No. 22-167

IN THE

Supreme Court of the United States

DANIEL J. VAN LINN,

Petitioner,

v.

WISCONSIN,

Respondent.

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

BRIEF OF *AMICI CURIAE* FOURTH AMENDMENT LEGAL SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who study, teach, and write about the Fourth Amendment. **Martin LaFalce** is Assistant Professor of Clinical Legal Education and Director of the Defense and Advocacy Clinic at Saint John's University School of Law. **Tracey Maclin** is Professor of Law and the Raymond & Miriam Ehrlich Eminent Scholar Chair at University of Florida Law School. **Daniel Medwed** is University Distinguished Professor of Law and Criminal Justice at Northeastern University School of Law. *Amici* share a professional interest in ensuring that judicial interpretations of the Fourth Amendment reflect its text, history, and purpose.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sheriff's Deputy Nicholas School had a decision to make as he stood over petitioner Daniel Van Linn's hospital bed. Only a couple hours prior, Mr. Van Linn was discovered lying on the road with blood running from his head, across the street from his crashed car. He had just been in a serious single-car accident. In the hospital, Deputy School, who suspected Mr. Van Linn might have been drinking, asked him to consent to a blood draw. Mr. Van Linn declined. The decision:

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Order a forced blood extraction, in plain disregard of Mr. Van Linn's constitutional rights, or get a warrant.

The answer should have been clear. Only four years prior, this Court held in *Missouri v. McNeely*, 569 U.S. 141 (2013) that a warrant is required under these precise circumstances. And Wisconsin law allows officers in the field to quickly obtain such a warrant electronically or by telephone.

But Deputy School nevertheless chose not to seek a warrant. Instead, he subjected Mr. Van Linn to a forced blood extraction. The results confirmed the deputy's suspicions: Mr. Van Linn's blood alcohol was over the legal limit.

At trial, the court predictably excluded the evidence of Deputy School's flagrantly unconstitutional blood draw. But that adverse ruling was only the beginning of the State's campaign to admit this evidence against Mr. Van Linn. Three months after the trial court excluded the evidence, the State—knowing full well what it would show based on the prior illegal search—subpoenaed blood work done on Mr. Van Linn when he was admitted to the hospital, which showed elevated levels of alcohol.

A divided Wisconsin Supreme Court ultimately blessed the admission of this later-acquired evidence under the "independent source doctrine." The independent source doctrine is a narrow exception to the exclusionary rule that allows admission of evidence discovered during an illegal search if the same evidence is subsequently discovered through legitimate means that are completely untainted by (or

"independent" from) the unlawful search. But the second source must be "*genuinely* independent"—the exception does not apply if information discovered from the illegal search "affect[ed]" the officer's decision to later seek a warrant or subpoena for the same evidence. *Murray v. United States*, 487 U.S. 533, 542 (1988) (emphasis added). In other words, the knowledge of the unlawfully obtained evidence must not have motivated the decision to seek a warrant.

But the decision below, like the other courts that purport to apply an "objective" standard of review, did not actually answer this critical question: whether the knowledge of Mr. Van Linn's elevated blood alcohol level gained from the illegal search was a motivating factor in the State's decision to later subpoena Mr. Van Linn's hospital records. Instead, the court concluded that because Deputy School had "reasonable grounds to suspect Van Linn of [drunk driving] prior to *anyone* drawing his blood," that was enough to satisfy the independent source doctrine. Pet. App. 13a.

In other words, the court held that so long as an officer *could have* gotten a warrant, she may conduct a search, and then, assured that it will be worth the trouble, obtain a warrant and retrace her steps later. This erroneous mode of analysis effectively eviscerates the exclusionary rule. Indeed, forget the exclusionary rule, it swallows the entire *warrant* requirement.

This untenable outcome is further facilitated by the vast and growing repositories of digital information that contain our personal and sensitive data. Under the objective standard, these databases are all

potential "independent" sources for police to "rediscover" evidence in the wake of an illegal search.

The exclusionary rule's central purpose is to deter police from violating our constitutional rights. Yet under the "objective" approach, the most flagrant violations of the Fourth Amendment—cases in which the officer has probable cause to get a warrant, but willfully conducts an illegal search nevertheless—will go unpunished. This result is squarely at odds with scores of cases in other jurisdictions, inconsistent with this Court's leading case on the independent source doctrine, and irreconcilable with the purpose and history of the exclusionary rule. This Court should grant the petition for certiorari.

