted an extension of time in which to file this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This Court has determined that "deliberate," "reckless," or "grossly negligent" disregard for an individual's Fourth Amendment rights precludes application of the *Leon* good-faith exception to the exclusionary rule. At the very least, "grossly negligent" conduct violative of the Fourth Amendment occurs when an experienced law enforcement officer seeks a nationwide search warrant under a statute and a Criminal Rule of Procedure which do not permit the issuing magistrate judge to issue such a warrant. This is what happened in Petitioner's case. Additionally, the exclusionary rule should be applied because the benefits of suppression outweigh the social cost of suppressing the evidence. The FBI agents in this case knew, or should have known,

that the United States magistrate judge from whom they sought issuance of the warrant who did not have the authority to order a nationwide—or indeed world-wide—search of computers. While the Rule of Criminal Procedure in question has been modified since the events underlying Petitioner's case, the deterrent effect in this case is particularly important in the evolving area of privacy rights in the current technological environment. "As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. United States*, 585 U.S. __, 138 S. Ct. 2206, __, 2018 WL 3073916 at *6 (2018) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

This Court should grant this Petition for Writ of Certiorari to answer the important question of when suppression should be the remedy when law enforcement officers, who are charged with knowing the law governing their conduct, act in a grossly negligent manner in seeking a warrant that they reasonably know is likely *void ab initio.*

I. Constitutional Authority – What Does the Fourth Amendment Permit?

The Fourth Amendment provides

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Fourth Amendment does not, of course, prohibit all search

and seizures, only those that are "unreasonable." As to the issuance of warrants, the amendment requires that a warrant be (1) signed by a neutral, detached magistrate; (2) supported by probable cause; and (3) sufficiently particular. *See Dalia v. United States*, 441 U.S. 238, 255 (1979). Importantly, "inherent in the notion of a 'neutral, detached magistrate' is that the magistrate have authority to issue the warrant." *United States v. Taylor*, 250 F. Supp. 3d 1215, 1235 (N.D. Ala. 2017) (citing *Shadwick v. City of Tampa*, 407 U.S. 345, 352 (1972) (holding, in answer to "[t]he single question [of] whether power has been lawfully vested," that municipal court clerks may issue warrants); *United States v. Krueger*, 809 F.3d 1109, 1123-24 (10th Cir. 2015) (Gorsuch, J., concurring) ("The principle animating the common law at the time of the Fourth Amendment's framing was clear: a warrant may travel only so far as the power of its issuing officer."); *United States v. Glover*, 736 F.3d 509, 515 (D.C. Cir. 2013) (holding that a Rule 41(b) violation constituted a "jurisdictional flaw" inexcusable as a "technical defect"), *abrogated on other grounds by Dahda v. United States*, 584 U.S. __, 138 S. Ct. 1491 (2018); *United States v. Master*, 614 F.3d 236, 241 (6th Cir. 2010) (holding a warrant issued by a judge lacking authority violated defendant's Fourth Amendment rights).

II. Statutory Authority – 28 U.S.C. § 636(a) – What Does the Statute Define?

The Federal Magistrates Act, 28 U.S.C. § 636(a), authorizes federal magistrate judges to exercise the "powers and duties conferred . . . by the Rules of Criminal Procedure" in three geographic areas: "[1] within the district in which sessions are

held by the court that appointed the magistrate judge, [2] at other places where that court may function, and [3] elsewhere as authorized by law." 28 U.S.C. § 636(a). Section 636(a) creates "jurisdictional limitations on the power of magistrate judges" as it "expressly and independently limits where those powers will be effective." *Krueger*, 809 F.3d at 1119 (Gorsuch, J., concurring); *see also United States v. Hazlewood*, 526 F.3d 862, 864 (5th Cir. 2008) ("In the Federal Magistrates Act, 28 U.S.C. § 636, Congress conferred jurisdiction to federal magistrate-judge[s]"). It goes without saying that federal magistrate judges have only those powers vested in them by Congress. *See N.L.R.B. v. A–Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994) (noting magistrate judges are "creatures of statute, and so is their jurisdiction. [Courts] cannot augment it").

III. Federal Rule of Criminal Procedure 41(b) – What are a Magistrate Judge's Powers?

Section 636(a) defines where a magistrate judge may exercise her powers; the Rules of Criminal Procedure define what those powers are. As is relevant to this case, Rule 41(b) provides that a magistrate judge may "issue a warrant to search for and seize a person or property located within the district." Fed. R. Crim. P. 41(b)(1). At the time of the events of this case, the Rule authorized only four exceptions to this territorial restriction: [1] for property that might be moved outside the district before the warrant is executed, Fed. R. Crim. P. 41(b)(2); [2] for terrorism investigations, Fed. R. Crim. P. 41(b)(3); [3] to install a tracking device within the magistrate judge's district that may track the movement of property outside that district, Fed. R. Crim.

