No. 21-5902

IN THE

Supreme Court of the United States

ALHAKKA CAMPBELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF THE PETITIONER

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INTRODUCTION

The Court should issue a writ of certiorari. Cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). Americans keep the most personal details of their lives on their phones, and in various private accounts accessible from those phones. Here, the Fourth Circuit approved a warrant to search Mr. Campbell's smart phone for "all electronic data" on the phone without any restriction on category of information, timeframe of information, or nexus to the crime being investigated, including searches of information in the "cloud" accessible from the phone.

There is a split among the federal circuits, as well as state courts, about the validity of such "all data" warrants under the Fourth Amendment. This legal question, that directly affects the exposure of people's most private information, is appropriate for certiorari, due to the clear split of authority and the importance of the issue. The government tries to avoid the existence of the circuit split by changing the question presented to an entirely separate legal doctrine, good faith under *Leon*.[1] This sleight of hand renders its argument unpersuasive. The Court should issue a writ of certiorari and clarify that "all data" warrants for cell phones are not sufficiently particular.

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[1] *United States v. Leon*, 468 U.S. 897 (1984).

A. The United States Errs in Describing the Holding of the Court of Appeals and Thus the Question Presented.

As a preliminary matter, the United States errs repeatedly in describing the legal issue presented by this case, and the holding of the Fourth Circuit below, in its Brief in Opposition.

Here is the relevant holding of the Fourth Circuit. The court first described the issue raised by the petitioner: "Alhakka Campbell argues that the district court erred by refusing to suppress the evidence obtained from the search of his phone." Pet. App. 6a. After stating the standard of review and the text of the Fourth Amendment, the court of appeals wrote:

> The requirement of particularity "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). "When it comes to particularity, we construe search warrants in a commonsense and realistic manner, avoiding a hypertechnical reading of their terms." *United States v. Blakeney*, 949 F.3d 851, 862 (4th Cir. 2020) (internal quotation marks omitted). A warrant is sufficiently particularized if it "describes the items to be seized with enough specificity that the executing officer is able to distinguish between those items which are to be seized and those that are not," and "constrain[s] the discretion of the executing officers and prevent[s] a general search." *Id.* at 862-63 (internal quotation marks omitted). After reviewing the record and relevant authorities on this point, we conclude that the district court did not err by refusing to suppress the evidence obtained from the search of Alhakka's phone.

Pet. App. 6a-7a. That is the court's ruling on this issue. Nothing about it mentions the good faith exception, or supports the government's assertion that the *Leon* good

faith doctrine was the basis for its decision. The district court mentioned good faith in its oral ruling. The court of appeals decision under review here, however, did not. The government is incorrect when it asserts otherwise, in its question presented and throughout its Brief in Opposition.

Crucially, this Court in *Groh v. Ramirez* noted that a warrant that fails for particularity is not subject to the good faith exception, which may be why the Fourth Circuit ruled as it did, addressing particularity and not good faith. The *Groh* Court wrote: "The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." 540 U.S. 551, 564-65 (2004). It continued: "Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so." *Id.* at 565.[2]

Just as in *Groh*, "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." *Id.* at 565 (quoting *Leon*, 468 U.S.,

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[2] The Court further noted that while *Groh* was a qualified immunity case, "we have explained 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.'" *Id.* at 564-65 n.8 (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)) (cleaned up). Although "[t]he situations are not perfectly analogous," *Leon*, 468 U.S. at 922 n.23, courts often consider decisions arising both in the good faith context and the qualified immunity context to determine the objective reasonableness of an officer's actions. *See, e.g.*, *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014).

at 923) (cleaned up). Like in *Groh*, the good faith exception did not excuse the search here. When a search-warrant affidavit is so "bare bones" that it cannot provide a basis for the magistrate to find probable cause, or when the warrant is so "facially deficient" that no reasonable officer could rely on it, the good faith exception does not apply. *E.g.*, *United States v. Wilhelm*, 80 F.3d 116, 121 (4th Cir. 1996). More importantly at this stage, the Fourth Circuit decision under review did not address it. *See* supra. The government complains that "[p]etitioner has not addressed good faith in his petition." BIO 12. That is because the court of appeals did not rule on it. Pet. App. 6a-7a.

The government's focus on something the court of appeals did not decide – good faith – may be an attempt to evade the existence of a circuit split on the actual question presented. *See* infra. As Petitioner addresses next, that circuit split merits a grant of certiorari by this Court.

B. There is a Split in Authority About the Fourth Amendment's Particularity Requirement and "All Data" Warrants for Cell Phones.