ARGUMENT

I. The "Objective Standard" Embraced By The Decision Below Is Inconsistent With The History And Purpose Of The Exclusionary Rule

The "independent source" doctrine at issue in this case is an exception to the exclusionary rule. It allows for the admission of illegally obtained evidence, when that same evidence is later uncovered from a separate source that is untainted by the illegal search. Like any exception, it must be applied in light of its purpose and history. The decision below fails to do so.

1. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. To give these words

effect, this Court established the exclusionary rule over a century ago. *Weeks v. United States*, 232 U.S. 383, 398 (1914); *see also Boyd v. United States*, 116 U.S. 616, 638 (1886). The exclusionary rule "prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search." *Murray*, 487 U.S. at 536 (citations omitted).

While many rationales initially animated the rule's adoption, today the only rationale that retains vitality is the need to deter illegal government searches. *Davis v. United States*, 564 U.S. 229, 236-38 (2011); *Herring v. United States*, 555 U.S. 135, 141 (2009). "Ever since its inception," the exclusionary rule "has been recognized as a principal mode of discouraging lawless police conduct." *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *see also* Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. Cal. L. Rev. 1, 5 (1994) ("The history of the Fourth Amendment is about controlling executive power."). The rule seeks to "compel respect for the" Fourth Amendment "by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). Achieving deterrence by exclusion of unconstitutionally obtained evidence rests "on the judgment that the importance of deterring police [mis]conduct … outweighs the importance of securing the conviction of the specific defendant on trial." *United States v. Caceres*, 440 U.S. 741, 754 (1979). But while the defendant on trial may benefit from exclusion, the rule also seeks—through general deterrence—to protect the rights of the many innocent people who are subjected to unconstitutional searches that uncover nothing incriminating, and therefore may be left without

any judicial remedy for the violation of their constitutional rights. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting); *cf.* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 932-35 (1997) (at common law, tort suits against officers did not meaningfully deter government misconduct).

But "[d]espite its broad deterrence purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *United States v. Calandra*, 414 U.S. 338, 348 (1974). There are certain recognized exceptions to the rule that identify particular circumstances in which its application would not materially deter police misconduct. *See Davis*, 564 U.S. at 237 (exclusion is "'unwarranted' … [w]here suppression fails to yield 'appreciable deterrence'"); *see also* Tracey Maclin, *The Supreme Court and the Fourth Amendment's Exclusionary Rule* 338-40 (2012). Much like exceptions to the warrant requirement, each exception to the exclusionary rule relies on a unique rationale. *E.g.*, *Riley v. California*, 573 U.S. 373, 387-91 (2014) (search of cell phone contents not justified by rationales of officer safety and preventing destruction of evidence that support search incident to arrest exception to warrant requirement). They accordingly must be applied with "a surgeon's scalpel and not a meat axe," so that the exclusionary rule may continue to carry out its core function: eliminating the government's temptation to engage in illegal searches. *See* Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, § 11.4(a) (6th ed.) (hereafter "LaFave").

Take, for example, the exception for certain derivative evidence. To effectuate its vital deterrence function, the exclusionary rule forbids not only the introduction of evidence uncovered during an illegal search, but also of "derivative evidence": evidence that is "acquired as an indirect result of the unlawful search." *Murray*, 487 U.S. at 536-37. If, however, the derivative evidence has only a distant or attenuated connection to the illegal search, the "taint" of the unlawful search is said to have "dissipate[ed]," and the evidence may be admitted. *Nardone v. United States*, 308 U.S. 338, 341 (1939). This exception to the exclusionary rule is justified on the basis that excluding evidence only tangentially related to the unlawful search would not meaningfully deter government misconduct. *See Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *cf. Herring*, 555 U.S. at 144 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it.").

The independent source doctrine—at issue in this case—is a distinct, but related exception to the exclusionary rule. Under this exception, "evidence initially discovered during, or as a consequence of, an unlawful search" may nevertheless be introduced where that same evidence is "later obtained independently from activities untainted by the initial illegality." *Murray*, 487 U.S. at 537; *see also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Generally, this occurs where an illegal search is later followed by a legal search authorized by warrant. *E.g.*, *Segura v. United States*, 468 U.S. 796, 814 (1984). The doctrine rests on the "policy that, while the government should not profit from its illegal activity, neither should it be

placed in a worse position than it would otherwise have occupied" absent the illegal conduct. *Murray*, 487 U.S. at 542. To be a "genuinely independent" source, two factors must be satisfied: information learned during the illegal search must not have (1) "prompted" the "decision to seek the warrant," or (2) "affected [the Magistrate's] decision to issue the warrant." *Id.* By ensuring that unconstitutionally obtained evidence does not exert influence on any decisionmaker involved in obtaining that evidence through another source, the independent source doctrine accords with the exclusionary rule's deterrence function.

