No. 19-527

In the

Supreme Court of the United States

PAUL HUSKISSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government denies the existence of a circuit split on an important question about the reach of the independent-source exception—even though the Seventh Circuit expressly acknowledged that it created one. That is because the government fears this Court's review, as this Court's cases establish that the independent-source exception should consider the severity of the police misconduct.

Despite many exclusionary-rule principles that center on "an assessment of the flagrancy of the police misconduct," the decision below insulated deliberate and obviously unconstitutional misconduct from the exclusionary rule's deterrent effect. *United States v. Leon*, 468 U.S. 897, 911 (1984). Yet nothing in this Court's precedent forecloses the independent-source exception from considering the flagrancy of the police misconduct. Quite the opposite, this Court's precedent demands it.

The government struggles to mount a defense to this Court's clear demands. It ignores the central features of this Court's independent-source cases: the evidence must come from a *truly independent source* wholly disconnected from the government's misconduct *and* the government must not exploit its presence in a suspect's home. It likewise asks the Court to ignore the lessons of its good-faith and attenuation cases even though this Court has analogized between the exceptions before. The government jumps through these hoops to preserve an illusion of "genuine independence": that disclosing in a warrant affidavit the positive results of field-tested

packages obtained from the officers' flagrantly unconstitutional conduct did not affect the magistrate's decision to issue the warrant and "did not contribute in any way to" getting the evidence. The government ultimately wants this Court to spare conduct that is most in need of deterrence.

Realizing its arguments face an uphill battle, the government claims that even if a circuit split exists, and the Seventh Circuit's reasoning is dubious, "no pressing need exists" for review. BIO.18. Never mind that a "search first, warrant later" approach is becoming increasingly common. Only this Court can end this troubling and increasingly common pattern by taking this case and clarifying that the flagrancy of police misconduct matters in independent-source cases. With the stakes so high, this Court should grant certiorari.

I. The Severity Of Police Misconduct Matters In Independent-Source Analysis.

A. The Seventh Circuit openly acknowledged the stark circuit split.

The circuit split is clear from the Seventh Circuit's own words: "Our precedent [] *bars us from applying the 'flagrant misconduct standard' of Madrid* …." App.8 n.2 (emphasis added).

The government resists this straightforward conclusion. It first suggests "it is far from clear whether" *Madrid* "rested entirely, or merely partly," on the flagrancy of the police misconduct. BIO.16. But *Madrid* was crystal clear: "*Notwithstanding these doubts* [about sufficiency], however, we cannot extend the application of the inevitable discovery doctrine to the facts of this case.… [W]e do not read [*Segura* and

Murray] as requiring the application of the inevitable discovery doctrine without regard to the severity of the police misconduct." 152 F.3d 1034, 1040-41 (8th Cir. 1998) (emphasis added).[1] Other courts confirm *Madrid's* holding. *See, e.g.*, *United States v. Dent*, 867 F.3d 37, 39-41 (1st Cir. 2017) (*Madrid* "proceeded to hold that the results of the warranted search could not be admitted under the inevitable-discovery exception due to 'the severity of the police misconduct'").

But even if *Madrid* rested only partially on the police's flagrant misconduct, it still creates a circuit split. The Eighth Circuit considers the flagrancy of the misconduct; the Seventh Circuit says it is "barred" from doing so.

Next, the government plays word games. Relying on *United States* v. *Swope*, 542 F.3d 609 (2008), it argues that "Eighth Circuit decisions have implicitly narrowed *Madrid* to reach, at most, 'egregious police misconduct.'" BIO.17. But whatever gap may exist between flagrant and egregious misconduct is a distinction without a difference. The circuits disagree about whether to consider the *severity* of police misconduct *at all* when applying the exclusionary rule. This Court should resolve that question.

Besides, *Swope* does not stand for what the government claims. The defendant there neither cited *Madrid* nor made the flagrant-police-misconduct argument, *see generally* Appellant's Brief, *United States* v. *Swope*, 2008 WL 214751 (8th Cir. Sept. 12,

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[1] The government agrees *Madrid* is an independent-source case. *See* BIO.16 ("more accurately, 'independent source[]' doctrine").