P. 41(b)(4); and [4] to search and seize property located outside any district but within the jurisdiction of the United States, Fed. R. Crim. P. 41(b)(5). "None of these [Rule 41(b)] exceptions expressly allow[ed] a magistrate judge in one jurisdiction to authorize the search of a computer in a different jurisdiction." *Horton*, 863 F.3d at 1047.

IV. Warrant *Void Ab Initio*

As noted above, the Fourth Amendment prohibits unreasonable searches and seizures. This Court has indicated that the Fourth Amendment "at a minimum, [provides] the degree of protection it afforded when it was adopted." *United States v. Jones*, 565 U.S. 400, 411 (2012). Therefore, this Court "look[s] to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

As is relevant to this matter, "[t]he principle animating the common law at the time of the Fourth Amendment's framing was clear: a warrant may travel only so far as the power of its issuing official." *Krueger*, 809 F.3d at 1124 (Gorsuch, J., concurring). Therefore, in issuing the NIT warrant, the magistrate judge exceeded her authorized jurisdiction under § 636(a), as she could only exercise the powers of Rule 41(b) under three circumstances: [1] "within the district" that appointed her—*i.e.*, the Eastern District of Virginia, [2] "at other places where [that district] may function," and [3] "elsewhere as authorized by law." 28 U.S.C. § 636(a). Accordingly, the NIT warrant was *void ab initio* because it violated § 636(a)'s jurisdictional limitations and "a warrant issued in defiance of positive law's restrictions on the territorial reach of the issuing authority will not qualify [at all] as a warrant for Fourth Amendment

purposes." *Krueger*, 809 F.3d at 1124 (Gorsuch, J., concurring).

V. Suppression Appropriate

Absent a warrant, a search by government officials of a place in which an individual has a reasonable expectation of privacy is unreasonable unless the government can cure the deficiency by application of one of the well-known exceptions to the Fourth Amendment's warrant requirement (such as consent or exigent circumstances). See *Brigham City v. Stuart*, 547 U.S. 398, 403–404 (2006) (describing exigencies allowing the warrantless search of a home). In this case, no such exception existed to permit a warrantless search of Petitioner's computer. Therefore, a violation of Petitioner's Fourth Amendment rights occurred.

Suppression of unconstitutionally obtained information in a criminal case is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Leon*, 486 U.S. at 909 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Central to the question of suppression is "the culpability of the law enforcement conduct." *Herring v. United* States, 555 U.S. 135, 143 (2009). Because "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence[,]" *id.* at 144, "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987) (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)). "In analyzing the applicability of

the rule, *Leon* admonished that we must consider the actions of all the police officers involved." *Herring*, 555 U.S. at 140 (citing *Leon*, 468 U.S., at 923, n.24 ("It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.")).

In *Leon*, this Court explained the limits of the good faith exception:

> Suppression . . . remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The [good faith] exception . . . will also not apply in cases where the issuing magistrate wholly abandoned his judicial role . . . . Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient . . . that the executing officers cannot reasonably presume it to be valid.

468 U.S. at 923 (citations omitted). The good-faith exception therefore applies if it is "objectively reasonable" for an officer to believe that his conduct was lawful, keeping in mind that a "reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). An officer's conduct "must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 U.S. at 144.

In *Leon*, the good-faith exception was applied when a warrant is issued but later determined to be lacking in probable cause; the same conclusion was reached when addressing a warrant determined to lack the requisite particularity. *Massachusetts*

v. Sheppard, 468 U.S. 981, 984 (1984). The exception has also been applied when the warrant at issue was quashed, *Arizona v. Evans*, 514 U.S. 1, 4 (1995), or recalled, *Herring*. In *Krull*, this Court extended the good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes, and in *Davis v. United States*, 564 U.S. 229 (2011), the good-faith exception was extended to evidence obtained during a search conducted in reasonable reliance on then-binding precedent. In all of these cases, however, the good-faith exception was applied in circumstances where a warrant was issued but was later determined to be invalid for a variety of reasons. None of these cases addresses a circumstance where there was, for constitutional purposes, no warrant at all.