2. In *Murray*, 487 U.S. 533, this Court explained how the exception works. There, two defendants under surveillance by law enforcement were each observed driving a vehicle (a truck and a camper, respectively) into a warehouse. *Id.* at 535. Twenty minutes later, the defendants drove out of the warehouse and turned over their vehicles to other drivers. *Id.* The vehicles were later pulled over, and marijuana was discovered inside. *Id.*

Sometime after the defendants initially drove out of the warehouse, officers decided to forcibly enter the warehouse without a warrant. *Id.* Therein they discovered "in plain view numerous burlap-wrapped bales that were later found to contain marijuana." *Id.* The officers exited the warehouse without disturbing the bales and reentered only after obtaining a warrant. *Id.* The warrant application did not state that the officers had illegally entered the warehouse or include any information about what they had seen during the warrantless search. *Id.* at 535-36. So the court

that issued the warrant was not influenced by the prior illegal search—the question was whether the officers were.

This Court explained that the evidence from the warehouse could be admitted under the independent source doctrine only "if the agents' decision to seek the warrant was [not] prompted by what they had seen during the initial entry." *Id.* at 542. In other words, the key question was: "whether the actual illegal search had *any effect* [o]n" the officers' decision to seek a warrant. *Id.* at 542 n.3 (emphasis added). This inquiry is designed to carefully delineate between cases in which applying the exclusionary rule would deter misconduct, from those cases where it would not. *See Murray*, 487 U.S. at 540.

This Court ultimately declined to resolve this question, reasoning that the record was not sufficiently developed. *Id.* at 543. It accordingly remanded to the trial court to make a factual finding on whether information gathered from the initial search affected the officers' decision to seek a warrant. *Id.* In so holding, the Court reversed the Court of Appeals—which had ruled in the government's favor—underscoring that "it is the function of the District Court rather than the Court of Appeals to determine the facts." *Id.*

3. The decision below cannot be squared with *Murray*. The majority opinion did not—as *Murray* teaches—ask whether the illegal blood extraction "prompted" the State to subpoena Mr. Van Linn's medical records. Instead, the court held that the first prong of *Murray* was satisfied because "the State had reasonable grounds to suspect Van Linn of [drunk

driving] prior to anyone drawing his blood." Pet. App. 13a. But that is not what *Murray* requires. *Murray* does not ask whether the officer *could have* obtained a warrant in the first instance (or whether there were "reasonable grounds" of criminal wrongdoing, whatever that might mean), but rather whether information learned from the illegal search motivated the officer to subsequently seek out the same information through legitimate means (typically through a warrant, or in this case, by subpoena). *Murray*, 487 U.S. at 542 & n.3. Because, like in *Murray*, the trial court here never made a factual finding on this point (Pet. App. 39a-40a), the Wisconsin Supreme Court should have remanded the case so that the trial court could do so in the first instance. *Murray*, 487 U.S. at 543-44.

The decision below is typical of the approach taken by other courts that have assessed the first prong of *Murray* under a so-called "objective" standard. *E.g.*, *United States v. Silva*, 554 F.3d 13, 19 (1st Cir. 2009) (assessing prong-one "objectively"); Pet. 18-23. But disregarding the exclusionary rule based on an "objective" standard pegged to what an officer *could have* done makes no sense here. That a hypothetical officer objectively could have obtained a warrant is a reason to require such officers to obtain one, not a reason to excuse an officer's subjective decision not to. That is why *Murray* requires courts to ask whether information from the illegal search actually "affected" *this particular officer's* decision to seek a warrant. *Murray*, 487 U.S. at 540. Engaging in conjecture about what a hypothetical officer might have done is irrelevant to determining whether applying the exclusionary rule would meaningfully deter

misconduct. *Compare* Pet. App. 13a *with* Pet. App. 21a-22a (Bradley, J., dissenting).

