No.

In the Supreme Court of the United States

DANIEL J. VAN LINN, PETITIONER,

v.

STATE OF WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a clear and intractable conflict regarding an important exception to the exclusionary rule. In *Murray v. United States*, 487 U.S. 533 (1988), this Court held that evidence obtained in violation of the Fourth Amendment can still be admitted and used against a criminal defendant if the evidence would have been gained lawfully through an "independent source." In so holding, this Court focused on what would have happened if the unlawful search never occurred.

After *Murray*, the circuits have squarely divided over whether the "independent source" inquiry is subjective or objective. In the majority of jurisdictions the inquiry is subjective: it asks whether the actual state officials involved in the case would have gotten the evidence in a lawful way had the unlawful search never happened. In three federal circuits and three states, however, the inquiry is objective: asking only whether a reasonable official would have gotten the evidence in a lawful way had the unlawful search never happened. In the case below, the Supreme Court of Wisconsin joined the small minority of courts that apply the objective approach. That holding was outcome-determinative, and this case is a perfect vehicle for resolving the widespread disagreement over this important question.

The question presented is:

Whether a court seeking to determine if a source of evidence is "genuinely independent" for purposes of the "independent source" exception to the exclusionary rule must ask whether the actual officers involved would have sought the relevant evidence had the unlawful search never taken place or instead may ask only whether a hypothetical reasonable officer would have sought the relevant evidence had the unlawful search never taken place.

RELATED PROCEEDINGS

The are no proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (App. 1a-25a) is published at 971 N.W.2d 478. The decision of the Court of Appeals of Wisconsin (App. 26a-37a) is unpublished but available at 953 N.W.2d 116 (Table) and 2020 WL 6733500. The trial court's order denying petitioner's motion to suppress (App. 38a-46a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on March 24, 2022. App. 1a. This Court then extended the time to file a petition for certiorari to August 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. 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.

STATEMENT OF THE CASE

This case is an ideal vehicle to resolve a clear and important circuit conflict regarding the "independent source" exception to the exclusionary rule. In the proceedings below, a divided Supreme Court of Wisconsin expressly adopted the position that, under the independent source exception to the exclusionary rule, a court need ask only whether a reasonable official would

have lawfully obtained the otherwise-tainted evidence to conclude that it is admissible at trial. The dissent would have reached the opposite conclusion. The dispute over whether the independent source inquiry is subjective or objective was resolved at each stage of this case and was dispositive below; there are no possible obstacles to resolving it in this Court.

This case readily meets the conventional criteria for granting review. The conflict is obvious and entrenched. The leading Fourth Amendment treatise has flagged the issue.[1] Three circuits and three state supreme courts have explicitly held that *Murray*'s "independent source" test may be applied by looking only to the actions of a hypothetical reasonable officer, whereas nine other circuits and numerous state courts have held the opposite. Further percolation is useless: the arguments have been comprehensively developed on each side, every circuit and a significant majority of state appellate courts have weighed in, and there is no genuine likelihood that either bloc will relent. All while the rights of criminal defendants in Fourth Amendment cases are left to the accident of geography.

The question presented raises legal and practical issues of exceptional gravity, and its appropriate resolution is essential to the implementation of the exclusionary rule. It is cold comfort to criminal defendants to seek to exclude evidence procured without a warrant when the prosecutor can get the evidence

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[1] 6 Wayne R. LaFave, *Search & Seizure* § 11.4(f) (6th ed.) ("*Murray* instructs that even if the illegality unquestionably contributed not at all to the magistrate's decision to issue the warrant, the warrant is nonetheless tainted if the illegally obtained facts prompted 'the agents' decision to seek the warrant.' But, exactly what is involved in making this latter determination? *Murray* is less than clear on this point . . . .").

admitted anyway because a hypothetical reasonable officer would have gotten a warrant.

This Court granted review in *Murray* to resolve this identical question at a time when the fruits of unlawful searches were almost always physical goods. Now in the era of electronic devices, where the same information can be stored in numerous separate locations, it is more essential than ever to have clarity about the scope of the independent source exception. This case is the ideal vehicle to resolve this surpassingly important question of federal law. The petition should be granted.

A. Legal Background

1. The Fourth Amendment to the U.S. Constitution protects against "unreasonable searches and seizures." U.S. Const. amend. IV. To enforce this protection, the Court established the exclusionary rule and held in *Weeks v. United States*, 232 U.S. 383 (1914), that the federal government could not rely on illegally seized evidence to obtain criminal convictions in federal court. In 1961, the Court held that the exclusionary rule applies to states in addition to the federal government, thus adopting the exclusionary rule as a national standard. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The exclusionary rule bars the government from using most evidence that was gathered as a result of a constitutional violation. In addition to evidence uncovered as a direct result of a constitutional violation, "the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so [attenuated] as to dissipate the taint.'" *Murray v. United States*, 487 U.S. 533, 536-37 (1988) (quoting *Nardone v. United States*, 308 U.S. 338, 341

(1988)). The derivative evidence is often called the "fruit of the poisonous tree."

2. The precise scope of the exclusionary rule and the "fruit of the poisonous tree" doctrine has generated substantial confusion for courts and litigants nationwide.

a. In *Murray v. United States*, 487 U.S. 533 (1988), the Court elaborated on an important exception to the exclusionary rule, which has come to be known as the "independent source" doctrine.

