No. _____

IN THE
Supreme Court of the United States

THOMAS T. SZCZERBA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JUSTIN K. GELFAND
MARGULIS GELFAND, LLC
8000 Maryland Avenue, Suite 420
St. Louis, MO 63105
p: 314.390.0234
f. 314.485.2264
justin@margulisgelfand.com
Attorney for Petitioner

QUESTIONS PRESENTED

I. Does the *Leon* "good-faith exception" to the exclusionary rule apply when a warrant fails to particularize the "things to be seized" and fails to contain appropriate words of incorporation of an affidavit in support of the warrant?

II. If the *Leon* "good-faith exception" to the exclusionary rule does not apply when a warrant fails to particularize the "things to be seized" and fails to contain appropriate words of incorporation of an affidavit in support of the warrant, may evidence obtained pursuant to the invalid warrant nevertheless be admitted if the executing officers' conduct is not deliberate, reckless, or grossly negligent?

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PETITION FOR CERTIORARI

Thomas T. Szczerba petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the United States and Thomas T. Szczerba.

OPINIONS BELOW

The opinion of the Eighth Circuit (Pet. App. 001a-020a) is reported at 897 F.3d 929. The magistrate judge's report and recommendation (Pet. App. 021a-034a) recommending that Petitioner's motions to suppress evidence be denied is unreported. The trial court's order adopting the magistrate judge's report and recommendation (Pet. App. 035a-039a) is unreported but is available at 2016 WL 8668285. The trial court's order (Pet. App. 040a-051a) denying Petitioner's motion for judgment of acquittal or, in the alternative, motion for new trial is unreported but is available at 2017 WL 2132366. The order denying rehearing *en banc* (Pet. App. 052a) is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on July 26, 2018. A timely petition for rehearing *en banc* was denied on August 31, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the United States Constitution 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.

INTRODUCTION

This case presents two important and recurring questions that have divided the courts of appeals.

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures[.]" U.S. Const. amend. IV. "Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured." *Kentucky v. King*, 563 U.S. 452, 459 (2011). When a search is conducted pursuant to a warrant, the warrant must particularly describe the "persons or things to be seized." U.S. Const. amend. IV.

That said, the "Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands[.]" *United States v. Leon*, 468 U.S. 897, 906 (1984). "Whether the exclusionary sanction is appropriately imposed in a particular case, [this Court's] decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

Decades of jurisprudence have demarcated when, exactly, exclusion of evidence obtained in violation of the Fourth Amendment is the remedy. Relevant here, this Court has concluded that evidence obtained in violation of the Fourth Amendment's warrant requirement need not be suppressed when executing officers relied, in objectively good faith, on a subsequently-invalidated search warrant. *Leon*, 468 U.S.

at 922. Specifically, this Court concluded, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* This holding is known as the "good-faith exception" to the exclusionary rule. *See Groh v. Ramirez*, 540 U.S. 551, 579 (2004).

While holding that objectively reasonable reliance on a subsequently invalidated search warrant does not require exclusion, this Court also took pains to articulate instances in which executing officers cannot possibly have reasonably presumed, in good faith, that a warrant was valid. One such instance, set out in *Leon* itself, is when a 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." *Leon*, 468 U.S. at 923.

Despite this Court's unambiguous pronouncement in *Leon* that a warrant, which entirely fails to particularize either the place to be searched or the things to be seized, cannot be reasonably replied upon, this Court has also held that the Fourth Amendment does not prohibit a warrant from cross-referencing other documents. *Groh*, 540 U.S. at 557. However, a court may construe a warrant with reference to a supporting affidavit only "if the warrant uses appropriate words of incorporation, *and* if the supporting document accompanies the warrant." *Id.* at 557-58 (emphasis added; citations omitted). This two-prong test, and its correlation to the good-faith exception, leads to the first question presented by this case.

The first question concerns whether the good-faith exception can possibly apply to a situation in which a warrant is "facially deficient"[1]—failing to particularize any "things to be seized"[2]—and where that deficiency is not remedied through utilization of sufficient words of reference incorporating an attached affidavit that particularizes the things to be seized.[3]

In the decision below, the Eighth Circuit correctly determined that the warrant at issue lacked particularity as it did not list any items to be seized and did not incorporate the affidavit in support. Pet. App. 009a. Nonetheless, the Eighth Circuit incorrectly concluded that this facially deficient warrant could still be relied upon by an objectively reasonable officer.

This decision draws the Eighth Circuit into direct conflict with at least two other courts of appeals. In the Ninth Circuit, where a warrant fails to contain any description of items to be seized and where the two-prong test articulated in *Groh* (words of incorporation *and* affidavit accompanies warrant) is not satisfied, the good-faith exception cannot possibly apply as a matter of law. *See United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997). Similarly, in the Tenth Circuit, where a warrant fails to contain a description of the place to be searched and where the two-prong test articulated in *Groh* is not satisfied, the good-faith exception is categorically inapplicable. *See United States v. Williamson*, 1 F.3d 1134, 1136 (10th Cir. 1993).

[1] *Leon*, 468 U.S. at 923.
[2] U.S. Const. amend. IV.
[3] *Groh*, 540 U.S. at 557-58.

If the decision below stands, the law in the Eighth Circuit will be that the good-faith exception applies to searches conducted pursuant to facially deficient warrants that in no way identify any items to be seized or incorporate an attached affidavit.