There are at least four major problems with the "objective" approach.

a. First, it will give license to the most egregious Fourth Amendment violations, like the one that even the State conceded occurred here. Pet. App. 6a n.3. Deputy School surely knew that he needed to get a warrant to draw Mr. Van Linn's blood. Indeed, this Court had already spoken to the precise situation that the deputy faced: extracting blood from a person suspected of drunk driving requires a warrant in the ordinary course. *Missouri*, 569 U.S. at 165. And there was every indication that the deputy would have had no trouble getting a warrant quickly. *Id.* at 154 (officers in the field may obtain a warrant with dispatch to conduct a blood draw); *id.* at 154 n.4 (citing Wisconsin statute permitting officers to get a warrant electronically or by telephone). Given these facts, Deputy School's decision to forgo a warrant altogether could not have been more gratuitous.

Yet under the "objective" approach, this gratuitousness is a virtue, not a defect. Because the deputy *could have* obtained a warrant, that is enough to satisfy the first prong of *Murray*. Pet. App. 13a. Under the objective standard, if an officer could have gotten a warrant but chose not, the evidence will be admissible under the independent source doctrine. Conversely, if the officer conducted a search without sufficient evidence to establish probable cause, the evidence will be excluded. These arbitrary and

irrational outcomes are entirely divorced from the principles underlying the exclusionary rule.

The exclusionary rule's deterrent effect is needed most where, as here, the constitutional violation is egregious. *E.g.*, *Herring*, 555 U.S. at 143 ("The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct.") (collecting cases); *cf. Brown v. Illinois*, 422 U.S. 590, 610 (1975) (Powell, J., concurring) ("I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights."). Yet the objective approach ushers in the opposite result: the most flagrant constitutional violations will often be the most likely to go unpunished. *See* Pet. 26.

b. Second, and relatedly, applying the objective standard will authorize the specific type of illegal search that is most condemned by *Murray*: confirmatory searches. LaFave, § 11.4(f) (both the majority and dissent in *Murray* agree that exclusionary rule should apply to confirmatory searches). A confirmatory search is when police knowingly perform an illegal search to "determine whether obtaining a warrant is worth the bother." LaFave, § 11.4(a).

In *Murray*, Justice Scalia explained that the test announced by this Court would remove any incentive to engage in such bad faith searches. By performing a confirmatory search, the Court explained, the officer "would risk suppression of all evidence on the premises," since his decision to enter illegally would saddle him with the "much more onerous burden of convincing a trial court that no information gained from the

illegal entry affected … [his] decision to seek a warrant." *Murray*, 487 U.S. at 540. This statement is only true if the first prong of *Murray* requires an inquiry into the offending officer's actual motivations for seeking a warrant. Yet under the rule announced by the decision below, it suffices that an officer could have gotten a warrant but chose not to, regardless of the officer's motivations. This "objective" standard accordingly does nothing to disincentivize the search-first-warrant-later approach that *Murray* was so intent on extinguishing.

c. The objective standard also conflicts with *Murray* for a third reason: Applying an objective standard to the first prong of the *Murray* test renders the second prong surplusage. Recall that the second prong asks whether "information obtained during [the initial illegal search] was presented to the Magistrate and affected his decision to issue the warrant." *Id.* at 542. This prong has been interpreted to mean that the warrant may contain information gathered from the illegal search, so long as the other evidence listed in the warrant application is sufficient to independently establish probable cause. *E.g.*, *United States v. Huskisson*, 926 F.3d 369, 375 (7th Cir. 2019); *United States v. Swope*, 542 F.3d 609, 614 (8th Cir. 2008) (collecting cases). Yet under the objective approach, the first prong of *Murray* is satisfied under this very condition: whenever there was probable cause prior to the illegal search. So under the objective standard, satisfaction of the first element would *per force* also satisfy the second element of *Murray*, rendering it surplusage. That the objective standard fails to give independent effect to each of the two elements of the *Murray* test is a telltale indication that it cannot be what *Murray*

prescribes. *Amaya v. Rosen*, 986 F.3d 424, 433 (4th Cir. 2021) (rejecting interpretation that would render prong of legal test surplusage); c*f. Duncan v. Walker*, 533 U.S. 167, 174 (2001) (treating statutory terms as surplusage is highly disfavored, particularly where the "term occupies so pivotal a place in the statutory scheme").

d. Finally, this implausible reading of *Murray* confuses the independent source doctrine with a distinct, but related exception to the exclusionary rule: the inevitable discovery doctrine—further catalyzing doctrinal disarray among the lower courts.