The government asserts that this case is factbound, and "does not conflict with any decision of this Court, another court of appeals, or a state court of last resort." BIO 8. The government is incorrect. As demonstrated in the petition, the validity of warrants to search "all electronic data" on a cellular phone, and whether such all data warrants are sufficiently particular, is a legal question that has divided the lower courts, both state and federal. *See* Pet. 5-12. And this search warrant is a paradigmatic "all data" warrant.

1. The government argues that the enumeration in the warrant of the crimes being investigated satisfies the particularity requirement of the Warrant Clause. BIO 10-11. This is both incorrect as a matter of law, and is also belied by a glance at the search warrant in this case. Pet. App. 12a.

Many cases the government cites in its brief in opposition are irrelevant to the question presented in this case. They do not describe "all data" warrants, but instead warrants that limit the scope of the data that can be searched. BIO 10-11. Some warrants were limited, as in the Tenth Circuit's decision in *Christie*, based on the enumerated crimes of investigation. 717 F.3d 1156, 1165 (10th Cir. 2013). Then-Judge Gorsuch wrote that warrant applications "may pass the particularity test if they *limit their scope* to evidence of specific federal crimes or to specific types of material." *Id.* at 1165 (emphasis added). The same is true of *United States v. Castro*, *see* BIO 11. 881 F.3d 961, 965 (6th Cir. 2018) ("A warrant that empowers police to search for something satisfies the particularity requirement if its text *constrains the search* to evidence of a specific crime.") (emphasis added).

This case is more like the Tenth Circuit case *United States v. Russian*, 848 F.3d 1239, 1245 (10th Cir. 2017), and not like *Christie*, supra, which *Russian* cites. And there is a clear split of authority on Fourth Amendment particularity between the decision below and *Russian*. The identification of the crimes of investigation in the warrant in this case does not distinguish it factually from *Russian*, where the warrant also "identified the crimes being investigated." 848 F.3d at 1243.

That is, the warrant in this case, while it lists the crimes being investigated as a basis for the issuance of the warrant, does not "limit the scope," *Christie*, supra, or "constrain the search," *Castro*, supra. As noted in the petition, the warrant in Petitioner's case explicitly states that it authorizes a search for "all electronic data on the device." Pet. App. 12a (warrant).[3] Because the "scope" is not "limited" to evidence of the enumerated crimes, the limitation espoused in *Christie* cannot be found here. Those cases are not "all data" warrant cases, by definition, if the warrants are "limited in scope" or "constrain the search."

"The particularity requirement has three components: First, a warrant must identify the specific offense for which the police have established probable cause. Second, a warrant must describe the place to be searched. Third, the warrant must specify the items to be seized by their relation to designated crimes." *United States v. Galpin*, 720 F.3d 436, 445-46 (2d Cir. 2013). The crimes under investigation are listed as a reason to issue the search warrant in this case, but not as a limitation on what things may be seized or searched. Pet. App. 12a. The government's suggestion otherwise is incorrect, legally and factually. In this case, the box for "things to be seized" in the search warrant expressly states: "all electronic data on the cellular device to be included but not limited to" various listed files types. Pet. App. 12a. The

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[3] The language in the warrant is explicit, and provides a clear-cut example of an "all electronic data" warrant. C.A.J.A. 62, 67, 75. In fact, the warrant authorizes a search not only of data on the phone, would allow the government to access accounts in the cloud. *Id.*; *see Riley v. California*, 573 U.S. 373, 397 (2014) (discussing cloud computing capacity of cell phones).

government's argument that this is not an "all data" warrant because it is impliedly limited, BIO 10-11, is contrary to the express language of the warrant, as well as the trial testimony.[4]

The government admits that the particularity requirement is satisfied only if the warrant "constrains the search to evidence of a specific crime" or "cabins the things being looked for," BIO 11 (citing and quoting cases), and the warrant in this case plainly does neither because it explicitly authorizes "all electronic data on the cellular device," without limitation, to be searched. Pet. App. 12a. The enumerated crimes go toward justifying the issuance of the warrant, but do not limit its scope. Pet. App. 12a. Accordingly, the listed crimes do not serve to meet the Fourth Amendment's particularity requirement, and cases cited by the government on pages 10 and 11 of the Brief in Opposition are distinguishable.

In upholding the warrant's validity despite its lack of particularity, the Fourth Circuit deepened a split of authority. This Court should issue a writ of certiorari to clarify the scope of Fourth Amendment particularity as applied to search warrants for "all electronic data" on a digital device.