In *Murray*, federal officers performed an illegal, warrantless search of a South Boston warehouse and spotted marijuana inside. Later, they obtained a warrant and performed a second, lawful search, whereupon they seized 270 bales of marijuana and customer lists. *Id.* at 535-36. Rather than automatically exclude the marijuana, the Court held that if the government could establish on remand that if the second (lawful) search would have been undertaken anyway if the first (unlawful) search had never happened, the evidence could be admitted because it was not derived from the unlawful search, but from a "genuinely independent source." *Id.* at 542. Because the district court had not made "adequate findings" to determine whether "the agents would have sought a warrant if they had not earlier entered the warehouse," this Court remanded for further factual development. *Id.* at 543.[2]

b. While *Murray* set forth the standard—that the fruits of a "genuinely independent" search should not be excluded—it did not resolve the proper analysis to use to determine whether two searches are, in fact, genuinely independent. To be sure, this Court strongly suggested

[2] "Murray negotiated an agreement with the government after this remand, negating the need for a decision on the 'independent source' question." *Murray v. United States*, 704 F.3d 23, 27 (1st Cir. 2013) (citation omitted).

that the inquiry depends on the actual knowledge and subjective intentions of the officers who conducted the searches—*i.e.*, whether they "would have" conducted the lawful search anyway. *Id.* at 537; *see* 6 Wayne R. LaFave, *Search & Seizure* § 11.4(f) (6th ed.) (*Murray* "*assumes*" that the "question is the actual motivation or intention of the officers in the particular case, that is, that a subjective rather than an objective test is applicable in this context" (emphasis added)). After all, the court of appeals had "infer[red]" from objective circumstances that the answer to this question was yes, but this Court found that "inference" was not "clear enough to justify the conclusion" and instead that more factual development was necessary. *Murray*, 487 U.S. at 543-44. But this Court did not explicitly resolve the subjective-versus-objective question. There is now a significant circuit split on this question, and this Court has not stepped in to clarify it.

B. Factual and Procedural Background

1. In the early hours of Sunday, March 26, 2017, Daniel Van Linn (petitioner here) was in a car accident. App. 4a. He was driving by himself that night on a country road in the small town of Mountain, Wisconsin (population: 900) when a car suddenly emerged from the darkness headed right at him. App. 4a. He swerved off the road, hit a tree, crossed back over the road, and crashed into a cabin. *Id.* at 4a-5a He called the police to report the accident, and a deputy arrived at the scene at around 2 a.m. *Id.* Petitioner was found lying on the ground with a bump on his head and some bleeding from his head and hands. *Id.* at 5a. The deputy noticed a "moderate odor of alcohol," and after petitioner admitted he had had "two beers," he was taken to a nearby hospital for his injuries. *Id.*

At around 4 a.m., the hospital performed a "diagnostic workup," which included a blood draw. *Id.* A short time later, a sheriff's deputy arrived and arrested

petitioner for operating while intoxicated ("OWI"). *Id.* The officer asked petitioner's consent for a blood draw, which petitioner refused. *Id.* The officer then drew petitioner's blood without a warrant. That blood draw showed that petitioner had a BAC of 0.205, which is higher than the legal limit. *Id.* at 6a.

2. At trial, petitioner moved to suppress the results of the deputy's blood draw because the deputy failed to get a warrant. *Id.* The circuit court agreed and suppressed the blood draw. *Id.*

Months passed with no action in petitioner's case. Then, three months after the circuit court suppressed the deputy's blood draw results, the State asked the circuit court to issue a subpoena (which in Wisconsin requires probable cause) for the results of the hospital's blood draw. *Id.* In its supporting affidavit, the State referenced the deputy's illegal blood draw and the results of that blood draw. *Id.* The State also asserted that "there was probable cause for the subpoena because the deputy smelled alcohol on [petitioner] at the scene, [petitioner] had a reduced BAC restriction, and [petitioner] admitted he had been drinking before the accident."[3] *Id.* Petitioner moved to quash the motion, but before the court held a hearing on petitioner's motion, the subpoena was issued and executed. *Id.* at 6a-7a. The hospital provided the State with the hospital's blood draw records. *Id.* at 7a. The hospital's blood draw showed that petitioner had a BAC of 0.226. *Id.* at 5a.

Petitioner filed a motion to suppress the hospital's blood draw results on the grounds that the State was attempting to circumvent the circuit court's prior decision to suppress the illegal blood draw. *Id.* The circuit court

[3] The State later admitted that the subpoena was "necessary after the suppression[]" of the illegal blood draw. Br. Opp. Def.'s Mot. to Supp. at 3-4.

denied petitioner's motion. *Id.* Following the ruling, petitioner pled no contest to the fifth-offense OWI charge. Subsequently, petitioner appealed. *Id.* at 30a.

3. On appeal, petitioner argued that the State's subpoena for the hospital's blood draw results was prompted by the results of the illegal blood draw. *Id.* at 7a-8a. Petitioner further argued that allowing the results of the hospital blood draw would undermine the exclusionary rule's purpose of deterring police misconduct. *Id.* at 30a. The court of appeals rejected these arguments and ruled against petitioner. *Id.* at 8a. The Supreme Court of Wisconsin granted review. *Id.*

4.a. A divided Supreme Court of Wisconsin affirmed. App. 14a-15a. The majority held that the hospital's blood draw results were admissible under the independent source doctrine. *Id.* The majority acknowledged that "typically," evidence obtained in violation of the Fourth Amendment "must be suppressed under the exclusionary rule," *id.* at 9a, but recognized that the "independent source" doctrine allows for the admission of evidence or information tainted by an illegal evidence-gathering activity "when the State otherwise acquires the same information . . . by lawful means 'in a fashion untainted' by that illegal activity," *id.* at 10a.

The majority rejected petitioner's argument that here the subpoena was tainted by the unlawful blood draw—and thus ineligible for the independent source doctrine—because "the State's decision to subpoena his medical records was 'motivated specifically' by the knowledge it gained from the deputy's unlawful blood draw—that his BAC was over the legal limit." *Id.* at 11a.