2008)—he had little reason to. The police officers in *Swope* did not agree in advance—like the officers here—that they would enter the defendant's home without a warrant. *See* 542 F.3d at 611-12. And the government there paid for its unconstitutional conduct: both the officer's observations during the illegal entry and the suspect's statements to the officer were suppressed. *Id.* at 612-13. Not so here.

The government also discounts that several states have adopted similar rules to *Madrid* when applying state-law equivalents of both the independent-source and the inevitable-discovery doctrine. BIO.18; *see* Pet.15-16. But these cases help provide a "compelling reason[]" for this Court's review, by helping extensively canvass the relevant issues and showing that the Seventh Circuit's flawed reasoning is incorrect and out-of-step with how other courts address the issue. Sup. Ct. R. 10. This issue is therefore ripe for review.

B. The decision below eviscerates bedrock exclusionary rule principles and precedent.

The government eventually reveals its real argument—it thinks *Madrid* is "incorrect." BIO.17. But *Madrid* faithfully applied this Court's precedent. Nothing in this Court's exclusionary-rule cases forecloses "focus[ing] the inquiry on the 'flagrancy of the police misconduct' at issue" in independent-source analysis. *Davis v. United States*, 564 U.S. 229, 238 (2011). Quite the opposite, this Court's precedent demands it.

The government tries to explain away this Court's cases in four ways. The first is perplexing. The second

is self-defeating. The third is deceiving. The last is distressing. Each are unavailing.

First, the perplexing. The government makes the remarkable claim that *Segura* and *Murray* bar considering the severity of police misconduct—despite neither case involving police exploiting their presence in the home. These absences were in fact crucial to both opinions.

In *Segura*, DEA agents, after arresting Segura outside his apartment building, unconstitutionally entered his apartment and observed several "accouterments of drug trafficking" in plain view during a protective sweep. 468 U.S. 796, 800-01 (1984). The Court held that the later-obtained warrant was an independent source "sufficiently distinguishable" from the unlawful entry, washing away the taint of the agents' earlier unconstitutional conduct. *Id.* at 814.

Crucial to the Court's analysis was its finding that the agents in no way "exploited" their presence in Segura's apartment, but simply waited for a warrant. *Id.* at 812. The Court thus emphasized that "[n]o information obtained during the initial entry or occupation of the apartment was needed *or used* by the agents to secure the warrant." *Id.* at 814 (emphasis added). The government instead used information "unrelated to the [unlawful entry]" and known to the agents "before they entered the apartment." *Id.* at 799, 814.

Recent precedent underscores *Segura's* breadth. "*Segura*," *Utah v. Strieff* explained, "applied the independent source doctrine because the unlawful entry 'did not contribute *in any way* to discovery of the

evidence seized under the warrant.'" 136 S. Ct. 2056, 2062 (2016) (emphasis added). To say, as the Seventh Circuit did below, that including in the warrant affidavit the results of the field-tested packages obtained from the officers' flagrantly unconstitutional misconduct "did not contribute in any way to" getting the evidence defies common sense.

The government also misreads *Murray*. That case involved a brief warrantless intrusion followed by a search several hours later authorized by a warrant "obtained on the basis of information *wholly unconnected* with the initial entry." 487 U.S. 533, 535-36 (1988) (emphasis added). Without disturbing anything during its illegal entry, the agents left the warehouse and did not re-enter until they had a search warrant—one the government got without revealing any illegally obtained information. *Id.* Because the police did not exploit their presence, the Court concluded that the warrantless entry did not influence the magistrate's decision to issue the warrant. *Id.* at 543-44.

In reaching that result, *Murray* stressed that it would be "difficult to establish" whether evidence from a "lawful seizure is genuinely independent of an earlier, tainted one" "whe[n] the seized goods are kept in the police's possession." 487 U.S. at 542. Yet under the government's reading, it is quite *easy* to show independence. Take the Seventh Circuit's analysis: the flagrant police misconduct—seizing and field testing the saran-wrapped packages and including the results in the warrant affidavit—was purged from step one and found irrelevant in step two. That turns this Court's guidance on its head.

This is why the Eighth Circuit in *Madrid* correctly saw nothing in the Constitution, or *Murray* and *Segura*, granting law enforcement "carte blanche to trample constitutional rights" in this way. 152 F.3d at 1041. In short, the government eviscerates bedrock exclusionary-rule principles and Fourth Amendment procedural protections, while *Madrid* vindicates them.