2. The government denies that there is a split between the Fourth Circuit in this case and the Tenth Circuit. The Tenth Circuit case Petitioner relied on in

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[4] The trial testimony about the conduct of the search shows that the search was conducted as broadly as the warrant allowed. The searching officer testified that he used software that searched through Alhakka Campbell's "call logs, web histories, Wi-Fi connection history . . . a lot of different data. Photos. All sorts of things." C.A.J.A. 1193; *see* Pet. 15-16.

noting the deepening of the split in authority, *United States v. Russian*, post-dates *Christie, supra*, relies on it, and is far more similar to this case. *Russian*, 848 F.3d at 1245 (citing and discussing *Christie* and holding a warrant that authorized an all data search for two cell phones invalid for lack of particularity).

In one bid to deny the existence of a split in authority, the government discusses cases decided on the basis of the good faith exception, repeatedly throughout its brief, and denies that any of them suffice to create a split of authority. BIO 13-15. The good faith holdings are irrelevant to this cert. petition, because the Fourth Circuit below did not even mention, never mind rely on, the good faith exception. Pet. App. 6a-7a; *see supra*. The government cannot avoid substantive constitutional merits questions by hiding behind the good faith exception to the exclusionary rule, particularly in cases in which the court of appeals did not even mention good faith. If it can, courts will not answer substantive Fourth Amendment questions, and constitutional rights will be eroded.

In *Russian*, the Tenth Circuit ruled not only on good faith, but also that the warrant was invalid for lack of particularity, in part because it did not "specify what material (*e.g.*, text messages, photos, or call logs) law enforcement was authorized to seize." *Id.* at 1245; *see also United States v. Wagner*, 951 F.3d 1232, 1247 (10th Cir. 2020) ("a warrant must describe with particularity the items sought on a computer"). The listing of the crimes of investigation, contrary to the government's argument, did not save that warrant, *see Russian*, 848 F.3d at 1243, and it does not save the one in

this case. The split in authority between Tenth's Circuit's holding in *Russian* and the Fourth Circuit's holding below is clear.

The government asserts that there is no conflict between the decision below and *Russian* because both denials of motions to suppress were upheld on appeal on the basis of the *Leon* good faith exception. BIO 13. The prophylactic good faith doctrine has no relation to the disagreement between the courts below on the substantive Fourth Amendment merits. There is a disagreement about the meaning of the Fourth Amendment merits with regard to all data warrants, particularity, and cell phones, and this Court's intervention is required.

Similarly, the government claims that there is no conflict between this case and *United States v. Stabile*, 633 F.3d 219, 237-38 (3d Cir. 2011), because in both cases suppression motions were denied, BIO 13. The affirmance of the denial of a motion, of course, does not require that the courts agreed on the law underlying the denials, and the courts in *Stabile* and the case below very clearly did not agree on the law. The court of appeals in *Stabile* in no way authorized an "all data" warrant. On the contrary, the court of appeals in *Stabile* strongly condemned general searches of computer drives, stating:

> On the other hand, as Stabile argues, granting the Government a carte blanche to search every file on the hard drive impermissibly transforms a "limited search into a general one." *Marron v. United States*, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another."); *see United States v. Tracey*, 597 F.3d 140, 146 (3d Cir. 2010). To reconcile these competing aims, many courts have suggested various

> strategies and search methodologies to limit the scope of the search.

633 F.3d at 237-38. The government's suggestion that the Third Circuit agrees with the court of appeals below thus is demonstrably false. As to the substance of the Fourth Amendment—that is, the rule governing police behavior and people's constitutional rights going forward—the two courts of appeals disagree.

The idea that there is not a circuit split on a legal question, with respect to the Fourth Amendment's particularity requirement as applied to all data warrants and cell phones, simply because evidence was admitted under either the plain view doctrine or the good faith exception, is similarly disingenuous. Courts can disagree on the Fourth Amendment merits, creating a split of authority, regardless of whether a search is saved by such doctrines as plain view, good faith, or qualified immunity.

That said, good faith is not at issue here. The district court did mention the good faith issue, but the decision on which certiorari is sought is the decision of the court of appeals, which neither ruled on nor mentioned the good faith doctrine. Pet. App. 6a-7a. There is a circuit split meriting this Court's intervention.

C. The Decision Below Was Wrong.

The decision below was wrong on the merits, and the government has almost conceded this by trying to change what the warrant authorized ex post, rather than defend what the warrant actually says.

Under the Fourth Amendment, a search warrant must describe the "things to be seized" with sufficient particularity, and cannot be broader than the probable cause on which it is based. The purpose of the particularity requirement is to "protect

persons against the government's indiscriminate rummaging through their property" and to "[prevent] the searching for and seizure of items that there is no probable cause to believe are either contraband or evidence of a crime." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). "By limiting the authorization to search to the specific area 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).