The majority held that *Murray* "demonstrates that the independent-source doctrine can apply even though the State knew the hospital's blood test would show an unlawful BAC." *Id.* The majority explained that "*Murray* teaches that the independent-source doctrine applies

when the State has a separate reason to seek the challenged evidence apart from the knowledge it gains from an unlawful search." *Id.* at 11a-12a. Applying its understanding of the independent source doctrine to the facts of this case, the majority held that the independent source doctrine applied because "the State had ample reasons to subpoena Van Linn's medical records for evidence of OWI, apart from what it learned from the deputy's unlawful blood draw." *Id.* at 12a.

Further responding to petitioner's argument that the subpoena was "the 'direct result' of the deputy's unlawful conduct" the majority gave two additional reasons for its conclusion that the independent source doctrine permitted the state to use the diagnostic blood test results. *Id.* at 13a.

First, the court explained that this Court "has rejected the strict but-for causality Van Linn presses here." *Id.* Therefore, the "more apt question" for whether the exclusionary rule applies is: did the State 'exploit[ ]' the deputy's unlawful conduct?" *Id.* And, in this case, "the State did not exploit the deputy's illegal conduct because, as explained above, the State had reasonable grounds to suspect Van Linn of OWI prior to *anyone* drawing his blood." *Id.* at 15a.

Second, the majority also reasoned that the illegal blood draw results should be admitted because suppressing these illegally obtained results "would not further the purpose of the exclusionary rule, which is to deter police misconduct." *Id.* at 14a. According to the majority, "[s]uppressing the hospital's diagnostic blood test . . . would have no further deterrent effect because it involved no police conduct at all, let alone misconduct." *Id.*

b. Justice Ann Walsh Bradley dissented. *Id.* at 16a.

Zeroing in on the majority's application of *Murray*, Justice Bradley explained that "the majority correctly

frames the question, focusing on 'whether the State's decision to seek the subpoena was prompted by what it learned from the deputy's unlawful blood draw'" but then "quickly strays from this inquiry." *Id.* at 21a. As Justice Bradley explained, the majority "highlights its conclusion that there was enough *information* to seek a subpoena of the hospital sample before either blood draw was conducted." *Id.*

But that "is not the question that *Murray* poses." *Id.* Rather, under *Murray*, "we must ask whether the information learned from the first unconstitutional search 'prompted' the second." *Id.* "Common sense says yes." *Id.* "[T]he illegal search gave the State a sneak-peek of what it was going to find in the 'lawful' search: that Van Linn's blood alcohol level was above the legal limit." *Id.* at 21a-22a. "In other words, when law enforcement filed for the subpoena of the hospital's test results, they already knew what they were going to find due to the illegal search." *Id.* at 22a. "Would officers really have sought the subpoena if the illegally obtained sample had shown that Van Linn's BAC was *below* the legal limit?" *Id.*

Justice Bradley explained that the majority's holding "create[es] a perverse incentive for law enforcement to conduct warrantless searches," *id.* at 17a, by "[p]roviding the State with an insurance policy in the event of an unconstitutional search," *id.* at 16a. Responding to the majority's reasoning that suppressing the test results from the hospital blood sample would have "no further deterrent effect," Justice Bradley explained that "allowing law enforcement a second chance to 'discover' the same information after it violates a person's rights in conducting a search *encourages* police misconduct." *Id.* at 22a. "Instead of taking the time to apply for a warrant, why wouldn't law enforcement give a warrantless search a try if it knew that it could get the same information

admitted from another source in the event the fruits of the first search are suppressed?" *Id.*

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT OVER THE "INDEPENDENT SOURCE" ANALYSIS

The Supreme Court of Wisconsin's decision further entrenches a conflict over a longstanding question that *Murray* did not expressly resolve: whether the independent source inquiry is "objective" or "subjective." 6 LaFave, *supra*, § 11.4(f). Nine circuits and the overwhelming majority of state supreme courts hold that the independent source inquiry is *subjective*. The officials involved bear the burden of establishing that they actually would have lawfully obtained the evidence even if the first search had never taken place. Three circuits and two state supreme courts, in addition to the Supreme Court of Wisconsin, apply an *objective* test, asking only whether a reasonable official would have lawfully obtained the evidence even if the first search had never taken place.

As it now stands, the scope of the exclusionary rule depends entirely on where a criminal prosecution is brought. Numerous criminal defendants have diminished Fourth Amendment rights in jurisdictions that apply the objective rule. The flagrant conflict over this elemental Fourth Amendment question is intolerable. The division of authority is incontestable and engrained, and it should be resolved by this Court.

1.a. The decision below directly conflicts with settled law in the Eighth Circuit. In *United States v. Leveringston*, 397 F.3d 1112 (8th Cir. 2005), the Eighth Circuit refused to apply the independent source exception in a situation materially identical to petitioner's, because the government did not prove "that the police would have sought a warrant if they had not earlier" conducted an unlawful search. The court held that it is "not sufficient,

under *Murray*, for a court of appeals to infer from the circumstances that the police inevitably would have sought a warrant; findings of fact by the district court are required." 397 F.3d at 1115.

In *Leveringston*, officers suspecting drug activity inside a hotel suite knocked on the door, heard a flurry of loud noises inside, and, a couple of minutes later, saw the suspect jump out the window of the suite. *Id.* at 1113-14. The officers chased down the suspect and, when detaining him, noticed that his hand was wounded and that he was covered in blood. *Id.* at 1114. The officers went back to the suite and entered without a warrant; inside, "they observed blood near a sink, a scale, plastic baggies, a razor blade, and what they believed to be crack cocaine." *Id.* Two or three hours later, officers obtained a search warrant and seized baggies of crack and cocaine from the suite. *Id.* The affidavit supporting the warrant referred to the officers' observations during the warrantless entry but also contained other information supporting "probable cause to search the hotel suite." *Id.* at 1115.