The good-faith exception is not available where the actions of law enforcement officers is "deliberate, reckless, or grossly negligent . . . ." *Herring*, 555 U.S. at 144, and "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Krull*, 480 U.S. at 348–49 (citation omitted).

In the case at hand, the FBI agents involved in obtaining and executing the Playpen NIT warrant were, at the very least, grossly negligent in seeking this warrant from a magistrate judge who lacked both statutory and Rules-based authority to issue a warrant for a nationwide search of computers. First, Special Agent Douglas Macfarlane of the FBI, the author of the affidavit in support of the search warrant, had been employed with the FBI since 1996, investigating federal crimes relating to

child pornography and the sexual exploitation of children. C.A.J.A. 39. *See also United States v. Levin*, 186 F. Supp. 3d 26, 42 (D. Mass. 2016), *vacated and remanded*, 874 F.3d 316 (1st Cir. 2017) (describing Macfarlane as "a veteran FBI agent with 19 years of federal law enforcement experience"). An experienced FBI agent would be familiar with a magistrate judge's jurisdictional authority. For example, agents apparently were aware that a magistrate judge could not issue an order under 18 U.S.C. § 2518, as a "Title III" order was obtained from a district court judge the very same day that they obtained the NIT warrant. C.A.J.A. 84; 182-87. See 18 U.S.C. § 2518 (application for issuance of order under § 2518 "shall be made . . . to a judge of competent jurisdiction . . . .").

Second, Agent Macfarlane "knew the NIT would deploy to computers outside the Eastern District of Virginia." C.A.J.A. 84. Agent Macfarlane testified that he believed that Rule 41(b)(4) authorized this deployment because he testified that he considered the NIT to be a "tracking device." *Id.* Yet as noted by the Third Circuit in *Werdene*, "it is clear that the FBI did not believe the NIT was a tracking device at the time that it sought the warrant. . . . Indeed, the term 'tracking device' is absent from the NIT warrant application and supporting affidavit." 883 F.3d at 211. Additionally,

> [a]lthough the seized information (mainly the IP address) assisted the FBI in identifying a user, it provided no information as to the computer's or user's precise and contemporary physical location. This fact—that the NIT did not track *movement*—is dispositive, because Rule 41(b)(4) is "based on the understanding that the device will assist officers *only* in tracking the movements of a person or object." Fed. R. Crim. P. 41 Advisory Committee's Note (2006) (emphasis added); see also Fed. R. Crim. P. 41(a)(2)(E) (incorporating the definition of "tracking device" from 18 U.S.C. § 3117(b), which is "an electronic or mechanical device which

> permits the tracking of the *movement* of a person or object." 18 U.S.C. § 3117(b) (emphasis added)). The NIT, by not contemporaneously transmitting the location of the computers that it searched, was therefore unlike the quintessential tracking device that the Government used in *United States v. Jones*, which "track[ed] the vehicle's *movements* ... [b]y means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer." 565 U.S. 400, 403, 132 S. Ct. 945, 181 L. Ed.2d 911 (2012) (emphasis added).

Id. at 212. *See also Horton*, 863 F.3d at 1047-48 (rejecting the government's argument regarding defendant having made a "virtual trip" to the Eastern District of Virginia as "bel[ying] how the NIT actually worked . . . .").

Third, "[c]oncerned with the legality of the NIT and similar remote access investigative programs, the FBI sought to amend the Federal Rules of Criminal Procedure in 2014 to enlarge the scope of magistrate judges' jurisdiction in issuing warrants." *McLamb*, 880 F.3d 689. It is true that lower courts had differed on the permissibility of remote access investigative techniques. Compare *United States v. Laurita*, No. 8:13-cv-107, 2016 WL 4179365, at *6 (D. Neb. Aug. 5, 2016) ("[Rule 41] authorizes the use of a tracking device and the NIT is analogous to a tracking device."), with *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753, 757 (S.D. Tex. 2013) (concluding NIT warrant exceeded the magistrate judge's Rule 41 jurisdiction). Yet because the FBI sought an amendment to Rule 41(b) as far back ast 2014, a reasonable officer in Agent Macfarlane's position certainly would know that the warrant issued by the magistrate judge in this case was likely illegal. It also cannot be reasonably questioned that a reasonably well-trained officer—such as Agent Macfarlane—would know that seeking a warrant from an officer without

jurisdiction to issue it would violate the Fourth Amendment rights of those individuals whose computers were searched. Because a warrant issued without jurisdiction is no warrant at all, Agent Macfarlane certainly had "fair notice" that the search was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).[4]