"The principal evil of the general warrant was addressed by the Fourth Amendment's particularity requirement." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742-43 (2011). The warrant here was effectively a general warrant to rummage throughout the entirety of Mr. Campbell's phone, and the court of appeals erred when it held that it was sufficiently particular. Pet. App. 6a-7a. The warrant allowed the police to search "all electronic" data on the phone without limitation as to file type or location, and without any temporal limitation either. Pet. App. 6a-7a. Failure to limit the search by relevant dates, when such dates are available to the police, also will render a warrant overbroad. *United States v. Lazar*, 604 F.3d 230, 238 (6th Cir. 2010).

Contrary to the government's principle merits defense, BIO 11, "[i]t is not enough that the warrant makes reference to a particular offense; the warrant must ensure that the search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Cassady v. Goering*, 567 F.3d 628, 636 (10th Cir. 2009). As the scope of the warrant was not

limited by type of data, location, or time, it failed the Fourth Amendment's particularity requirement. The court below erred when it concluded otherwise.

Given the vast quantity of data stored on cell phones and other digital devices, there is "a serious risk that every warrant for electronic information will become, in effect, a general warrant rendering the Fourth Amendment irrelevant." *Galpin*, 720 F.3d at 446 (quoting *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1176 (9th Cir. 2010) (en banc)). "This threat demands heightened sensitivity to the particularity requirement in the context of digital searches." *Id.* "We have clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant." *Groh*, 540 U.S. at 559. The government cannot change the scope of this warrant retroactively by reading a limitation into it that does not exist. The district court and case agent certainly did not. *E.g.*, C.A.J.A. 1193.

Just as in *Groh*: "The warrant was plainly invalid. The Fourth Amendment states unambiguously that '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.' The warrant in this case complied with the first three of these requirements: It was based on probable cause and supported by a sworn affidavit, and it described particularly the place of the search. On the fourth requirement, however, the warrant failed altogether." *Groh*, 540 U.S. at 557. So too here. The decision below was wrong.

D. The Error Was Not Harmless Beyond a Reasonable Doubt, Nor Has the Government Attempted to Meet Its Burden to Show that it Was.

The government further argues that this case is a poor vehicle because there was other evidence that Petitioner Campbell might have been guilty of the crimes with which he was charged, making any error "harmless." BIO 16.

This legal issue, with regard to the invalidity of the search warrant under the Fourth Amendment due to particularity, was fully litigated and preserved at every stage of this case. That there may have been other evidence against Mr. Campbell does not make this case a "poor vehicle" in which to decide a preserved Fourth Amendment legal question. This Court does not require accused criminal defendants to demonstrate factual innocence before they may make preserved legal arguments on direct appeal.

Moreover, because this issue is about a constitutional error, the standard for harmlessness is harmlessness beyond a reasonable doubt, not harmless error, *contra* BIO 16, and the burden is on the government to prove it. The government asserts that the error in this case was "harmless," citing *Chambers v. Maroney*. But the government states the law incorrectly. The standard the Court applied in *Chambers* was "harmless beyond a reasonable doubt." 399 U.S. 42, 53 (1970); *see also Chapman v. California*, 386 U.S. 18, 24 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

Harmless beyond a reasonable doubt is a far higher standard than the Rule 52(a) harmless error standard, and there is one other crucial difference. It is the government who bears the burden of proving harmlessness beyond a reasonable doubt in constitutional cases, rather than the accused. *See Chapman*, 386 U.S. at 24. Mr. Campbell noted in his petition that the Fourth Amendment violation in the search warrant here was not harmless. Pet. 15-16. He maintains that position. He also notes, however, that the government's invitation to require an accused person to demonstrate some quantum of factual innocence on direct appeal before this Court agrees to answer a legal question about the Fourth Amendment is both illogical and unwise.

As Mr. Campbell argued in the petition, Pet. 16, the government relied on the evidence that came from the invalid and insufficiently particular "all data" warrant heavily at the trial in this case. Thus the error was not harmless, and certainly was not harmless beyond a reasonable doubt, a burden the government has neither acknowledged, nor met.

The validity of a search warrant that lacks particularity on its face, because authorizes a search of "all electronic data" on a phone, is a legal question that this Court can and should answer, and is a question on which the lower courts are divided. The merits of that question are unrelated to any other facts adduced at the trial of Mr. Campbell, and thus to the question of harmlessness beyond a reasonable doubt.

CONCLUSION

The split of authority on Fourth Amendment particularity and "all data" search warrants is clear. Petitioner asks this Court to grant certiorari to resolve the question presented.

Respectfully submitted,

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