On appeal from the denial of the defendant's suppression motion, the government invoked "the 'independent source doctrine,'" arguing "that the later-obtained warrant provides a sufficient basis for the disputed seizure, even assuming the initial entry was unlawful, so there is no need to decide whether exigent circumstances justified the warrantless entry." *Id.* at 1114 (citing *Murray*). But the Eighth Circuit "c[ould] not accept the government's position on this point, because it understate[d] the showing required to establish that a search warrant is genuinely independent of an earlier entry." *Id.* at 1115. The court instead found it necessary to decide whether the initial search was justified by exigent circumstances. *Id.* at 1115-18.

In rejecting application of the independent source exception, the Eighth Circuit made clear that the test is

subjective, not objective, and therefore that the existence of "probable cause to search the suite" at the time of the unlawful entry is not sufficient. *Id.* at 1115. *Murray*, the court explained, "makes clear … that to employ the independent source doctrine, the government … must establish that the police would have sought a warrant if they had not earlier entered the hotel suite." *Id.* "It is not sufficient, under *Murray*, for a court of appeals to infer from the circumstances that the police inevitably would have sought a warrant; findings of fact by the district court are required." *Id.*

The Eighth Circuit held that these "findings of fact" must establish that officers in fact would have sought a warrant regardless of the illegal entry. "When the government seeks to rely on the independent source doctrine in a case involving a later-obtained warrant, it should present specific evidence that the officers were not prompted by allegedly unlawful activity to obtain the warrant, and should seek a finding on that point from the district court." *Id.*

The government's independent source argument failed because the district court had not made that critical, subjective finding. Rather, the district court had "found that after the initial warrantless entry, 'Sergeant Arroyo called Detective Cesena of the Drug Enforcement Unit who arrived on the scene and, *based on her observations of the suite,* obtained a no-knock search warrant for the suite approximately two or three hours later.'" *Id.* (emphasis in original). "While th[at] finding d[id] not preclude the possibility that officers other than Detective Cesena would have sought a warrant even if they had been prevented from entering the suite without a warrant," it was not the appellate court's "function to determine the facts, and the district court certainly did not 'explicitly find that the agents would have sought a warrant if they

had not earlier entered the [hotel suite].'" *Id.* (quoting *Murray,* 487 U.S. at 543).

The Eighth Circuit has since confirmed that it uses a subjective approach, evaluating "what officers *would have done* if" the initial unlawful search had not occurred. *United States v. Anguiano*, 934 F.3d 871, 875 (8th Cir. 2019).

b. The Supreme Court of Wisconsin's decision also conflicts with settled law in the Eleventh Circuit. Like the Eighth Circuit, the Eleventh Circuit has held that the independent source doctrine does not apply unless the officers establish, as a factual matter, that they "would have sought [a] warrant" absent the unlawful search. *United States v. Noriega*, 676 F.3d 1252, 1260 (11th Cir. 2012).

In *Noriega*, officers were investigating a house where an anonymous tipper reported that marijuana was being grown. *Id.* at 1256. Earlier that day, they had searched a nearby property and found a growing operation, as well as a rifle and surveillance system. Concerned about their safety, the officers conducted a protective sweep of the house, during which they spotted suspicious lighting equipment, ballasts, and a timer, similar to what they had seen in the first property. *Id.* at 1257. One of the officers then walked around the house's outbuilding and smelled marijuana. *Id.* Based on the anonymous tip, the search of the first property, and the officers' observations during the protective sweep and odor near the outbuilding, the officers obtained a warrant to search the house and outbuilding and inside discovered another growing operation. *Id.* at 1257-58.

The defendant claimed that the protective sweep violated the Fourth Amendment, and thus the subsequent search was invalid because it depended on what officers observed during the sweep. *Id.* at 1259-60. But rather than deciding whether the protective sweep was lawful,

the Eleventh Circuit analyzed whether the later search was nonetheless justified under "the independent source exception to the exclusionary rule." *Id.* at 1260. The court applied its established "two-part test," asking, first, whether there would have been probable cause for a warrant even without the unlawfully obtained information and, second, whether the officers "would have sought the warrant" absent the unlawful search. *Id.* (citing *United States v. Chaves*, 169 F.3d 687, 692-93 (11th Cir. 1999)). If the officer "would have sought the warrant anyway," the Eleventh Circuit explained, then "the district court did not err in denying the motion to suppress under the independent source exception to the exclusionary rule." *Id.* at 1263. "But if [the officer] would not have sought the warrant anyway, we will have to decide whether the district court erred in determining that the protective sweep of [the] house did not violate the Fourth Amendment." *Id.*

The Eleventh Circuit held that it lacked the facts necessary to resolve its inquiry, and thus remanded for a determination of "whether Corporal Williams would have sought the oral search warrant for the Chutney Drive house and outbuilding if he had not already conducted the protective sweep of that house." *Id.* The key question—"Would he have sought the search warrant even if he had not conducted the protective sweep?"—was "a question of fact, which the district court did not resolve when ruling on Noriega's motion to suppress." *Id.* (citing *Murray*).

c. The Supreme Court of Wisconsin's decision also squarely conflicts with established law in the Second Circuit. In *United States v. Johnson*, 994 F.2d 980 (2d Cir. 1993), the Second Circuit applied the same two-part test applied by the Eleventh Circuit, agreeing that in applying *Murray*, "the relevant question is whether the warrant 'would have been sought even if what actually happened

had not occurred.'" 994 F.2d at 987 (quoting *Murray*, 487 U.S. at 542 n.3).