While this Court has held that the good-faith exception in appropriate instances advances society's interest in securing justice, its use must be subject to certain meaningful limitations. Indeed, this Court was careful to note in the seminal case creating this exception that "[t]he good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect." *Leon*, 468 U.S. at 924. Allowing the decision below to stand will signal an unwillingness to enforce the requirements of the Fourth Amendment.

Concluding that it is objectively reasonable for an officer to rely on a warrant listing no items to be seized and containing no words incorporating an attached affidavit would constitute an unprecedented shift in this Court's Fourth Amendment jurisprudence and would open the floodgates to searches conducted pursuant to general warrants. If the decision below stands, law enforcement will be able to obtain general warrants unlimited in scope, conduct searches pursuant to these general warrants, and courts will still admit the evidence. This constitutes a tangible threat to the ever-shrinking protections afforded by the Fourth Amendment.

The second question presented concerns whether evidence obtained pursuant to a warrant that is facially deficient may nonetheless be admissible under *Herring*

v. United States, 555 U.S. 135 (2009) so long as law enforcement's conduct was not deliberate, reckless, or grossly negligent.

The decision below again draws the Eighth Circuit into a direct conflict with another Circuit: the Sixth. In the decision below, the Eighth Circuit held, in the alternative and in reliance on this Court's decision in *Herring*, that even if the good-faith exception to the exclusionary rule could not apply, exclusion of the evidence was still unwarranted because the executing officer's conduct was not deliberate, reckless, or grossly negligent. This incorrect approach has been applied by the Second and Third Circuits as well. *See United States v. Rosa*, 626 F.3d 56 (2d Cir. 2010); *United States v. Graves*, 777 F.3d 635 (3d Cir. 2015).

In *United States v. Lazar*, the Sixth Circuit reached the opposite—and correct—conclusion. 604 F.3d 230 (6th Cir. 2010). There, after discussing this Court's decisions in *Leon*, *Groh*, and *Herring*, the court concluded that *Herring* does not alter that aspect of the exclusionary rule which applies to warrants that are facially deficient. Stated simply, the Sixth Circuit unambiguously holds that once a court concludes that a warrant is facially deficient—thus making application of the good-faith exception inapplicable—the court must end the inquiry and suppress the pertinent evidence without regard to whether law enforcement acted deliberately, recklessly, or with gross negligence.

The Sixth Circuit's take on the interplay between this Court's decisions in *Leon*, *Groh*, and *Herring* is spot-on. To accept the Eighth Circuit's view will require courts to engage in numerous arduous tests, applying drastically different standards,

in an attempt to answer what should be a simple question: was the search conducted pursuant to a facially-deficient warrant? If so, the evidence obtained must be excluded.

While rigid adherence to the Fourth Amendment's warrant requirement has been winnowed away by decades of vital jurisprudence, there must come a time when enough is enough. Once a court determines that no reasonable officer can objectively rely in good faith on a warrant that is facially deficient, there is no need to engage in further analysis concerning whether particular officers personally acted deliberately, recklessly, or with gross negligence.

This Court should grant this petition for certiorari because this case presents the perfect vehicle for resolving the circuit split on two questions of critical importance. All Americans depend on the Fourth Amendment to protect themselves from unwarranted intrusions by the Government. If this Court does not step in, the protections afforded all citizens will continue to be chiseled away until the Fourth Amendment is nothing more than a toothless symbolic relic. Moreover, review by this Court is warranted because the decision below, on both issues, is incorrect. This Court already held, in *Leon*, that the good-faith exception cannot apply when a warrant—like the one at issue—is facially deficient given its complete failure to particularize the items to be seized. And once it is determined that the good-faith exception cannot save evidence obtained pursuant to a facially-deficient warrant, there is no need for further inquiry. Regardless of whether law enforcement acted deliberately, recklessly, or with gross negligence, they acted pursuant to a facially deficient

warrant—that is objectively unreasonable. This Court can, and should, resolve this matter.

As such, Petitioner respectfully requests that this Court grant review.

STATEMENT OF THE CASE

A. Factual Background And Proceedings In The District Court

On July 16, 2015, Sergeant Patricia Nijkamp ("Nijkamp") began investigating claims that Petitioner Thomas T. Szczerba ("Szczerba") and Keisha Edwards ("Edwards") had required a woman, B.M., to work as a prostitute. Pet. App. 021a. B.M. told Nijkamp that Szczerba and Edwards were residing in a nearby hotel room. Pet. App. 022a. Nijkamp went to the hotel room and made contact with Szczerba and Edwards, who refused to consent to a search of the room. Pet. App. 023a. Law enforcement also located a car registered to Edwards in the hotel parking lot. Pet. App. 023a.

Nijkamp then applied for a search warrant in state court. Pet. App. 023a. A judge signed the warrant. Pet. App. 024a. While the warrant mentioned the hotel room and the car, the warrant authorized only the search of Edwards—not the hotel room or car. Pet. App. 024a. The warrant did not list any items that were to be seized. Pet. App. 024a.

Ostensibly relying on the warrant, Nijkamp supervised searches of the hotel room and car. Pet. App. 025a. From the hotel room, officers seized makeup sponges, phones, chargers, sex toys, medication, medical paperwork, keys, lubricant, condoms, cleansing tissues, dental dams, an E-Reader, a speaker, a wristwatch, and a wallet. Pet. App. 025a. From the car, officers seized receipts, a date book, a notebook, and a whip. Pet. App. 025a. The Government ultimately charged Szczerba with seven criminal counts.