The inevitable discovery doctrine is "a variation upon the 'independent source' theory." LaFave, § 11.4(a). Both doctrines are grounded in the rationale that the government should not be placed in "a worse position" than it would have been in had "no misconduct … taken place." *Nix v. Williams*, 467 U.S. 431, 443-44 (1984); *supra* 7-8. But while the independent source doctrine asks whether police *actually acquired* evidence from an independent source, the inevitable discovery doctrine asks whether illegally obtained evidence *would have* inevitably been discovered from an independent source. *See Murray*, 487 U.S. at 539 ("This 'inevitable discovery' doctrine obviously assumes the validity of the independent source doctrine as applied to evidence initially acquired unlawfully.").

By flipping this "would have" to a "could have," the "objective" standard imports an overbroad version of the inevitable discovery doctrine into the first prong of the independent source exception. And while

the objective approach is an amalgamation of these two distinct doctrines, it manages to be faithful to neither. Like the independent source doctrine, the inevitable discovery exception requires the existence of a "wholly independent" source that is untainted by the illegality of the initial search. *Nix*, 467 U.S. at 443. It accordingly does not—as the objective approach requires (*supra* 10)—permit courts to engage in speculation about what a reasonable officer would have done. Just the opposite: it "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Id.* at 444 n.5; *id.* at 457 ("This is not a case in which the prosecution can escape responsibility for a constitutional violation through speculation.") (Stevens, J., concurring).

And because the inevitable discovery doctrine is also narrowly tailored to ensure that the exclusionary rule continues to deter misconduct, it also does not approve the search-first-warrant-later approach that was blessed by the decision below. "If the doctrine were applied when such a shortcut was intentionally taken, the effect would be to read [the warrant requirement] out of the Fourth Amendment." LaFave, § 11.4(a); *see also, e.g.*, *United States v. Camou*, 773 F.3d 932, 943 (9th Cir. 2014) ("We have 'never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant.'"); *United States v. Griffin*, 502 F.2d 959, 961 (6th Cir. 1974) (same); *United States v. Satterfield*, 743 F.2d 827, 846-47 (11th Cir. 1984) (same); *Mobley v. State*, 307 Ga. 59, 76-77 (2019) (same).

The Wisconsin Supreme Court is hardly the first court to confuse these two doctrines. *E.g.*, *United States v. Lundin*, 817 F.3d 1151, 1161 (9th Cir. 2016) (in a prior opinion, "we inaccurately characterized our decision as an application of the 'inevitable discovery doctrine'" rather than the independent source doctrine); Jessica Forbes, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 Fordham L. Rev. 1221, 1238 n.61 (1987) (collecting cases).[2] Indeed, because the objective standard is a mishmash of these two distinct exceptions to the exclusionary rule, all of the courts to adopt it are perpetuating this doctrinal imprecision. Absent this Court's intervention, this confusion will persist. Jurisdictions applying the objective standard will continue to erode the Fourth Amendment's warrant requirement by providing safe harbor to officers that engage in flagrant and willfully unconstitutional searches and seizures.

[2] The majority's apparent confusion and resulting decision to join the minority of courts that apply the "objective" standard may have been influenced by its misreading of *Murray*, which it characterized as holding "that the marijuana evidence was admissible." Pet. App. 11a. But *Murray* held no such thing. It remanded to the trial court to make a factual finding necessary to resolve the evidence's admissibility. *Murray*, 487 U.S. at 543; *supra* 9.

II. The Ubiquity Of Digital Data Storage Makes The "Objective Standard" Particularly Unworkable

An order applying the exclusionary rule to unlawfully obtained evidence should conclusively resolve whether the trier of fact will ever get to consider it. But as the facts of this case demonstrate, under the objective approach, such exclusion orders may be only the beginning, not the end, of the government's efforts to get the evidence in front of jury. So long as the government can show that it could have obtained a warrant prior to the illegal search, it will then be free to launch a post-hoc investigation to "rediscover" the same evidence from an "independent" source. *Supra* 11-13. And because in today's world so much information is digitally stored for long or indefinite periods, the government will have a robust menu of electronic troves to raid in search of the same evidence that it obtained illegally. *See* Maclin, *supra*, 68 S. Cal. L. Rev. at 8 (police officers "have a greater array of weapons to invade our privacy and personal security" than ever before); Pet. 26-27. Under the objective approach, officers may engage in illegal searches with the confidence that they will likely be able to recapture the same information in one of the many digital databases at their disposal.