Second, the self-defeating. The government suggests that "neither" the attenuation doctrine nor the good-faith "exception is analogous to the independent source doctrine." BIO.14. Yet precedent teaches the opposite, and the government invokes analogies to similar doctrines.

To begin, nothing in this Court's good-faith or attenuation cases purport to exclude its guidance from the independent-source exception. These cases always describe the flagrancy-of-police-misconduct factor as essential for determining *exclusion* generally.

Take *Leon*, a good-faith case. When determining exclusion, *Leon* stressed that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus." 468 U.S. at 911. Indeed, "[t]he basic insight of" *Leon* "is that the deterrence benefits of *exclusion* 'var[y] with the culpability of the law enforcement conduct' at issue." *Davis*, 564 U.S. at 238 (emphasis added).

Herring similarly highlighted that "[t]he extent to which the *exclusionary rule* is justified by these deterrence principles varies with the culpability of the law enforcement conduct." 555 U.S. 135, 143 (2009) (emphasis added).

Davis likewise explained that the Court "recalibrated [its] cost-benefit analysis in *exclusion*

cases to focus the inquiry on the 'flagrancy of the police misconduct' at issue." 564 U.S. at 238 (emphasis added). As that Court later elaborated, "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of *exclusion* is strong and tends to outweigh the resulting costs." *Id.* (emphasis added).

If there were still doubts that police misconduct always matters in exclusion analysis, *Strieff* (attenuation) extinguished them. That Court emphasized: "But the significant costs of this rule have led us to deem it 'applicable only ... where its deterrence benefits outweigh its substantial social costs,'" "by favoring exclusion only when the police misconduct is most in need of deterrence." 136 S. Ct. at 2061-63. That is why "the purpose and flagrancy of the official misconduct" is "'particularly' significant." *Id.* at 2062.

These cases show this Court has never said that the severity of police misconduct should be treated differently in the independent-source exception. *For good reason:* the exclusionary rule cannot have "a more rigorous weighing of its costs and deterrence benefits" without the independent-source exception heeding "an important step in the calculus." *Davis*, 564 U.S. at 238; *Leon*, 468 U.S. at 911.

Plus, Supreme Court precedent *affirmatively encourages* analogizing between the exceptions. In *Strieff* (attenuation), this Court analogized to *Segura* (independent source). 136 S. Ct. at 2062. So too in another attenuation case, *Hudson v. Michigan*, 547 U.S. 586, 600-01 (2006). In both cases, which did not suppress evidence, the Court never thought twice, and

the government never complained, about analogizing between the doctrines—after all, the independent-source exception has the same origin as the attenuation doctrine. *See Segura*, 468 U.S. at 805. But now when a rule might lead to suppression, the government pleads for a paradox: the Court may analogize to avoid exclusion but not to support it.

And the government breaks its own no-analogizing rule. The government takes great pains to defend using *Franks v. Delaware*, 38 U.S. 154 (1978), to mutate a tainted warrant into a "genuinely independent" source. BIO.10-12. Yet *Franks*, like good faith and attenuation, depends on whether "considerations independently warrant admitting the unlawfully obtained evidence even though doing so may put the police in a *better* position than they would have been in without the misconduct." BIO.14-15. After all, *Franks* spares negligent misinformation or omissions, even when they materially affected the warrant's issuance. *See* 438 U.S. at 170 ("Our reluctance today to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen's Fourth Amendment rights ...."). In reality, analogizing between the exceptions has never been taboo. Nor should it be.

But no matter what, an independent-source analysis mutated by *Franks* purifying puts the government in a *better* position. Indeed, the government skirts its usual burden of showing probable cause before a neutral magistrate. Instead, all the government must show is that a magistrate

"would surely have found" probable cause—*not* that the magistrate's actual determination "would surely not have been different absent the constitutional error." *Cf. Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (emphasis omitted).

Third, the deceiving. The government tries to distract the Court with the inevitable-discovery doctrine's rejection of an absence-of-bad-faith *requirement*. *Nix v. Williams*, 467 U.S. 431, 445 (1984); BIO.15. But *Nix* changes nothing for its "cousin" the independent-source exception. When arguing otherwise, the government clings onto the exceptions' similarities but overlooks their differences. This is unsurprising. After all, under the government's test, there really is no difference between the two. Indeed, having *Franks* infect the independent-source analysis transforms the exception into the inevitable-discovery doctrine's fraternal twin. It is hard to imagine a case where the Seventh Circuit's test is satisfied but the inevitable-discovery doctrine is not.