Szczerba moved to suppress evidence seized during the searches. The magistrate judge held an evidentiary hearing. Pet. App. 035a. At the hearing, Nijkamp was asked what criteria she used to determine the items to seize. Pet. App. 035a. Nijkamp testified,

> There was a general idea of what was going to be in there, and then whatever I felt was relevant to the case I was going to seize...I seize items that I believe are relevant to the case or of high monetary value was my criteria.

See Motion Hearing Tr. at 34-35, *United States v. Szczerba*, No. 4:15-cr-00348-HEA-1 (E.D. Mo. April 27, 2016), ECF No. 126. Following the hearing, the magistrate judge issued a report and recommendation. The magistrate judge concluded the warrant did *not* authorize the searches. Pet. App. 031a. The magistrate judge concluded the warrant did not describe the locations to be searched or the items to be seized. Pet. App. 029a. The magistrate judge also determined that the warrant did not incorporate the affidavit in support. Pet. App. 031a.

Nonetheless, the magistrate judge recommended, citing this Court's decision in *Leon*, that evidence obtained pursuant to the warrantless searches not be suppressed because Nijkamp had reasonably relied on the deficient warrant and that, the good-faith exception therefore applies. Pet. App. 032a. Over Szczerba's objection, the district court adopted the magistrate judge's report and recommendation in its entirety. Pet. App. 035a. At trial, over Szczerba's objection, the Government introduced evidence seized from the hotel room and car and evidence derived from the warrantless searches.

Following a jury trial, Szczerba was acquitted of three counts and convicted of four. Szczerba was sentenced to 140 months' imprisonment.

Szczerba moved for a judgment of acquittal or new trial under Federal Rules of Criminal Procedure 29 and 33 on the ground, *inter alia*, that evidence obtained pursuant to the warrantless searches of the hotel room and car should have been suppressed because the *Leon* good-faith exception to the exclusionary rule could not apply because the warrant was 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." *See* Motion for Judgment of Acquittal or, In the Alternative, Motion for New Trial, *United States v. Szczerba*, No. 4:15-cr-00348-HEA-1 (E.D. Mo. Feb. 27, 2017), ECF No. 222 (quoting *Leon*, 468 U.S. at 923). The district court denied the motion. Pet. App. 040a.

B. Proceedings In The Eighth Circuit

Szczerba timely appealed. Relevant here, he challenged his convictions on the ground that the district court erred in denying his motions to suppress evidence obtained pursuant to the warrantless searches of the hotel room and car because the warrant was so facially deficient—in that it failed entirely to particularly describe the place to be searched or items to be seized—that no executing officer could reasonably presume it to be valid and that, therefore, the good-faith exception to the exclusionary rule could not, as a matter of law, apply.

The Eighth Circuit rejected Szczerba's argument. It held that the warrant's authorization to search an individual rather than the hotel room or the car was a

mere clerical error. Pet. App. 009a. However, it also concluded that the "warrant lacked particularity, because it did not list the items to be seized or incorporate Nijkamp's affidavit." Pet. App. 009a. It then correctly explained that the "particularity requirement can be satisfied by listing the items to be seized in the warrant itself or in an affidavit that is incorporated into the warrant." Pet. App. 009a. The Eighth Circuit noted, "a warrant will be read to incorporate an affidavit 'if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.'" Pet. App. 009a-010a (quoting *Groh*, 540 U.S. at 557-58). The court then rejected the "government's contention that the details-lacking warrant incorporated Nijkamp's affidavit by reference." Pet. App. 010a.

Nonetheless, despite correctly determining that the particularity requirement of the Fourth Amendment was not satisfied by the affidavit in support of the warrant due to the warrant's lack of appropriate words of incorporation, the court concluded, "the warrant was not so obviously deficient that any reasonable officer would have known that it was constitutionally fatal." Pet. App. 012a. Thus, the Eighth Circuit concluded that a facially-deficient warrant *can* be relied upon by an objectively reasonable officer and, therefore, that application of the good-faith exception is appropriate.

The Eighth Circuit also offered an alternative justification for affirming the district court's denial of Szczerba's motions to suppress: "Moreover, application of the exclusionary rule in this case would not result in appreciable deterrence of police misconduct." Pet. App. 012a. The court concluded that although Nijkamp had acted

negligently, her conduct "did not reflect the type of deliberate, reckless, or grossly negligent disregard for the Fourth Amendment that the exclusionary rule can effectively deter." Pet. App. 013a.

Szczerba sought rehearing *en banc*, which was summarily denied. Pet. App. 052a. Szczerba timely petitioned for review from this Court on November 29, 2018.

REASONS FOR GRANTING THE WRIT

I. Can The Good-Faith Exception To The Exclusionary Rule Apply To A Warrant That Is Facially Deficient?

A. This Case Presents The Perfect Opportunity To Resolve The Circuit Split

The courts of appeals expressly disagree about whether evidence obtained pursuant to a facially-deficient warrant—that contains no list of items to be seized and no words incorporating an attached affidavit in support—can be admitted by way of the good-faith exception to the exclusionary rule. Had Szczerba been prosecuted in a district court located within the Ninth or Tenth Circuits (constituting 15 states) as opposed to a district court situated within the Eighth Circuit, the evidence obtained pursuant to the facially-deficient warrant would have been suppressed.