In *Johnson*, the defendant was convicted of attempted murder for shooting two coworkers at the Brooklyn Navy Yard. Prior to the shootings, the defendant had begun wearing a miniature tape recorder under his shirt to tape conversations as well as private statements. "On the tapes, Johnson could be heard making various comments about his co-workers and about himself that reflected his state of mind prior to the shooting." *Id.* at 982. Agents seized several of these tapes while arresting the defendant and during a subsequent unlawful search of his residence and van. They listened to the tapes for months without a warrant, but, after the district court held that the search of the defendant's residence and van was unlawful and indicated that review of the tapes incident to arrest was likely unjustified, the government obtained a warrant relying on information "independent of what had been gleaned from the prior listening to the tapes." *Id.*

The Second Circuit affirmed application of the independent source exception, and in doing so, confirmed that the relevant inquiry is subjective, not objective. The key question, the court explained, was "whether the agents would have applied for a warrant had they not listened to the tapes beforehand." *Id.* at 987. This independent source analysis was crucial to ensuring "that the government does not gain an advantage from its initial violation"; in the court's view, that concern was not present for the tapes but only because "the government did not apply for the warrant based on its premature review of the tapes." *Id.* "Clearly, the agents would have and could have applied for and been issued a warrant to listen to the tapes regardless of their prior review." *Id.* "The government would have acquired the evidence on the tapes without the agents' mistaken prior review of the

tapes, since the warrant application was prompted not by the prior review but by the obvious relevance of the tapes and the district court's indication that a warrant was necessary." *Id.*

d. The Second, Eighth, and Eleventh Circuits' subjective approach is emblematic of the approach taken by the Fourth, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits. In these circuits, "the core judicial inquiry . . . is a subjective one"; all require proof that officers actually would have obtained a warrant absent the initial unlawful search. *United States v. Restrepo*, 966 F.2d 964, 972 (5th Cir. 1992); *see also United States v. Hill*, 776 F.3d 243, 253 (4th Cir. 2015) (remanding "to the district court to determine whether the information gained from the illegal walk-through and dog sniff affected Officer Root's decision to seek a warrant"); *United States v. Huskisson*, 926 F.3d 369, 376 (7th Cir. 2019) ("the district court faithfully applied [our] standards … to determine the government's motives in filing the search warrant application"); *United States v. Howard*, 972 F.2d 1345 (9th Cir. 1992) (Mem.) ("Here, as in *Murray,* no determination was made as to whether the agents would have sought a warrant if they had not earlier obtained incriminating evidence in the illegal entry into Howard's residence."); *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1116 (10th Cir. 1998) (affirming rejection of independent source argument because although "the government presented several witnesses … who testified that generally their investigation did not depend on the [unlawfully seized] notepad and that none of the counts in the indictment were attributable to the information in the notepad," the "district court … exercised its prerogative to disbelieve the testimony of the government's witnesses"); *United States v. Halliman*, 923 F.2d 873, 880 (D.C. Cir. 1991) (affirming denial of suppression because the "district court [had] found that the officers had not

decided to obtain the emergency warrant on the basis of what they had seen" during their unlawful search).

The appellate courts of at least 40 states and the District of Columbia also have adopted a subjective approach.[4] The D.C. Court of Appeals, for instance,

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[4] *Kabat v. State*, 867 So. 2d 1153, 1157-58 (Ala. Crim. App. 2003); *Mathis v. State*, 778 P.2d 1161, 1166 (Alaska Ct. App. 1989); *State v. Peterman*, No. 1 CA-CR 15-0710, 2016 WL 7368566, at *4 (Ariz. Ct. App. Dec. 20, 2016); *Lauderdale v. State*, 82 Ark. App. 474, 481-88 (2003); *People v. Weiss*, 20 Cal. 4th 1073, 1079 (1999); *People v. Haack*, 2019 CO 52, ¶¶ 12-13, 44 P.3d 105, 108-09; *State v. Vivo*, 241 Conn. 665, 672-78 (1997); *State v. Blackwood*, No. 1809011229, 2020 WL 975465, at *8 (Del. Super. Ct. Feb. 27, 2020); *Evans v. United States*, 122 A.3d 876 (D.C. 2015); *Jackson v. State*, 1 So. 3d 273, 278-79 (Fla. Dist. Ct. App. 2009); *State v. Lejeune*, 277 Ga. 749, 754-55 (2004); *State v. Follinus*, 124 Idaho 26, 28 (1993); *People v. Haubrich*, No. 2-19-0858, 2021 WL 6101475, at ¶ 43-52 (Ill. App. Ct. 2nd Dist. Dec. 21, 2021); *Ogburn v. State*, 53 N.E.3d 464, 476 (Ind. Ct. App. 2016); *State v. McGrane*, 733 N.W.2d 671, 682 (Iowa 2007); *State v. Daly*, 14 Kan. App. 2d 310, 315 (1990); *Dadbin v. Com.*, No. 2003-CA-000262-MR, 2004 WL 1532258, at *2 (Ky. Ct. App. July 9, 2004); *Kamara v. State*, 205 Md. App. 607, 628 (2012); *State v. Thibodeau*, 2000 ME 52, ¶¶ 6-7, 747 A.2d 596, 598-99; *People v. McKinney*, No. 315483, 2014 WL 4098791, at *7, *10 (Mich. Ct. App. Aug. 7, 2014); *State v. Hoel*, No. A12-2064, 2014 WL 2807525, at *4 (Minn. Ct. App. June 23, 2014); *Chesney v. State*, 165 So. 3d 498, 512 (Miss. Ct. App. 2015); *State v. Renfrow*, 224 S.W.3d 27, 35 (Mo. Ct. App. 2007), *as modified* (May 1, 2007); *State v. New*, 276 Mont. 529, 536-37, 917 P.2d 919, 923-24 (1996); *State v. Beeken*, 585 N.W.2d 865, 874 (Neb. Ct. App. 1998); *State v. Zittel*, 131 Nev. 1351 (Nev. App. 2015); *State v. Cushing*, No. A-0856-12T1, 2014 WL 243023, at *8 (N.J. Super. Ct. App. Div. Jan. 23, 2014), *aff'd*, 140 A.3d 1281 (N.J. 2016); *People v. Herman*, 533 N.Y.S.2d 971, 974 (1988); *State v. McLean*, 463 S.E.2d 826, 829 (N.C. Ct. App. 1995); *State v. Kuruc*, 2014 ND 95, ¶¶ 21-23, 846 N.W.2d 314, 321-22; *State v. Banks-Harvey*, 152 Ohio St. 3d 368, 376, 2018-Ohio-201, 96 N.E.3d 262, 271-72; *State v. Morgan*, 2019 OK CR 26, ¶ 19, 452 P.3d 434, 439-40; *State v. Tardie*, 509 P.3d 705, 713 (Or. Ct. App. 2022); *State v. Gonzalez*, 254 A.3d 813, 817-18 (R.I. 2021), *cert. denied*, 142 S. Ct. 1388 (2022); *State v. Heney*, 2013 SD 77, ¶¶ 15-25, 839 N.W.2d 558, 563-67; *State*