The good-faith exception simply does not apply here. Additionally, suppression of the evidence obtained in appropriate. "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Davis*, 564 U.S.at 237. Where police conduct is deliberate, reckless, or grossly negligent, the deterrent value of suppression is typically high enough to warrant suppression. *Id.* at 238. In this case, agents' actions were, at the very least, grossly negligent, thus warranting suppression. In *Workman*, the Tenth Circuit relied on the actions of the "executing agents" to find the good-faith exception applied. *See Workman*, 863 F.3d 1320. However, this Court has directed that "we must consider the actions of all the police officers involved." *Herring*, 555 U.S. at 140. And while "objective reasonableness sometimes turns on the clarity of existing law," *Workman*, 863 F.3d at 1321, the fact that the FBI sought a change in the Criminal Rules prior to the issuance of this warrant establishes at the very least that there was a serious enough question as to the magistrate judge's jurisdictional authority to put Agent Macfarlane on notice that

[4] *See Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004) (noting that "the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer." (citation omitted)).

having a magistrate judge in Virginia issue a " "watering hole" warrant,[5] which would deploy malware and search computers all over the world, was unconstitutional.

The circuit courts have, to date, held that the good-faith exception applies to this unconstitutional warrant and its ensuing search and seizure. As noted above, the Tenth Circuit relied on the good faith of the "executing agents" to find suppression was not warranted. *Workman*, 863 F.3d at 1315. In *Horton*, the Eighth Circuit found the warrant *void ab initio*, but that "[b]ecause *Leon* provides an exception for good faith, we apply it as long as the circumstances do not demonstrate bad faith . . . ." 863 F.3d at 1051. The court found that "[b]ecause Rule 41 has been updated to authorize warrants exactly like this one, this is no need to deter law enforcement from seeking similar warrants." *Id.* at 1052. In *Levin*, the First Circuit determined that none of the "bad faith" circumstances outlined in *Leon* applied to the issuance of the Playpen warrant, as "the NIT warrant was not written in general terms that would have signaled to a reasonable officer that something was amiss." 874 F.3d at 323. The Fourth Circuit, in *McLamb*, also looked at the conditions outlined in *Leon* where suppression would be warranted ("the limits of the good faith exception," 880 F.3d at 690), finding none applied to the Playpen warrant. The Fourth Circuit held that "[s]uppressing evidence merely because it was obtained pursuant to a warrant that reached beyond the boundaries of a magistrate judge's jurisdiction would not, under

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[5]See Devin M. Adams, *The 2016 Amendments to Criminal Rule 41: National Search Warrants to Seize Cyberspace, "Particularly" Speaking*, 51 U. Rich. L. Rev. 727, 739-40 (2017).

the facts of this case, produce an 'appreciable deterrence' on law enforcement." *Id.* at 691. Finally, in *Werdene*, the Third Circuit Court of Appeals determined that even though unconstitutional, the good-faith exception applied to the NIT search at issue here, as the "Rule 41(b) error [ ] was committed by the magistrate judge, not the FBI agents who reasonably relied on the NIT warrant . . . ." 883 F.3d at 217-18.

None of these cases, however, address the issue raised herein: that agents were, at the very least, grossly negligent in seeking this warrant from a magistrate judge who they reasonably knew had no authority to issue it. The *Workman* and *Levin* decisions fail to account for Agent Macfarlane's role in seeking the warrant, relying on the actions of the executing agents. The *Horton* case found an absence of bad faith and that the deterrent effect of suppression was negligible. *McLamb* fails to account for agents' grossly negligent conduct, and the *Werdene* decision found any error was committed by the magistrate judge, not agents.

"[S]uppression furthers the purpose of the exclusionary rule by deterring law enforcement from seeking and obtaining warrants that clearly violate" the Criminal Rules. *Krueger*, 809 F.3d at 1117 (citation omitted). This warrant clearly violated Criminal Rule 41(b). Even though Rule 41(b) was modified in 2016 to permit federal magistrate judges to issue warrants like the warrant in this case, the FBI was, at the very least, grossly negligent in seeking the issuance of this warrant from a magistrate judge without jurisdictional authority to issue it. In this circumstance, therefore, "the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis*, 564 U.S. at 238.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted and the decision of the court of appeals should be reversed.

Respectfully submitted,

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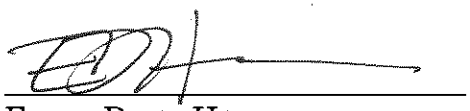

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