In *McGrew*, an agent prepared an affidavit demonstrating a belief that the defendant was involved in drug trafficking. *United States v. McGrew*, 122 F.3d 847, 848 (9th Cir. 1997). Based on the affidavit, a magistrate approved a warrant to search the defendant's residence. *Id.* The warrant, however, failed to specify the criminal activity suspected or any type of evidence sought. *Id.* In the space provided on the warrant wherein a list of items to be seized would normally be found, the warrant referred the reader to the "attached affidavit which is incorporated herein." *Id.* Agents then executed the search. *Id.* However, the affidavit did not accompany the warrant. *Id.* at 848-49.

The defendant filed a motion to suppress the evidence obtained in the search, arguing that the warrant lacked the particularity required by the Fourth

Amendment. *Id.* at 849. The district court denied the motion, ruling that the affidavit did not need to accompany the warrant. *Id.* The government then introduced evidence gathered in the search at trial and the defendant was convicted of numerous felonies. *Id.*

On appeal, the Ninth Circuit explained that the district court's ruling contradicted "a long line of this circuit's clearly established Fourth Amendment precedent." *Id.* The court continued, "[t]he Fourth Amendment dictates that a search warrant must be sufficiently particular and not overbroad." *Id.* (citing *Andersen v. Maryland*, 427 U.S. 463, 480 (1976); *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)).

The Ninth Circuit noted that "the search warrant contained absolutely no description of the types of items sought, or even of the types of crimes for which it sought evidence. The warrant only referred to an 'attached affidavit which is incorporated herein.'" *Id.* However, no evidence demonstrated that the affidavit was ever attached to the warrant or that the affidavit was present at the time of the search. *Id.* The Government argued that because the executing officers were aware of the contents of the affidavit listing items to be seized, the Fourth Amendment's particularity requirement was satisfied. *Id.* Rejecting this argument, the Ninth Circuit explained: "The well settled law of this circuit states that a 'search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein.'" *Id.*

(quoting *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982); citing *United States v. Van Damme*, 48 F.3d 461, 466 (9th Cir. 1995); *United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993); *Spilotro*, 800 F.2d at 967)).

Having established that the warrant contained no particularized list of items to be seized and was unaccompanied by an affidavit curing this deficiency, the court easily dispensed with any argument that the good-faith exception could possibly apply to the facially-deficient warrant: "the 'good faith' exception to the exclusionary rule is not available in this instance. In order to avoid the effect of the exclusionary rule, there must be an 'objective reasonable basis for the mistaken belief that the warrant was valid.'" *Id.* at 850 (quoting *United States v. Michaelian*, 803 F.2d 1042, 1047 (9th Cir. 1986)). "If the 'incorporated' affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents." *Id.* at 850 (citing *United States v. Kow*, 58 F.3d 423, 428 (9th Cir. 1995); *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989)).

Somewhat similarly, in *Williamson*, an officer applied for a warrant to search a business. *United States v. Williamson*, 1 F.3d 1134, 1135 (10th Cir. 1993). The warrant was issued, a search was conducted, and evidence was seized. *Id.* The defendant moved to suppress the evidence on grounds that the warrant was insufficiently particular. *Id.* The district court granted the motion to suppress and the Government appealed. *Id.* Affirming, the Tenth Circuit explained, "the warrant at issue did not describe the premises to be searched with sufficient particularity[.]" *Id.* at 1136. The court noted,

> We do not consider the contents of the warrant application or its accompanying affidavit because such documents can cure a defective warrant only when *both* of two requirements are met: "first, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference."

Id. at n.1 (emphasis in original) (quoting *United States v. Leary*, 846 F.2d 598, 603 (10th Cir. 1988); 2 Wayne R. LaFave, Search and Seizure § 4.6(a) at 241 (2d ed. 1987)). Putting the matter to rest, the court concluded,

> the government is not entitled to the 'good faith' exception to the exclusionary rule established in [*Leon*]. The Supreme Court has made clear that 'a warrant may be 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.' This is precisely such a case: no reasonable officer could have concluded that this warrant—which provides no meaningful description of the premises—was valid.

Id. at 1136 (quoting *Leon*, 468 U.S. at 923).

The decision below draws the Eighth Circuit into direct conflict with both the Ninth and Tenth Circuits. The Eighth Circuit concluded that the warrant at issue "lacked particularity, because it did not list the items to be seized or incorporate [the] affidavit." Pet. App. 009a. Nonetheless, despite the fact that the warrant lacked particularity—and was, thus, facially deficient under this Court's articulation in *Leon*—"the warrant was not so obviously deficient that any reasonable officer would have known that it was constitutionally fatal." Pet. App. 012a. Stated otherwise, the Eighth Circuit concluded that the good-faith exception applies even where a warrant is facially deficient given in its complete lack of particularity.

This Court should resolve the circuit split in this case. Any further difference in interpretation of when the good-faith exception to the exclusionary rule can apply is unjust. The differing opinions on this issue make clear that there is no possibility of the circuit conflict resolving itself without this Court's intervention.

This case presents an excellent opportunity for resolving the reach of the good-faith exception. Szczerba's convictions rise and fall on the resolution of this question. If the Eighth Circuit had agreed with the Ninth and Tenth Circuit's correct articulation of the applicability of the good-faith exception, the evidence from the warrantless searches would have been suppressed and it is exceedingly unlikely that he would have been convicted of a single crime.

B. This Question Is Important

This question is of particular importance because the Eighth Circuit's articulation of the good-faith exception completely upends decades of jurisprudence. The Fourth Amendment requires a warrant to be particular. However, a shortfall in particularity can be cured by an attached and incorporated affidavit in support. *See Groh*, 540 U.S. at 557-58. But now, in the Eighth Circuit—unless this Court steps in—a shortfall in particularity can be cured so long as an affidavit is present at the time of the search; it need not be incorporated into the warrant.