Take cell phones, for example. Currently, 97% of Americans own one. Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021), https://tinyurl.com/4kwnykms. Each of these devices "continuously" connects to tower-mounted "cell sites." *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018). The time and location of each one of these

connections is tracked and stored by our cell phone service providers. *Id.* This "cell phone location information"—which "is detailed, encyclopedic, and effortlessly compiled"—can be used to track a person's movements with remarkable precision. *Id.* at 2216. It is little wonder then that law enforcement agencies frequently avail themselves of it. AT&T for example, received over 54,000 requests for such location information in the first half of this year alone. AT&T, *Transparency Report* 4 (Aug. 2022), https://tinyurl.com/yck5vcn6.[3] It turned over the requested data 92% of the time. *Id.*

While such location data provides a ready source to "independently" establish a criminal defendant's location at a crime scene in the wake of an illegal search, it captures only a tiny fraction of the information housed on the cell phones themselves. Eighty-five percent of Americans own a "smart phone" (Pew Research, *supra*), each one of which contains "a digital record of nearly every aspect of [its owner's] li[fe]—from the mundane to the intimate" (*Riley*, 573 U.S. at 395). Such digital repositories—both on the phone itself and backed up in the "cloud" (*id.* at 397)—are fertile ground for "rediscovering" previously excluded evidence. *See* Darlene Bedley, *A Look at the Proposed Electronic Communications Privacy Act Amendments Act of 2011: Where Is Smart Grid Technology, and How Does Inevitable Discovery Apply?*, 36 Nova L. Rev. 521, 546-48 (2012) (a lax reading of "Murray['s]

[3] Other cell service providers report similarly staggering statistics. *E.g.*, Verizon, *U.S. Transparency Report 2022 (1st half),* 6 (2022) (over 16,500 requests in first half of 2022), https://tinyurl.com/2spd5z3w.

[first prong] opens the door in the electronic world to [a] hack now, get a warrant later" approach).

Much like in this case, police may also gain access to the many databases containing our personal and sensitive medical information. Privately-owned DNA databases, for example, are increasingly popular targets for law enforcement searches. Natalie Ram, *Genetic Privacy After* Carpenter, 105 Va. L. Rev. 1357, 1362-64 (2019). As of 2019, 26 million Americans had uploaded their DNA to a consumer genetic service, and that number is rising quickly. *Id.* at 1364-65; *see also id.* 1387-88 (noting that this figure doubled between 2016 and 2017). These caches of highly sensitive information can often be accessed without a warrant (*id.* 1361-64), which makes them especially attractive targets for any investigation that might follow the illegal collection of a DNA sample.

To highlight one final example, "tens of millions" of homes are outfitted with "smart" doorbells, which are typically connected to the internet and record video footage of a home's curtilage and the surrounding public roadways. *See* Policing Project NYU Law Sch., *Ring Neighbors & Neighbors Public Safety Service: A Civil Rights & Civil Liberties Audit* 1, 12-13 (2021), https://tinyurl.com/bda7sv58. Video footage, which may be stored on the cloud (*id.* at 13), can be easily accessed by law enforcement, often without a warrant or any formal legal process (*id.* at 20; *see also* Justine Morris, *Surveillance by Amazon: The Warrant Requirement, Tech Exceptionalism, & Ring Security*, 27 B.U. J. Sci. & Tech. L. 237, 245-49 (2021)).

These examples are hardly exhaustive. They are merely a handful of the thousands of digital databases that can facilitate the "re-discovery" of illegally obtained evidence. The quantity of information accessible to law enforcement in this way will only grow with time, as handing over data to third parties becomes an increasingly necessary prerequisite to participation in modern life. Avidan Y. Cover, *Corporate Avatars and the Erosion of the Populist Fourth Amendment*, 100 Iowa L. Rev. 1441 (2015) ("in the big data surveillance era … communicating and sharing information through third parties' technology is a necessary condition of existence"); Jacob M. Small, *Storing Documents in the Cloud: Toward an Evidentiary Privilege Protecting Papers and Effects Stored on the Internet*, 23 Geo. Mason U. Civ. Rts. L.J. 255, 256 (2013) ("the percentage of users who store data in the cloud is expected to grow rapidly over the coming years").

As a result, the practical consequences of applying the objective standard to the first prong of *Murray* will only become more pronounced with time. This Court's intervention is needed to forestall further erosion of the Fourth Amendment's warrant requirement.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and reverse the judgment of the Wisconsin Supreme Court.

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