To justify its position, the government plucks language from *United States v. Karo*, 468 U.S. 705 (1984). BIO.11. But *Karo* is inapt: it neither applied the independent-source exception nor involved flagrant police misconduct. 468 U.S. at 719. Worse, its reasoning for using *Franks* is threadbare, totaling one sentence. *Id.*

In any event, there are important differences between the two exceptions. The inevitable-discovery exception assumes that "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the

evidence sought would inevitably be discovered." *Nix,* 467 U.S. at 445. But that is not the case for the independent-source exception. An officer with tainted evidence from obviously unconstitutional conduct who would retrieve a warrant anyway would know that it has a judicially sanctioned independent source available for shelter. So the officer would be "in a position to calculate whether the evidence sought would be" independently obtained. *Id.* That is why the independent-source exception was never meant to spare deliberate and obviously unconstitutional conduct from the exclusionary rule. It thus requires a "wholly unconnected" or a "genuinely independent" source. *Murray*, 487 U.S. at 535, 542. This requirement discourages the fruits from the flagrantly unconstitutional conduct from infecting basic procedural safeguards.

Finally, the distressing. The government tries to escape this Court's review by claiming "no pressing need exists." BIO.18. There *is* a pressing need. Law enforcement is increasingly taking a "search first, warrant later" approach. Yet courts routinely excuse these obvious constitutional violations under the independent-source exception, often despite disclosing the illegally obtained evidence to the magistrate. *See* Pet.22-23 (collecting cases); *see also, e.g.*, *United States v. Jenkins*, 396 F.3d 751, 755-56 (6th Cir. 2005); *United States v. Perez*, 280 F.3d 318, 340 (3d Cir. 2002). The decision below fits this mold: it did not take these concerns seriously by relegating the issue to a footnote. App.8 n.2.

Only this Court can end this troubling and increasingly common pattern by taking this case and

clarifying that the flagrancy of police misconduct matters in independent-source analysis. In fact, this Court in *Strieff* acknowledged that a flagrancy-of-police-misconduct factor is a necessary safeguard. As *Strieff* explained, "dragnet searches" would not occur because the attenuation factors "take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the [attenuation] factors could be different." 136 S. Ct. at 2064. Right now no similar backstop exists in the Seventh Circuit to stop deliberately unconstitutional conduct in independent-source cases.

II. The Government's Response Gives This Court More Reason to Grant And Decide The Retroactivity of the First Step Act.

The Court should grant, vacate, and remand—or outright grant—the First Step Act question as well.

The Seventh Circuit in *United States v. Pierson* did not engage with the textual arguments in the petition. *See generally* 925 F.3d 913 (7th Cir. 2019). The same goes for the other two circuits to address the question. *See United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019); *United States v. Avile*s, 938 F.3d 503, 510 (3d Cir. 2019). But the presumption-of-consistent-usage and the title-and-headings canon reveal that imposing a sentence occurs when a court enters final judgment.

In two other clauses of the First Step Act, Congress used different language that plainly prevented retroactivity. Pub. L. No. 115-391, §402(b); *id.* §102(b)(3). But here it used different language, so the text should be given a different meaning. Even

more, the title of the retroactivity provision says "Pending Cases." Huskisson, while on direct review, is a case "awaiting decision," *Pending*, Black's Law Dictionary (11th ed. 2019), reinforcing that he benefits from the First Step Act's sentence reductions.

The government argues that Huskisson forfeited his arguments because he "could have submitted a supplemental brief." BIO.23. But its reliance on *Rent-A-Center* is misguided; it involved no intervening *change* in law. In *Rent-A-Center v. Jackson*, the intervening case "affirmed a rule that had been in place in the [relevant] Circuit" for five years already. 561 U.S. 63, 76 n.5 (2010). That litigant also had over a year before judgment. *Id.* Here, however, the First Step Act was an intervening *legislative change* and Huskisson had far less time to file a supplemental brief. Thus, Huskisson preserved his arguments.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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