It is difficult to overstate the implications of this ruling. Taken to its logical end, an officer can apply for a general warrant to search for anything (or nothing in particular), conduct a search pursuant to the warrant, seize anything she chooses without limitation, and the evidence will be admissible pursuant to the good-faith

exception so long as evidence shows that the officer brought with her an affidavit that was never incorporated into the warrant. This cannot be where the law on this issue stands.

This Court has long recognized the importance of denying unfettered discretion to law enforcement officers to seize whatever they see fit. *See, e.g., Payton v. New York*, 445 U.S. 573, 583 (1980) ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment"). But the Eighth Circuit's decision essentially writes out of the Fourth Amendment the requirement of particularity and disregards this Court's mandate in *Leon* that the good-faith exception cannot apply to facially deficient warrants. *Leon*, 468 U.S. at 923. This Court should grant review to decide whether it is appropriate to grant law enforcement unfettered discretion to seize whatever they deem fit as the Eighth Circuit implicitly has done in this case.

C. The Decision Below Was Wrongly Decided

Review is also warranted because the Eighth Circuit misconstrued the applicability of the good-faith exception. If this decision is permitted to stand, the law in the Eighth Circuit would be plainly incorrect: that the good-faith exception *can* save the fruits of a search conducted pursuant to a facially deficient warrant from suppression despite the warrant's utter failure to specify any items to be seized or to incorporate an affidavit in support utilizing suitable words of incorporation.

The decision below states that the "warrant did not identify the items authorized to be seized during the search, and although it referred to Nijkamp's supporting affidavit, it did not incorporate the affidavit by reference." Pet. App. 008a. And the decision below notes that "suppression remains an appropriate remedy if, 'depending on the circumstances of the particular case, a 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.'" Pet. App. 012a (quoting *Leon*, 468 U.S. at 923). Nonetheless, the court concluded "that the warrant was not so obviously deficient that any reasonable officer would have known that it was constitutionally fatal." Pet. App. 012a. The court asserts that the case is distinguishable from *Groh* simply because the affidavit was signed by the issuing judge and because the unincorporated affidavit accompanied the warrant. Pet. App. 012a. The decision does not explain the significance of the fact that the issuing judge signed the affidavit—as a matter of law, it is irrelevant.

While it is unclear from the opinion, it appears, perhaps, that the Eighth Circuit is attempting to create a new test—separate and distinct from the test set out by this Court in *Groh*—for when an invalid warrant can be saved by cross-referencing other documents. Now, perhaps, in the Eighth Circuit, a court may construe a warrant with reference to a supporting affidavit if the affidavit accompanies the warrant and if the warrant uses appropriate words of incorporation *or* if the issuing judge signs the affidavit. *Cf. Groh*, 540 U.S. at 557. For this reason, too, this Court

should review this decision to determine whether this new formulation of the test laid out in *Groh* is legally justifiable.

To conclude that reliance on a warrant listing no items to be seized and no words incorporating an affidavit is objectively reasonable would constitute an unprecedented affront to the Fourth Amendment. If this decision stands, law enforcement will be able to obtain general warrants, unlimited in scope, conduct searches pursuant to the unconstitutional warrants, and courts will admit the evidence obtained so long as the officers claim to have brought with them a completely unincorporated list of items. This eviscerates the Fourth Amendment's protections and this Court should review this decision.

II. Is Evidence Admissible Despite Being Seized Pursuant To A Facially Deficient Warrant So Long As Law Enforcement's Conduct Was Not Deliberate, Reckless, Or Grossly Negligent?

A. This Case Presents The Perfect Opportunity To Resolve The Circuit Split

The courts of appeals also expressly disagree as to whether—once it is determined that a warrant is so facially deficient that executing officers cannot reasonably presume it to be valid—an additional determination concerning whether law enforcement's conduct was deliberate, reckless, or grossly negligent is required under *Herring* prior to applying the exclusionary rule.

In *Lazar*, the Sixth Circuit soundly concluded that evidence must always be suppressed when it is obtained pursuant to a warrant that is so facially deficient that no officer could reasonably presume it valid—and that there is no need to engage in yet another layer of analysis to determine the culpability of the executing officers.

Lazar, 604 F.3d at 237-38. There, law enforcement applied for a warrant to search certain medical offices. *Id.* at 233. The defendant moved to suppress evidence obtained pursuant to the searches arguing, *inter alia*, that the warrants did not satisfy the particularity requirement of the Fourth Amendment. *Id.* at 232. The district court granted the motion to suppress and the Government appealed. *Id.*

The Sixth Circuit noted that the warrants appeared to incorporate certain lists of patients whose files could be seized but that there were numerous patient lists and the lower court, "made no finding as to which, if any, patient lists came before the issuing Magistrate Judge." *Id.* at 234-36. After concluding that the search warrants did, indeed, incorporate the patient lists presented to the issuing judge, the Sixth Circuit illuminated the interplay between this Court's decisions in *Groh* and *Herring*. *Id.* at 236.

The Sixth Circuit explained, "[t]he Supreme Court's decision in [*Groh*], rather than its more recent, but less on point, decision in [*Herring*], controls, and requires suppression of all patient records seized beyond the scope of any patient list presented to the issuing Magistrate Judge." *Id.* Justifying this conclusion, the Sixth Circuit explained that in *Groh*, the search warrant "failed to identify any of the items that [the agent] intended to seize." *Id.* (quoting *Groh*, 540 U.S. at 554). "The warrant also failed to 'incorporate by reference the itemized list contained in the application [affidavit]." *Id.* (quoting *Groh*, 540 U.S. at 554-55). The court continued:

> Quoting its prior decision in [*Leon*], the Supreme Court [in *Groh*] further held that the good faith exception did not apply: "'[A] warrant may be 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.' This is such a case."