specifically considered and rejected the objective test in *Evans v. United States*, 122 A.3d 876 (D.C. 2015). There, the government argued that the court "could *itself* conclude that the officers would have gotten a warrant" regardless of the unlawful search "because the warrant refers only to" an offense not connected to what officers saw during the unlawful search. *Id.* at 884 (emphasis added). The D.C. Court of Appeals "disagree[d]" that the warrant alone could resolve the independent source question. *Id.* The search warrant did "not shed very direct light on what the officers would have done if Officer Wendt had not entered the apartment" unlawfully; the "current record" was "not clear about what the officers would have done if Officer Wendt had not entered the apartment"; and, "in any event," it was not the appellate court's "function to decide issues of fact." *Id.* (citing *Murray*). Because the trial court did not "make a factual finding as to what the officers would have done if Officer Wendt had not entered the apartment," and "the officers did not testify about what they would have done if Officer Wendt had not entered the apartment," the government's independent source argument failed. *Id.*

2. In contrast with the prevailing subjective rule, the First, Third, and Sixth Circuits, along with the supreme courts of Pennsylvania and Washington, agree with the Supreme Court of Wisconsin that the independent source inquiry is *objective*. In these courts, if a reasonable officer

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v. Harmon, 775 S.W.2d 583, 586-87 (Tenn. 1989); *Howard v. State*, 624 S.W.3d 14, 22-24 (Tex. App. 2021), *petition for discretionary review refused* (July 28, 2021); *State v. Krukowski*, 2004 UT 94, ¶¶ 23-24, 100 P.3d 1222, 1227-28; *State v. Birchard*, 2010 VT 57, ¶¶ 25-28, 188 Vt. 172, 185, 5 A.3d 879, 888-89; *Commonwealth v. Dawson*, No. 0822-14-1, 2014 WL 5327997, at *3 (Va. Ct. App. Oct. 21, 2014); *State v. Strawser*, No. 16-1039, 2017 WL 5513617, at *6 (W. Va. Nov. 17, 2017).

would have sought a warrant regardless of the initial unlawful search, then the fruits will not be excluded.

a. The First Circuit applies an objective approach indistinguishable from the Supreme Court of Wisconsin's, asking whether absent the initial, unlawful search "a reasonable officer would seek a warrant considering the totality of the circumstances." *United States v. Silva*, 554 F.3d 13, 19 (1st Cir. 2009); *see* App. 15a (dispositive that "the State had reasonable grounds to suspect Van Linn of OWI prior to anyone drawing his blood").

In *Silva*, an agent conducted an unlawful, warrantless search of the defendant's bedroom and seized a driver's license and cell phone bill. 554 F.3d at 17. After the agent brought the evidence to the police station, officers sought a warrant. *Id.* The First Circuit held that the evidence was admissible under *Murray*, rejecting the defendant's argument that the "search was tainted by the evidence obtained in [the illegal] search." *Id.* at 19.

The First Circuit understood *Murray* to require a fundamentally different inquiry from the courts that apply a subjective approach, asking not whether the officers would have obtained a warrant absent the first search, but rather whether "a *reasonable* officer would seek a warrant considering the totality of the circumstances." *Id.* (emphasis added). In the court's view, a reasonable officer would have sought a warrant because even without the evidence obtained during the initial search, "ample evidence remained" that supported probable cause. *Id.*; *see also, e.g.*, *United States v. Dessesaure*, 429 F.3d 359, 369 (1st Cir. 2005) ("Applying the first prong of *Murray,* it is clear that objectively the officers were not prompted to seek the warrant by what they saw in the apartment.").

b. The Third Circuit has expressly adopted the First Circuit's approach, concurring that the independent source exception applies so long as a reasonable officer

would have conducted the lawful search regardless of the unlawful one. In *United States v. Barefoot*, 391 F. App'x 997, 999 (3d Cir. 2010), the court affirmed application of the exception because the officers "had enough information" from an anonymous tip and interview "to have been prompted to apply for a warrant" regardless of the prior unlawful search. Rather than require any evidence or testimony about what the officers did or would have done, the court emphasized that it simply "may presume law enforcement officers will act reasonably, absent evidence to the contrary," citing First Circuit precedent supporting this presumption. *Id.* at 999 (citing *United States v. Siciliano*, 578 F.3d 61, 69 (1st Cir. 2009)).

c. Like the First and Third Circuits, the Sixth Circuit focuses exclusively on what evidence the officers possessed besides that gained during the unlawful search and asks whether that evidence would have supported a lawful search. In *United States v. Jenkins*, 396 F.3d 751 (6th Cir. 2005), officers squeezed (and thus seized) the defendant's luggage without a warrant and, based on the weight and feel of the bags, suspected there were bricks of cocaine inside. 396 F.3d at 754-56. One of the agents later testified that he deliberately chose to seize the bags before obtaining a warrant because if they were "soft" or particularly "heavy," he would be able to "get that information back to … the agent preparing the warrant affidavit." *Id.* at 755. In seeking a warrant, the officers even told the magistrate orally what they had discovered, and an agent "testified that he felt that the information the officers told [the magistrate] affected his decision." *Id.* at 758. The officers did not, however, include the information in their written warrant application.