Id. at 237 (quoting *Groh*, 540 U.S. at 565). The Sixth Circuit declared, "The Supreme Court's recent decision in *Herring* does not question this statement of law." *Id.* The Sixth Circuit's conclusion cannot be reasonably disputed.

Readily distinguishing *Herring* from the facts at hand and defining *Herring*'s relationship to facially deficient search warrants, the Sixth Circuit explained,

> This case does not involve the sort of police error or misconduct present in *Herring*. Like *Groh*, it instead deals with particularization of search warrants and whether they are facially deficient. Despite the government's argument to the contrary, *Herring* does not purport to alter that aspect of the exclusionary rule which applies to warrants that are facially deficient warrants *ab initio*.

Id. at 237-38.

The Sixth Circuit then determined that the warrants were invalid with respect to any patients whose names were not presented to the magistrate judge and that "this facial deficiency was so evident...that no officer could reasonably presume the warrants valid." *Id.* at 238. Stated otherwise, the Sixth Circuit correctly held that once a court determines a warrant is facially deficient, thus making application of the good-faith exception legally unjustifiable, the court must end the inquiry and suppress the pertinent evidence without regard to whether law enforcement officers acted deliberately, recklessly, or with gross negligence.

Conversely, in *United States v. Rosa*, the Second Circuit concluded that courts must engage in an additional culpability determination before evidence obtained pursuant to a facially deficient warrant can be suppressed. *Rosa*, 626 F.3d at 58-59.

In *Rosa*, the defendant moved to suppress evidence seized from his home, arguing, *inter alia*, that the warrant lacked particularity. *Id.* at 60. The Second Circuit agreed with the argument. *Id.* at 62. The court explained, "the warrant directed officers to seize and search certain electronic devices, but provided them with no guidance as to the type of evidence sought." *Id.* Denouncing limitless searches, the court announced, "[T]he particularity requirement 'makes general searches...impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'" *Id.* (quoting *United States v. Buck*, 813 F.2d 588, 590 (2d Cir. 1987)). The court concluded, "[b]ecause we may no longer rely on unincorporated, unattached supporting documents to cure an otherwise defective search warrant, the warrant fails for lack of particularity." *Id.* at 64.

Nonetheless, the Second Circuit explained, "[n]ot every facially deficient warrant, however, will be so defective that an officer will lack a reasonable basis for relying upon it[.] *Id.* at 66 (citing *United States v. Otero*, 563 F.3d 1127, 1134 (10th Cir. 2009)). The court explained:

> while the objective inquiries underlying the good faith exception and qualified immunity are the same, *see Groh,* 540 U.S. at 565 n. 8, application of the exclusionary rule requires the additional determination that the officers' conduct was "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system[.]"

Id. (quoting *Herring*, 555 U.S. at 144).

Applying this interpretation of *Herring*'s relationship to facially deficient warrants, the Second Circuit concluded that because there was no evidence that law

enforcement "actually relied on the defective warrant, as opposed to their knowledge of the investigation and the contemplated limits of the town justice's authorization, in executing the search, the requisite levels of deliberateness and culpability justifying suppression are lacking." *Id.* In the decision below, the Eighth Circuit applied the very same logic.

The Second Circuit's conclusion that courts must make an additional determination after deciding that a search was conducted pursuant to a facially deficient warrant is incorrect. Indeed, even a judge who joined in the *Rosa* decision subsequently recognized the fundamental error in the court's reasoning.

Following the Second Circuit's affirmance of the district court's denial of the motion to suppress, the defendant in *Rosa* petitioned for rehearing *en banc*, which was denied. *See United States v. Rosa*, 634 F.3d 639 (2d Cir. 2011). However, Judge Kaplan, who had joined in the underlying decision, dissented from the court's denial of a rehearing. *Id.* (Kaplan, J. dissenting). Judge Kaplan explained,

> I have come to the conclusion that the panel holding is inconsistent with *Groh v. Ramirez,* which is more directly on point and which *Herring v. United States* did not explicitly overrule. *Groh* and *United States v. George,* [975 F.2d 72 (2d Cir. 1992)] in my view, compel exclusion of the evidence discovered because the good faith exception to the exclusionary rule does not apply here.

Id. (footnotes omitted)

Judge Kaplan artfully addressed, like the Sixth Circuit in *Lazar*, the interplay between this Court's decisions in *Leon*, *Groh*, and *Herring*. Judge Kaplan explained,

> In *United States v. Leon,* the Supreme Court simultaneously established the good faith exception and acknowledged that in some circumstances "a warrant may be so facially deficient—*i.e.,* in failing to particularize

> the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid." Based on *Leon*, this Court held in *George* that the good faith exception did not apply because a "warrant not limited in scope to *any crime at all* is so unconstitutionally broad that no reasonably well-trained police officer could believe otherwise."

Id. (footnotes omitted; emphasis in original). Judge Kaplan astutely continued: "*Herring* used broad language in holding that the good faith exception applied in the different context of a search made pursuant to a facially *valid* warrant. It did not, however, purport to overrule *Groh*." *Id.* at 640 (footnote omitted; emphasis added). This distinction is critical: the warrant at issue in *Herring* was facially *valid*—unlike the warrants in *Groh* and *Szczerba*. *See Herring*, 555 U.S. at 137. The only reason the warrant in *Herring* was invalid was because of a computer recordkeeping error which had failed to reveal that the warrant had been previously recalled. *Id.* at 137-38. Thus, it was, in fact, objectively reasonable for law enforcement to rely on it.

Continuing to coherently articulate why *Herring* does not impose on courts an additional level of analysis following a determination that a warrant is facially deficient, Judge Kaplan explained:

> *George*, *Groh*, and *Herring,* moreover, are compatible when *Herring*'s broad language is read in light of its facts. The Court in *Herring* held the good faith exception applicable because (1) the officer executing the warrant acted reasonably because the warrant was facially valid, and (2) the upstream police error was the result of "isolated negligence [by clerical staff] attenuated from the [illegal] arrest." In those circumstances, the costs of exclusion outweighed the negligible deterrent benefits.
>
> This case is quite different. Here, as the majority acknowledges and as was true also in *Groh* and *George,* the warrant's facial invalidity was obvious. The police errors that resulted in the unconstitutional search were not attenuated from the search. They were committed by the officer

> who drafted and then helped execute the deficient warrant and by the other officers who assisted in executing that warrant notwithstanding its patent facial invalidity. *Groh* and *George* held that exclusion is appropriate where, as here, a reasonable officer could not have presumed the warrant to have been valid. Here, the deterrent benefits of exclusion—namely, encouraging police to take greater care in drafting and executing warrants—are greater and outweigh the costs.

Id. at 640–41 (footnotes omitted).

Judge Kaplan's analysis is airtight. This Court's decision in *Herring* does not overrule *Leon* or *Groh* and the broad language of *Herring* does not impose on defendants an additional burden beyond demonstrating that evidence was obtained pursuant to a facially-deficient warrant. This Court, in *Leon*, expressly held that the good-faith exception does not apply when a warrant is facially deficient in its failure to particularize the place to be searched or the things to be seized. *Leon*, 468 U.S. at 923.

Indeed, excluding reliance on a facially deficient warrant from the scenarios in which the good-faith exception can apply is entirely consistent with the approach taken by this Court in *Herring*. This is because executing a search pursuant to a facially deficient warrant inescapably involves conduct that is either deliberate, reckless, or grossly negligent and, thus, the benefits of deterring future misconduct outweighs the costs of excluding the evidence. *See Herring*, 555 U.S. at 141.

The decision below draws the Eighth Circuit into a direct conflict with the Sixth Circuit. In the decision below, the Eighth Circuit held, in the alternative and relying on the broad language of *Herring*, that even if the good-faith exception to the exclusionary rule did not apply, exclusion of the evidence was still unnecessary

because the executing officer's conduct "did not reflect the type of deliberate, reckless, or grossly negligent disregard for the Fourth Amendment that the exclusionary rule can effectively deter." Pet. App. 013a. This approach has been utilized in the Second and Third Circuits as well. *See Rosa*, 626 F.3d at 58-59; *Graves*, 777 F.3d at 639 ("even if a warrant is facially invalid, an assessment of the officers' culpability and the value of deterrence may counsel against suppression").

This Court should resolve the circuit split on this issue. Further divergent decisions on this matter are unnecessary and will result in unjust and unpredictable outcomes. Indeed, the defendant in *Rosa* was sentenced to 120 years' imprisonment following the denial of his motion to suppress evidence obtained pursuant to a facially deficient warrant that could not have been relied on in good faith. *See Rosa*, 626 F.3d at 61. The clear circuit split and vastly different takes on *Herring*'s effect on this Court's holdings in *Leon* and *Groh* demonstrates that this split will not resolve itself absent this Court's involvement.

B. This Question Is Important

As Judge Kaplan's dissent makes clear, the question presented is one of singular importance. Some courts of appeals are interpreting this Court's ruling in *Herring* as overruling *Leon* and *Groh*. If that were this Court's intention, this Court should expressly say so. If, however, this Court's ruling in *Herring* left the holdings of *Leon* and *Groh* intact—specifically, that a warrant that 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"—it is evident that

the courts of appeals require clarification on this point. *See Leon*, 468 U.S. at 923; *Groh*, 540 U.S. at 565.

C. The Decision Below Was Wrongly Decided

Review is warranted because the Eighth Circuit misconstrued this Court's holding in *Herring* to make suppression unnecessary even when a search was conducted pursuant to a facially deficient warrant absent an indication that law enforcement acted deliberately, recklessly, or with gross negligence. Pet. App. 012a-013a.

In the decision below, the Eighth Circuit concluded that Nijkamp's conduct was merely negligent and that, therefore, suppression was unwarranted even if the good-faith exception could not apply. Pet. App. 012a-013a. In support of the conclusion that Nijkamp's conduct was, at worst, negligent, the court noted,

> Nijkamp served as the lead detective in the case. She believed that the warrant authorized the search of the hotel room and of the Mercedes and the seizure of evidence set forth in her affidavit. Nijkamp brought a copy of the warrant and the supporting affidavit with her when she went to conduct the searches. She, along with her lieutenant, supervised the officers searching the hotel room and the vehicle.