The Sixth Circuit acknowledged the agent's testimony showing that the unlawful seizure influenced the officers' decision to obtain a warrant, and recognized that "strict application of *Murray*'s test" to that

testimony would likely make suppression "correct." *Id.* at 758. Nonetheless, the Sixth Circuit allowed introduction of the cocaine under the independent source exception. *Id.* at 757-58. In doing so, the court focused exclusively on the information in the written warrant application, holding that it "provide[d] sufficient probable cause for the warrant" independent from the information gained during the unlawful seizure of the luggage. *Id.* at 760. The district court had therefore "erred in suppressing the cocaine, because there was a sufficient basis for the warrant that was wholly independent from any 'tainted' information orally communicated to the issuing judge." *Id.*

d. Two other state supreme courts also have similarly rejected the subjective rule, holding that if "predictable police procedures" would have led reasonable officers to obtain a warrant regardless of the illegal search, then the independent source doctrine allows admission of the evidence. *State v. Gaines*, 116 P.3d 993 (Wash. 2005); *see Commonwealth v. Katona*, 240 A.3d 463 (Pa. 2020).

In *Gaines*, police performed an unlawful, warrantless search of the trunk of the defendant's car, during which they saw an assault rifle and ammunition. 116 P.3d at 995. The officers closed the trunk, obtained a warrant the next day, and seized the evidence. *Id.* The Washington Supreme Court affirmed denial of the defendant's suppression motion, holding that *Murray* "does not compel" excluding the fruits of the warrantless search. *Id.* at 998.

In contrast to the courts that require proof of what the officers actually would have done absent the initial search, the Washington Supreme Court relied exclusively on the trial court's finding "that the police would have obtained the items in the trunk 'through the course of *predictable police procedures*'"—a finding that "strongly, and we believe adequately, supports the conclusion that

the police would have sought a search warrant … independently from the improper glance inside the trunk." *Id.* (emphasis added). The court referenced no officer testimony about what the officers would have done if the initial unlawful search had not occurred. Instead, the court was assumed that the officers would have "predictabl[y]" sought a warrant because the vehicle the officers searched "played a central role in the crimes." *Gaines*, 116 P.3d at 998; *see also State v. Gaines*, 119 Wash. App. 1009 (2003) (court below affirming denial of exclusion because there was "ample connection here between the crimes alleged and the search warrant obtained to conclude that discovery of the rifle was inevitable").

Likewise, the Pennsylvania Supreme Court has expressly adopted an objective approach, focusing exclusively on whether the officers had adequate independent evidence to support a lawful search, rather than whether the officers actually would have conducted the lawful search absent the unlawful one. In *Commonwealth v. Katona*, 240 A.3d 463 (Pa. 2020), officers enlisted an informant to make recordings of the defendant at his home and, based on suspicions of drug dealing, later obtained a warrant and searched the home. 240 A.3d at 466-68. Applying *Murray*, the Pennsylvania Supreme Court held that, even if the recordings were unlawful, the independent source exception permitted introduction of drugs and paraphernalia seized during the search of the home. *Id.* at 481. Critically, the court claimed that it could resolve the *Murray* issue based on "the four corners of the affidavit of probable cause" used to secure the warrant. *Id.* In the Pennsylvania Supreme Court's view, the affidavit's reliance on evidence of drug dealing besides the unlawful recordings—including interviews and controlled purchases—"squarely answered" the independent source question, despite the lack of any

direct testimony regarding what the officer would have done absent the unlawful recording. *Id.* at 482. The independent evidence showed *per se* that the officer's decision "was prompted not by any recording made . . . , but instead by the totality of the evidence . . . collected over the course of their long-running investigation." *Id.*; *see also, e.g.*, *Commonwealth v. Brundidge*, 620 A.2d 1115, 1119 (Pa. 1993) (applying *Murray* because the warrant affidavit identified "sufficient evidence" besides that gained during the unlawful search).

3. Numerous lower courts have likewise split over which approach to follow under the independent source doctrine. District courts within the First Circuit, for example, expressly apply the objective approach, asking whether a "reasonable officer" would have sought a warrant to secure the unlawfully obtained evidence. *United States v. Ponzo*, 972 F. Supp. 2d 82, 86 (D. Mass. 2013). Other district courts openly disagree, instead conducting a "motivational inquiry" to "root out . . . 'confirmatory search[es],'" *i.e.*, unlawful searches conducted "merely to see if there was anything worth getting a warrant for." *United States v. Hanhardt*, 155 F. Supp. 2d 840, 847-48 (N.D. Ill. 2001) (quoting *Murray*, 487 U.S. at 540 n.2); *see also, e.g.*, *United States v. Nayyar*, 221 F. Supp. 3d 454, 467 (S.D.N.Y 2016) (key question is "what motivated law enforcement officers"); *see also* 6 LaFave, *supra* § 11.4(f) ("*Murray* assumes that the question is the actual motivation or intention of the officers in the particular case, that is, that a subjective rather than an objective test is applicable in this context.").