Pet. App. 008a. The court continued, declaring that Nijkamp was "'most mindful of the Fourth Amendment warrant requirement,' in that she asked for consent to search, secured the hotel room after consent was refused, applied for a warrant, and 'concealed no facts from the judge." Pet. App. 012a-013a (quoting Order and Recommendation of June 7, 2016 at Pet. App. 032a). As such, the court concluded, "application of the exclusionary rule in this case would not result in appreciable deterrence of police misconduct." Pet. App. 012a. The court asserted, "Nijkamp's

conduct certainly did not reflect the type of deliberate, reckless, or grossly negligent disregard for the Fourth Amendment that the exclusionary rule can effectively deter." Pet. App. 013a.

Judge Kaplan's dissent from the denial of rehearing in *Rosa* again sheds light on why the Eighth Circuit's conclusion is unsound. Criticizing the Second Circuit's reasoning that suppression was unnecessary because the affiant was also the officer in charge of executing the search, Justice Kaplan incisively explained,

> The fact that [the officer] played multiple roles here—he (1) drafted the application, affidavit, and warrant, (2) was present when the magistrate signed it, (3) executed the warrant along with others, and (4) subsequently performed the forensic analysis of the seized media—does not cut against this conclusion [that suppression was necessary]. The majority argues that this circumstance made it objectively more reasonable for the officers to have presumed the warrant to have been valid and that it rendered the officers' conduct less culpable.

Rosa, 634 F.3d at 641 (Kaplan, J. dissenting). Judge Kaplan expounded,

> the same factors were present in *Groh* and *George,* both of which held that the good faith exception was inapplicable. Those cases, moreover, control here, and they involved interests not implicated in *Herring*. The particularity requirement, at issue in *Groh, George,* and *Rosa,* (1) insures that a magistrate rather than the searching officers' discretion limits the scope of the authorized search, and (2) "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." Those interests are not sufficiently protected where courts, as the majority does here, allow law enforcement to enjoy the fruits of searches conducted pursuant to facially deficient warrants simply because one of the officers executing the warrant knew the proper scope of the search as stated in documents that were not incorporated into the warrant. [That officer] was not the only officer who conducted the search, and there is a significant risk in assuming, as the majority does, that the other officers did not rely on the invalid warrant rather than [the officer's] particular knowledge. Such a rule creates bad incentives for police conduct, encouraging the drafting of overbroad warrants.

Id. at 641–42 (footnotes omitted). The purpose of the particularity requirement of the Fourth Amendment is:

> to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84 (1987). Just as in *Rosa,* Nijkamp's purported knowledge of the proper scope of the search as stated in documents that were not incorporated into the warrant does not safeguard the interests the Fourth Amendment was enacted to protect. Making matters worse, Nijkamp made clear during the evidentiary hearing that the officers conducting the searches did not limit the scope of the searches in conformity with the unincorporated affidavit. At the evidentiary hearing on the motions to suppress, the following colloquy occurred:

> Q. When you entered the hotel room, was it your understanding that you were authorized to seize anything that you happened to find that might be relevant to human trafficking or alleged human trafficking?
>
> A. Absolutely.
>
> Q. In other words, you weren't going off of a specified list of particular items that could be seized, correct?
>
> A. There was a general idea of what was going to be in there, and then whatever I felt was relevant to the case I was going to seize.
>
> Q. And that was the instruction that – first of all, you weren't the only person searching the hotel room, correct?
>
> A. Correct.
>
> Q. That was the instruction that you gave the other law enforcement officers that were assisting in the search, correct?

A. Yes.

Q. And so how would you describe what, if any, limits you used as to what could be seized versus what could not be seized when actually executing the search of the hotel room?

A. I seize items that I believe are relevant to the case or of high monetary value was my criteria.

See Motion Hearing Tr. at 34-35, *United States v. Szczerba*, No. 4:15-cr-00348-HEA-1 (E.D. Mo. April 27, 2016), ECF No. 126.

Even if the justification utilized by the majority in *Rosa* for denying suppression was acceptable—that one of the officers executing the warrant knew the proper scope of the search as stated in unincorporated documents—it is clear that Nijkamp did not even claim to have limited the scope of the search to that stated in the unincorporated affidavit. While it need not be demonstrated where a warrant is facially deficient, the need for appreciable deterrence could not be any clearer. Rather than using the unincorporated affidavit as her guide in determining what items could be seized, Nijkamp testified that she seized—and instructed other officers to seize—"whatever [she] felt was relevant," and apparently (without further explanation) items "of high monetary value." *Id.* In her own words, this was her "criteria." *Id.*

A rule that will safeguard evidence seized pursuant to facially deficient warrants merely because an executing officer did not act culpably enough creates bad incentives for police misconduct and encourages the drafting of overbroad and facially deficient warrants. If the decision below stands, there will be no reason for law

enforcement to strive to comply with the particularity requirement of the Fourth Amendment.

The surgical precision with which Judge Kaplan describes the vitality of the holdings of *Leon* and *Groh*, even in the post-*Herring* legal landscape, is illuminating and should be endorsed by this Court so as to avoid further divergent opinions by the courts of appeals on this issue. The importance of this question cannot be overstated, and it is clear that review by this Court is necessary to resolve this circuit split.

The Eighth Circuit adopted an erroneous reading of this Court's holding in *Herring* and it is not alone. This Court should grant review to clarify that evidence seized pursuant to facially deficient warrants must be suppressed regardless of whether a defendant can further establish that executing officers acted deliberately, recklessly, or with gross negligence.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Justin K. Gelfand
Justin K. Gelfand
Margulis Gelfand, LLC
8000 Maryland Avenue, Suite 420
St. Louis, MO 63105
p: 314.390.0234
f. 314.485.2264
justin@margulisgelfand.com
Attorney for Petitioner