* * * * *

This entrenched split will not subside without this Court's intervention. The conflict is so widespread that it is incapable of self-correction: Every regional federal circuit has weighed in, as have the appellate courts of the

vast majority of states. Three federal courts of appeals, along with three state supreme courts (together governing over 80 million people) have committed to the objective approach. In these courts, defendants can be prosecuted and convicted using evidence obtained because of an unlawful search, so long as a reasonable officer could have obtained the evidence through a lawful search. A significant majority of circuits and state appellate courts have committed to the subjective approach, with many decisions expressly considering and rejecting the objective view as conflicting with *Murray*. *See, e.g.*, *Leveringston*, 397 F.3d at 1115 ("It is not sufficient, under *Murray*, for a court of appeals to infer from the circumstances that the police inevitably would have sought a warrant; findings of fact by the district court are required."). Unless this Court intervenes, citizens' Fourth Amendment protections will continue to depend on the happenstance of geography—and even turn on whether they are prosecuted in state versus federal court. *Compare United States v. Huskisson*, 926 F.3d 369, 376 (7th Cir. 2019) (*Murray* depends on "the government's motives in filing the search warrant application"), *with* App. 15a (*Murray* depends on whether "the State had reasonable grounds to suspect Van Linn of OWI prior to anyone drawing his blood").

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

The question presented is of exceptional legal and practical importance. The need for further review is starkly apparent. The case presents a clear, entrenched conflict over a significant question of constitutional law with profound real-world stakes. The courts of appeals and state supreme courts are divided over how to apply a critical exception to the exclusionary rule. This Court alone can say what the exclusionary rule requires in these cases. The issue arises repeatedly in criminal cases

nationwide, and the practical stakes are significant: the issue determines whether police misconduct results in the exclusion of evidence in every court with criminal jurisdiction in the United States. The issue could hardly be more important.

Nor is there any hope of this issue resolving itself. Dozens of courts with jurisdiction over tens of millions of people are arrayed on both sides. There are simply too many courts across too many jurisdictions to expect that they will all come into alignment without this Court's intervention. And the stakes are substantial. In jurisdictions that apply the objective standard the ability of a criminal defendant to secure the exclusion of adverse evidence is substantially diminished. This issue will continue generating uncertainty and confusion among courts of appeals and state high courts until this Court intervenes, and this case is the ideal vehicle for resolving the question. Certiorari is warranted.[5]

1.a. The sheer number of reported decisions involving the independent source exception confirms the issue's importance, and there is no genuine dispute that the issue arises constantly in courts nationwide. Criminal cases in which government officials invoke the independent source exception to the exclusionary rule are common, and with even a small fraction turning on the objective versus subjective distinction, the need to resolve the question presented is obvious.

There is no basis for leaving an issue with such a broad and important consequences to the happenstance of where a criminal investigation is conducted and a criminal prosecution is brought. Police officers and prosecutors

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[5] This court often grants review to decide Fourth Amendment questions arising in the unique context of exigent searches for evidence of intoxication. *Birchfield v. North Dakota*, 579 U.S. 438, 454 (2016); *Missouri v. McNeely*, 569 U.S. 141, 147 (2013).

should have "clear guidance" "through categorical rules" to resolve questions about when and whether police misconduct requires exclusion of adverse evidence. *Riley v. California*, 573 U.S. 373, 398 (2014).

b. A clear answer is especially important in light of the relevant law enforcement incentives created by the different rules. *See* 3 Wayne R. LaFave et al., *Criminal Procedure* § 9.3(d) (4th ed. 2021) (discussing incentives). The subjective test deters law enforcement officials from continuing investigations once it becomes clear that any further investigative steps will be found by a reviewing court to have been prompted by tainted evidence. *Murray*, 487 U.S. at 540. The objective test encourages the exact opposite: continued investigation even if that continued investigation is the result of the discovery of tainted evidence. *See id.* at 539.[6] These two opposing incentives structures create disparate law enforcement outcomes in jurisdictions that follow the different rules.

c. Review is even more essential in the age of cell phones and cloud storage to ensure that the exclusionary rule continues to serve its core function. Virtually every individual owns a cell phone connected to cloud services. In jurisdictions that follow the objective test, law enforcement officers can search cell phones without warrants, then, depending on what they find, turn around and subpoena the same information from cloud providers.

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[6] As a leading law enforcement trade publication instructs officers: so long as there would have been some "alternative justification" for obtaining the unlawfully obtained evidence, "it's not too late" to introduce the evidence, "even though the alternative justification wasn't one you subjectively considered." Devallis Ruteledge, *The Independent Source Doctrine*, Police Mag. (Jan. 12, 2012), https://bit.ly/3cNjSFS; *see also, e.g.*, David C. Newell, *Wehrenberg v. State: Resetting a Bad Search With the Independent Source Doctrine*, Texas Dist. & Cty. Attys. Ass'n (2014), https://bit.ly/3oxbyg4 (similar).

Even if the cell phone evidence is excluded, as long as the officer had probable cause before he conducted the unlawful cell phone search, the evidence from the cloud provider is admissible under the objective version of the independent source doctrine because a reasonable officer would have sought the subpoena as part of a reasonable law enforcement investigation.

2. This case is an optimal vehicle for deciding this important question. The dispute turns on a pure question of law. The question presented was squarely raised and resolved below and the court treated it as dispositive. Nor is there any doubt that this issue was outcome-determinative. The prosecution held this criminal case in abeyance for months until it ultimately decided to gamble on the possibility that the trial court would admit petitioner's hospital records notwithstanding the fact that the decision to seek the subpoena was clearly prompted by the unlawful blood draw.

Nor are there any factual or procedural obstacles to resolving the question presented. The relevant facts are undisputed and directly implicate the circuit conflict: It is uncontested that the State put on no evidence that any state official *in fact* would have subpoenaed petitioner's hospital records if the unlawful blood draw had never happened. Petitioner would have won his motion to suppress under the established rule in 40 other states and in the Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, but lost because his case arose in Wisconsin. This clean presentation is the perfect backdrop for deciding this significant constitutional question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES