No. _____

In the

Supreme Court of the United States

_____

Brian Matthew Morton,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Whether the pervasive role of cell phones in contemporary society alone can supply probable cause to believe that evidence of a known or suspected crime will appear on a suspect's phone?

Whether police officers may avail themselves of the good faith doctrine when they execute a warrant that relies solely on the central role of cell phones in contemporary society to supply a nexus between suspected criminal activity and a suspect's phone?

PARTIES TO THE PROCEEDING

Petitioner is Brian Matthew Morton, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Matthew Morton seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published Opinion of the *en banc* court of appeals is reported at *United States v. Morton,* 46 F.4th 331 (5th Cir. August 22, 2022). It is reprinted at pages 1a-21a of the Appendix to this Petition. The published Opinion of the panel of the court of appeals is reported at *United States v. Morton*, 984 F.3d 421 (5th Cir. January 5, 2021), and at pages 22a-36a of the Appendix to this Petition. The district court's Judgment and Sentence is attached at pages 37a-42a of the Appendix to this Petition. Its Order Denying the Motion to Suppress is attached at pages 43a-47a of the Appendix to this Petition. The Motion itself, along with the exhibits that Petitioner attached to the Motion, is included pages 48a-73a of the Appendix to this Petition.

JURISDICTION

The *en banc* Opinion and Judgment of the Fifth Circuit were entered on August 22, 2022. This Court extended the time for filing the instant Petition until December 5, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Traffic Stop

Petitioner Brian Morton underwent a traffic stop on Interstate 20 for traveling 8 miles above the speed limit, not far from Fort Worth. *See* (ROA.278)[1]; *United States v. Morton*, 46 F.4th 331, 333 (5th Cir. 2022)(*en banc*); Pet. App. 1a-2a, 71a. The Texas Department of Public Safety Trooper conducting the stop (Trooper Blue) thought the van smelled like marijuana, and Petitioner admitted that he had some marijuana in the car. (ROA.278); *Morton*, 46 F.4th at 333; Pet. App. 1a-2a, 71a. The officers found a small amount of marijuana, and 16 pills of MDMA in an Advil bottle. *See* (ROA.278); *Morton*, 46 F.4th at 333-334; Pet. App. 2a, 71a. Petitioner had three phones in the car. *See* (ROA.279); *Morton*, 46 F.4th at 333; Pet. App. 3a, 72a.

During their search of the car, officers also uncovered information showing that Petitioner may engage in non-standard sexual practices. He had a pair of women's underwear in his pocket, 100's of pairs of women's underwear in his vehicle, sex toys in his vehicle, and lubricant. *See* (ROA.278); *Morton*, 46 F.4th at 334; Pet. App. 2a, 71a. His pants were unzipped, and officers discovered during booking that he was wearing women's underwear. *See* (ROA.278); Pet. App. 71a.

The case for drug possession was a simple one, but the arresting Troopers suspected that Petitioner may have committed some manner of sexual crime. *See* (ROA.278-279); *Morton*, 46 F.4th at 334; Pet. App. 2a 71a-72a. One of them said to the

[1] References to "ROA" are to the record in the court of appeals. They are included in case they are of use to the government in formulating a response. Parallel citations to the Appendix have also been included.

other, "[s]omething is not right with this guy." (ROA.275); Pet. App. 68a. Trooper Blue conducted the following roadside interrogation of Petitioner, who was handcuffed at the time:

> I made contact with Morton. I asked Morton if he was a cross dresser and he stated he was not. I asked him why he had a pair of panties in his pocket and he stated it was something between him and his wife. I asked Morton why he was carrying so many pairs of women's underwear and he stated he just carr[ie]s them. I asked him if the women[']s underwear belong to his wife. Morton stated they belong to him and his wife.
>
> I asked Morton if he cross dressed or if he was a pedophile and Morton began to laugh. Morton then stated he wears them in bed. Morton would not maintain eye contact with me as he spoke.

(ROA.278); Pet. App. 71a.[2] Following this conversation, Trooper Blue reiterated his concern to his colleagues that Petitioner may a pedophile. (ROA.279); Pet. App. 72a. He again told Petitioner he "believed he may be in possession of child porn or other" -- unspecified -- "illegal sexual acts." (ROA.279); Pet. App. 72a. Trooper Blue then requested consent to search the phone for child pornography, and Petitioner refused. *See* (ROA.279); Pet. App. 72a.

B. The Search Warrant

Denied consent, the Troopers sought a warrant. *See* (ROA.269-272); *Morton*, 46 F.4th at 334; Pet. App. 62a-65a. In order to help draft it, Trooper Blue contacted another officer with expertise in searching for child pornography. *See* (ROA.275, 279);

[2] Another officer on the scene noted that Petitioner possessed a single lollipop, and "school supplies" in a bag in a backpack. (ROA.275); *Morton*, 46 F.4th at 334; Pet. App. 68a. But these "school supplies" were just writing implements, bearing no particular connection to childhood: "pencils, erasers, colored markers and pens…" (ROA.275); Pet. App. 68a.

Morton, 46 F.4th at 334; Pet. App. 68a, 72a. Indeed, one of the Troopers at the scene stated explicitly that this contact was made "[t]o further the investigation for drugs and clues of a sexual predator…" (ROA.275); Pet. App. 68a. The officers then prepared search warrant applications for Petitioner's phones, signed by Trooper Blue. *See* (ROA.269-272); *Morton*, 46 F.4th at 334; Pet. App. 62a-65a.

Though the resulting warrant affidavits did mention that Petitioner wore women's underwear and that he possessed sex toys, and did report his refusal to consent to a search, they did not actually seek permission to seize evidence of any sexually related offenses. *See* (ROA.269-272); Pet. App. 62a-65a. Instead, they recounted the drugs seized during the stop, and asked permission to seize evidence of drug offenses. *See* (ROA.270-271); *Morton*, 46 F.4th at 334; Pet. App. 3a, 63a-64a. No particular evidence linked the drugs to Petitioner's phones, aside from his simultaneous possession of both. *See* (ROA.269-280); Pet. App. 62a-73a. The affidavits therefore tried to establish probable cause to search the phone with the following recitation:

> Affiant knows through training and experience that individuals use cellular telephones to arrange for the illicit receipt and delivery of controlled substances along with other criminal activity.

(ROA.269); Pet. App. 62a. The affidavits continued by surveying the features of a cell phone – telephone number storage, photographs, and texts – and explained how each could produce evidence of criminality. (ROA.270-271); *Morton*, 46 F.4th at 334; Pet. App. 3a, 63a-64a. The warrant applications did not cite the number of cell phones –

i.e. the fact that Petitioner possessed more than one of them – as a reason to suspect him of drug offenses. *See* (ROA.270-271); Pet. App. 63a-64a.

The warrant issued, and the Troopers found pictures of children suffering sexual exploitation. *See Morton*, 46 F.4th at 334; Pet. App. 3a. There is no evidence that they found any information to support a drug offense on the phone. They returned to the Magistrate and obtained additional warrants to search for and seize such images on the phones. *See Morton*, 46 F.4th at 334; Pet. App. 3a.

C. District Court Proceedings

The federal government indicted Petitioner on one count of receiving an image depicting the sexual exploitation of a minor. *See Morton*, 46 F.4th at 334; Pet. App. 3a. He moved to suppress the image, alleging an unconstitutional search of his phone. *See* (ROA.255-280); *Morton*, 46 F.4th at 334; Pet. App. 3a, 48a-73a. He contended that the affidavit in support of the warrant failed to state probable cause to search his phone for any crime, (ROA.259), Pet. App. 52a, noting especially the absence of any evidence of drug *trafficking*, (ROA.261); Pet. App. 54a. In particular, he argued that the affidavit lacked sufficiently "particularized facts" giving rise to suspicion that the phone contained evidence of drug possession, and certainly no evidence that would add to the officers' already conclusive evidence of that crime. (ROA.261); Pet. App. 54a. He also contended that the affidavit showed no reason to access his pictures specifically, arguing "the search warrant affidavits make no connection to why the officers needed to search Mr. Morton's photos to find additional evidence that he possessed drugs." (ROA.262); Pet. App. 55a.

As for the good faith exception to the probable cause exception, the Motion contended that the "affidavit [wa]s 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" (ROA.259); Pet. App. 52a (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)). The Motion also sought to defeat the good faith doctrine with evidence that the stated intent to acquire evidence of drug offenses represented a mere pretext to indulge the officers' hunch regarding sex offenses. (ROA.264); Pet. App. 57a ("A pretextual search of a phone must be excluded where the pretext was not presented to the magistrate for a consideration of probable cause.'"). It attached and discussed the police reports and memoranda essentially admitting as much. *See* (ROA.262, 275-280); Pet. App. 55a, 68a-72a.

The district court denied the Motion by written order and opinion. *See* (ROA.44-48); *Morton*, 46 F.4th at 334; Pet. App. 44a-47a. It thought that the Magistrate could reasonably find probable cause to believe the phones contained evidence of drug possession and purchase. *See* (ROA.47-48); Pet. App. 46a-47a. In doing so, it credited the officer's statement that "individuals use cellular telephones to arrange for the illicit receipt and delivery of controlled substances." (ROA.47-48); Pet. App. 46a-47a. And it thought the officers' subjective motivation irrelevant. *See* (ROA.48); Pet. App. 47a.

The government and Petitioner agreed to a conditional plea, in which Petitioner retained the right to appeal the denial of the Motion to Suppress. *See* *Morton*, 46 F.4th at 334; Pet. App. 4a.

D. Appellate Proceedings

A panel of the Fifth Circuit vacated Petitioner's conviction. *See United States v. Morton*, 984 F.3d 421, 431 (5th Cir. 2021), *vacated by*, 996 F.3d 754 (5th Cir. 2021)(*en banc*), *different results reached en banc*, 46 F.4th 331 (5th Cir. 2022); Pet. App. 22a-36a. It did think the affidavit showed probable cause to believe Petitioners' phones contained evidence of drug possession. *See Morton*, 984 F.3d at 427; Pet. App. 28a-29a. It reasoned that the phone would likely document the transaction that produced the drugs. *See id.*; Pet. App. 28a-29a. But it didn't think the affidavit showed probable cause to believe that *the photos* would show evidence of a drug offense. *See id.* at 427-429; Pet. App. 29a-32a. Indeed, it thought this deficiency so glaring as to preclude application of the good faith doctrine. *See id.* at 430; Pet. App. 32a-34a.

The government moved for rehearing *en banc*, arguing that the opinion would hamper law enforcement investigations involving cell phones. *See* Petition for Rehearing En Banc in *United States v. Morton*, No. 19-10842 (5th Cir. Filed March 11, 2021). Indeed, it thought the issue so important that it collected the signatures of every U.S. Attorney in the Circuit. *See id.*, at *1-2 .

The court granted the Petition and affirmed the judgment. *See United States v. Morton*, 996 F.3d 754 (5th Cir. 2021)(en banc), *different results reached en banc*, 46 F.4th 331 (5th Cir. 2022). The *en banc* majority described the question of probable cause as "close" and "borderline." *Morton*, 46 F.4th at 338, 339; Pet. App. 11a-12a. But it thought the affidavit's general statements regarding the tendency of "criminals" to photograph their crimes sufficed to justify application of the good faith

doctrine, when combined with the presence of drugs and three phones. *See id.* at 337-338; Pet. App. 7a-11a. It did not think it significant that the affidavits themselves omitted the presence of three phones –as opposed to only one -- as a reason to think drug evidence would appear on the phones. *See id.* at 338, n.3; Pet. App. 10a.

The majority disagreed with the panel about the proper scope of the analysis, agreeing instead with the government that probable cause must be analyzed in terms of the entire phone rather than in terms of particular applications. *See id.* at 339; Pet. App. 11a-13a. Further, it did not think this issue preserved by Petitioner. *See id.* at 338-339; Pet. App. 11a. But it did not cite or address the relevant language from the Motion to Suppress making this argument: "the search warrant affidavits make no connection to why the officers needed to search Mr. Morton's photos to find additional evidence that he possessed drugs." (ROA.262); Pet. App. 55a; *see Morton*, 46 F.4th at 338-339; Pet. App. 11a.

Five Judges concurred, expressing concern that "a cell phone search premised solely on the simultaneous possession of drugs and a phone" would provide police access to a target's intimate information without probable cause specific to the phone. *see Morton*, 46 F.4th at 340-341 (Higginson, J., concurring); Pet. App. 15a. These Judges explored possible solutions to the problem of overbroad phone searches premised on limited cause, including use restrictions on the fruits of a phone search. *See id.*; Pet. App. 15a-16a. Three of these Judges even said that "if the fact that the arrestee was carrying a cell phone at the time of arrest is sufficient to support

probable cause for a search, then the warrant requirement is merely a paperwork requirement." *Id*. at 340-341; Pet. App. 14a-15a.

Finally, two Judges dissented entirely. *See id.* at 341-344 (Graves, J., dissenting); Pet. App. 17a-21a. These Judges criticized the majority for skipping any analysis of probable cause before resolving an important case in terms of the good faith doctrine. *See id.* at 341-342; Pet. App. 17a. This, the dissent argued, failed to heed this Court's caution against the "inflexible practice … of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated." *Id.* at 342; Pet. App. 17a (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)).

On the merits, the dissent thought that the lack of any particularized information that Petitioner had used his phone in a drug crime rendered the affidavit so deficient as to preclude application of the good faith doctrine. *See id.* at 341-344; Pet. App. 17a-21a. It closed with this warning:

> I fear that the incentive for law enforcement to imitate Trooper Blue's conduct in this case will be both strong and widespread. It is routine for officers to find evidence of small quantities of illicit drugs for personal use during an automobile stop. If the officer then wishes to gain access to such person's phone—and, with it, "[t]he sum of [his or her] private life,"—the majority's approach imposes virtually no costs against doing so. All the officer needs to do is state what drugs they found, where they found it, and provide boilerplate language about how "cellphones are used for receipt and delivery of illegal narcotics." The officer can then take refuge in the majority's holding that he is protected by the good faith exception. This is unjust, unfair, and unconstitutional.

Id. at 34; Pet. App. 20a-21a (cleaned up)(quoting *Riley v. California*, 573 U.S. 373, 394 (2014)).

REASONS FOR GRANTING THE PETITION

The decision below turns Riley v. California, 573 U.S. 373 (2014), on its head, transforming its observations about the role of cell phones in contemporary society into a weapon against our privacy protections, rather than a shield against government surveillance. Further, it implicates two Fourth Amendment questions that have generated intense conflict, dissension, and splintering in the lower courts: 1) whether the tendency of Americans to document their activities with cell phones can alone supply a nexus between a known or suspected crime and a targeted cell phone, or whether some particularized connection is necessary, and 2) whether officers who obtain a warrant for a cell phone search act in objective good faith if they act without a particularized nexus between the crime and phone. The extent of conflict and dissension, and the alarming impact of the decision below on the privacy rights of the citizenry, reflect an urgent need for guidance

A. The logic of the decision below contradicts that of *Riley*

1. *Riley* recognizes profound privacy interests in the content of a cell phone.

Riley v. California, 573 U.S. 373 (2014), unequivocally recognizes that an unrestricted search of a cell phone represents a profound intrusion into the possessor's privacy interests. In that case, this Court unanimously rejected an effort by prosecutors to invoke the search incident to arrest exception to the warrant requirement when officers arrest a defendant with his or her phone. *See Riley*, 573

U.S. at 403. The reasoning of the decision offers substantial insight into the flaws and dangers in the government's claim embraced below: that the mere simultaneous possession of cell phones and a personal use drug quantities can support a full blown search of the phones. The logic of *Riley* simply cannot support a cell phone exception to the requirement of a nexus between the suspected crime and the place of search.

In declining to apply the search incident to arrest exception to information on a cell phone, *Riley* undertook a balancing test "by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 385. It observed that phones "hold for many Americans the privacies of life[,]" *id.* at 403, and that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[,]" *id.* at 396 (emphasis in original).

Indeed, a cell phone search may even approach a direct search of the body or mind. A cell phone records the most intimate conversations, and even thoughts the user intends only for him or herself. *See id*. at 385. ("…it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.") As this Court observed that "modern 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." *Id*. at 385.

The intrusiveness of a cell search stems from both quantitative and the qualitative features of the information kept on the device. *Id.* at 393–95. Quantitatively, the Court explained, cell phones are unique because they "are in fact minicomputers" and have an "immense storage capacity." *Id.* at 393. The average smartphone in 2014 could hold "millions of pages of text, thousands of pictures, or hundreds of videos." *Id.* at 394. Moreover, cell phones can hold several different *types* of information, including "photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on." *Id.*

The quantity of storage capacity has four consequences for privacy. *Id.* First, because it "collects in one place many distinct types of information," a cell phone reveals more than any isolated record. *Id.* Second, a cell phone's storage capacity allows each individual kind of information, e.g. photographs, to "convey far more than previously possible." *Id.* ("The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet."). Third, the information routinely preserved on cell phones reaches back further in time than other information physically carried. *See id.* at 394–95. And fourth, cell phones are so pervasive—owned by 90 percent of American adults when *Riley* was decided and 97 percent of Americans today[3]—that they will almost always be present for police to scrutinize. *See id.* at 395.

[3] Pew Research Center, "Mobile Phone Ownership Over Time," *available at https://www.pewresearch.org/internet/fact-sheet/mobile/* (April 7, 2021) (Petitioner is referencing the information under the clickable "data" tab), *last visited December 1, 2022.*

Qualitatively, cell phones differ from other searchable items because they contain highly personal information. *See id.* at 395–96. This includes past location data, political affiliation, addictions, budget, hobbies, and romantic entanglements. *Id.* Furthermore, cell phones are not self-contained but instead can be used to access data located on remote servers such as the Cloud. *See id.* at 397.

This analysis by the unanimous Court thus recognized a profound stake for the American citizenry in avoiding indiscriminate searches of cell phones. *See id.* at 396–397. It also recognized, however, that their utility to law enforcement creates a special danger to the Fourth Amendment. It is *precisely because* cell phones provide such a thorough accounting of an individual's life and thinking that law enforcement will find them useful in detecting criminal activity. This Court cautioned that:

> [i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone. Even an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone. An individual pulled over for reckless driving might have evidence on the phone that shows whether he was texting while driving.

Id. at 399.

2. The decision below inverts *Riley*

The en banc majority below – joined, as will be seen, by certain Judges of the Sixth and D.C. Circuits -- rather precisely inverts this logic. The *en banc* majority relied on no particular fact in the case beyond a personal use quantity of drugs and three phones. *See United States v. Morton*, 46 F.4th 331, 337 (5th Cir. 2022)(en banc); Pet. App. 9a-10a. To connect the drugs to the phones, it accepted the officer's

explanation – for the purposes of invoking good faith, if not to establish probable cause -- as to "why, based on his experience, he believed it likely that the cellphones contained evidence of illegal drug activity." *Morton*, 46 F.4th at 334; Pet. App. 3a. Namely, it accepted the officer's statement that "[p]eople often communicate via cellphone to arrange drug transactions. And 'criminals often take photographs of co-conspirators as well as illicit drugs and currency derived from the sale of illicit drugs.'" *Id.*; Pet. App. 3a.

But if this statement in fact supplies probable to think that Petitioner's phone harbored evidence of a crime, it supplies probable to cause believe the same of virtually everyone who possesses a small quantity of drugs and a phone. In other words, the crucial nexus to the phone was supplied not by facts particular to Petitioner, but by knowledge that phones tend to document everything we do. In this way, the presence of a cell phone effectively transforms probable cause to arrest into probable cause to search a phone, blurring the critical distinction between search and arrest warrants. As the Southern District of Texas held (prior to the decision below), if it is sufficient to authorize a search to say that a "person's cell phone contains evidence of almost any activity in which they participate … every accusation of criminal activity would automatically authorize a search of the suspect's cell phone, transforming every arrest warrant into a search warrant and directly contravening the Supreme Court's decision in *Riley*." *United States v. Oglesby*, No. 4:18-CR-0626, 2019 WL 1877228, at *6 (S.D. Tex. Apr. 26, 2019).

When the *Riley* court discussed the use of cell phones in contemporary America, it was not speaking as a panel of honorary sociologists. Rather, it imagined a particular use for its observations, namely as a basis to expand and fortify protections against unreasonable searches toward the phone. But by accepting as sufficient the broad assertion that criminals keep evidence on cell phones, the court below used the ubiquity of cell phones as a basis to diminish rather than expand privacy protections. In this analysis, *Riley* is worse than a dead letter – it is a weapon in the hands of government surveillance, rather than a shield against it.

With the blessing of the en banc majority below, the police in this case essentially treated *Riley*'s word of caution about the "unimaginative officer" as a road map to undertake intrusive searches in pursuit of hunches and biases, simply substituting drug possession for the referenced traffic offenses. Notably, and as in the *Riley* hypotheticals, the police searched the phone for matters having nothing to do with the ostensible basis of the search. In the present case, they sought evidence of a sex crime based on the hypothesis that persons with unusual sexual predilections engage in child sexual abuse. But nothing limits their conduct to a search for criminal activity at all – so long as a police officer finds drugs (or any other offense phones tend to document), he or she may engage in an unlimited search for information about the target's religious, sexual, or political dispositions, with all the potential for subsequent abuse that implies.

B. The questions presented – whether probable cause and good faith require a particularized nexus to the target's phone, or whether, instead, police may rely on mere generalities about the role of phones in modern society -- have provoked unusually intense division and conflict in the courts of appeals.

The *Riley* court's observations about the role and prevalence of cell phones in contemporary society have given rise to intense conflict between and within circuits dealing with searches of cell phones pursuant to warrant. Specifically, the circuits – and, in multiple cases, the judges addressing the same case – are profoundly divided as to whether the law requires a particularized reason to believe that a target's cell phone will contain evidence of a crime, or whether it is instead sufficient to rely on the axiom that cell phones likely document a person's activity. They exhibit the same degree of division on a closely related question: whether officers exhibit objective good faith when they rely on a warrant that uses this axiom to supply a nexus to the targeted phone. This is well illustrated in the recent opinions of three federal circuits who addressed this question, none of whom have achieved unanimity on *either* question.

1. A panel of the Sixth Circuit produced a deeply splintered resolution as to both questions presented.

Most recently, a splintered panel of the Sixth Circuit affirmed a defendant's conviction based on a warrant that implicated these issues. In *United States v. Smith*, __F.4th__, 2022 WL 4115879 (6th Cir. Sept. 9, 2022), police received information from

undisclosed sources accusing the defendant and another person of involvement in a shooting. *See Smith*, 2022 WL 4115879, at *1. After arresting both men, they noted that the defendant possessed two cell phones. *See id.* The officers successfully sought a warrant to search the phones, reciting the informant's claims as probable cause to believe they had participated in the shooting. *See id.* at *1-2. To show probable cause that evidence would appear on the phone, however, the officers could only rely on generalities. The affiant swore:

> that he "knows through training and experience that people involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission, or the concealment of crime and that they will document criminal activity through photographs, text messages, and other electronic data contained within and accessed by such devices."

Id. at *2. The Magistrate granted the warrant, the district court found the warrant lawfully issued, and the defendant appealed. *See id.*

Three judges of the Sixth Circuit reached three different conclusions about the legality of the warrant and the applicability of the good faith doctrine. In the view of the first judge (Guy), "it seems a judge could reasonably infer that there is a fair probability that [defendant and co-defendant] used their cell phones to communicate, at some time, about some aspect of the shooting because that is how people in our modern society generally communicate when they do anything together." *Id*. at *8 (Guy, J., concurring). That view – which stopped just short of a formal conclusion as to probable cause, *see id*. – was highly informed by *Riley*'s discussion of the ubiquity and centrality of cell phones in contemporary America. Theis Judge said

> As a practical matter, the Supreme Court has observed that cell phones are "a pervasive and insistent part of daily life" and that "[c]ell phones

> have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals."

Id. (quoting *Riley*, 573 U.S. at 385, 401).

Having used *Riley*'s observations to dispense with any need for a particularized nexus to the cell phone, this judge proceeded to apply the good faith doctrine. *See id.* at *9. The absence of controlling precedent requiring a particularized nexus to the phone, he found, doomed any claim to suppression. *See id.* ("No police conduct here even begins to approximate those labels, not least because there is no binding precedent dictating that this search warrant violated the Fourth Amendment.").

A second judge (Clay) expressly found that the affidavit did not show probable cause, in part because the general language pertaining to the use of phones by criminals contained no particularized information establishing a link between the crime and the phone. *See id*. at *10 (Clay, J., concurring and dissenting). Indeed, this judge dissented from the judgment, concluding "that the good faith exception does not save the unlawful search…." *Id.*

Although this second judge did not think the affidavit presented probable cause of a crime, he also independently believed that it showed no nexus to the cell phone. *See id*. at *15. In his view, an officer's assertion "that people involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission, or the concealment of crime" could not "establish a nexus between the thing to be searched (Smith's cell phone) and the evidence sought (involvement in a homicide)." *Id.* at *15 (parentheses in original).

Nor did he think the conviction salvageable by the good faith doctrine, in part because the affidavit simply did not contain any information linking the crime to the phone. *See id.* at *16. He explained that "[t]he lack of a nexus between the criminal activity alleged (a homicide) and Defendant's cell phone rendered reliance on the warrant objectively unreasonable and the good faith exception inapplicable." *Id.*

Finally, a third judge (Moore) concurred with the second that the affidavit failed to show probable cause to believe the phone contained evidence of the crime. *See id.* (Moore, J., concurring). In her view, "no factual allegations contained in the affidavit connect the crime at issue here to the contents of Smith's cell phone." *Id.* Further, she expressed "concern" with the "breadth of a rule allowing the government to search an arrestee's cell phone as long as two people are allegedly involved in a crime." *Id.* at *17. She nonetheless voted to affirm because she did not think it "reckless" to rely on the "large inferential leaps" required to connect the shooting to the phones. *Id.*

The splintering on display in *Smith* should be enough to demonstrate a need for guidance on the questions presented. The three judges could not reach unanimity on either the question of probable cause or the question of good faith. Each judge stood alone from his or her colleagues on at least one of these two points.

2. A divided panel of the D.C. Circuit reached a conclusion opposite to the Sixth Circuit and the court below.

In *United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017), a divided panel of the D.C. Circuit reversed the defendant's conviction for possessing a firearm. *See*

Griffith, 867 F.3d at 1281. The police in that case suspected the defendant of acting as a getaway driver in a gang-related homicide. *See id.* at 1268-1269. As such, they sought and received a warrant to search the defendant's home for his phone, and then to search the phone. *See id.* at 1268-1270. After setting forth probable cause to suspect the defendant's involvement in the homicide, the affidavit provided the following language, which may sound familiar to a reader of *Smith* or the instant case:

> Based upon your affiant's professional training and experience and your affiant's work with other veteran police officers and detectives, I know that gang/crew members involved in criminal activity maintain regular contact with each other, even when they are arrested or incarcerated, and that they often stay advised and share intelligence about their activities through cell phones and other electronic communication devices and the Internet, to include Facebook, Twitter and E-mail accounts.

Id. at 1269.

The majority, however, did not regard this as sufficient. For one, it found no reason to think the defendant even owned a cell phone, in spite of their ubiquity. *See id.* at 1272. Independently, however, it did not think the affidavit provided any nexus between the cell phone and evidence of the homicide. It held that while "[m]ost of us nowadays carry a cell phone, [a]nd our phones frequently contain information chronicling our daily lives—where we go, whom we see, what we say to our friends, and the like," this does not "this mean that, whenever officers have reason to suspect a person of involvement in a crime, they have probable cause to search his home for cell phones because he might own one and it might contain relevant evidence." *Id.* at 1268.

Nor did the majority think it fit to apply the good faith doctrine. In its view, the mere truism that criminals have phones and talk to each other does not represent cognizable evidence of a nexus between any suspected criminal activity and the home or phone. *See id.* at 1279. As such, the majority thought the warrant – in addition to its overbreadth – was essentially bare bones as to the necessary nexus. *See id.* It said:

> we do not doubt that most criminals—like most people—have cell phones, or that many phones owned by criminals may contain evidence of recent criminal activity. Even so, officers seeking authority to search a person's home must do more than set out their basis for suspecting him of a crime.

Id.

Typical of cases addressing these issues, however, the opinion drew a dissent. Although this dissenting judge appeared to find probable cause, she stopped short of saying as much. *See id*. at 1284 (Brown, C.J., dissenting)("Even if this Court were to assume Detective Giannakoulias's affidavit failed to establish probable cause to search Lewis's apartment, I can find no discernable basis to justify the Court's assertion that the warrant was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"). But she certainly found the affidavit sufficient to invoke the good faith exception. *See id.* In reaching that conclusion, she, like the first judge in *Smith*, relied on the ubiquity of cell phones, and the commonsense conclusion that conspirators would use them to talk to each other. *See id.* at 1285. Indeed, she cited *Riley* on this point, transforming a shield in protection of privacy into a sword with which to attack it. *See id.* ("The Supreme Court

has recognized that 'a significant majority of American adults now own [cell] phones.'")(quoting *Riley*, 573 U.S.at 385).

3. The proceedings below exhibit extensive dissension – horizontal and vertical – as well as ambivalence toward the result.

Finally, there are the proceedings below. A panel of the court below initially found probable cause to believe that Petitioner's phone contained evidence of a drug purchase. *See United States v. Morton*, 984 F.3d 421, 427 (5th Cir. 2021), *vacated by*, 996 F.3d 754 (5th Cir. 2021)(en banc), *different results reached en banc*, 46 F.4th 331 (5th Cir. 2022); Pet . App. 29a-29a. In a passage that mirrors portions of *Smith* and *Griffith*, it accepted the officer's "assert(ion) that suspects' call logs often show calls 'arrang[ing] for the illicit receipt and delivery of controlled substances'; stored numbers identify 'suppliers of illicit narcotics'; and text messages 'may concern conversations' along these lines as well." *Morton*, 984 F.3d at 427 (brackets added by panel); Pet. App. 29a. The evidence for this assumption, notably, was not anything particular observed about Petitioner save his possession of drugs and phones. *See id.*; Pet. App. 29a. The panel simply assumed that evidence of drug possession implied evidence of that crime on the phone. *See id.*; Pet. App. 29a. The panel nonetheless reversed the conviction for want of probable cause – nor anything close enough to probable cause to invoke the good faith doctrine – that evidence would be found in Petitioner's pictures particularly. *See id.* at 428-431; Pet. App. 28a-34a.

The government successfully moved for rehearing *en banc*. Signaling the critical importance of the issues involved, it obtained the signatures of every U.S. Attorney in the Circuit. *See* Petition for Rehearing En Banc in *United States v. Morton*, No. 19-10842, at *1-2 (5th Cir. Filed March 11, 2021). Confirming the importance of the issue, moreover, four civil rights organizations joined two briefs in Petitioner's favor during the en banc merits briefing. *See Brief of Amicus Curiae Upturn, Inc*., in *United States v. Morton*, No. 19-10842, 2021 WL 3036323 (5th Cir. Filed July 26, 2021); *Brief of Amicus Curiae Electronic Frontier Foundation, et al, in United States v. Morton*, No. 19-10842, 2021 WL 3036324 (5th Cir. July 16, 2021). The *en banc* court affirmed the district in yet another fractious series of opinions. *See United States v. Morton*, 46 F.4th 331 (5th Cir. 2022)(en banc).

The majority declined to reach the probable cause question, characterizing the question as "close" and "borderline." *Morton*, 46 F.4th at 338, 339; Pet. App. 11a-12a. Nonetheless, it thought that the mere presence of drugs in the car provided at least a good faith basis to search the phone pursuant to a warrant. *See id.* at 337-339; Pet. App. 9a-11a. Notably, it thought so even though no evidence linked the drugs to the phone specifically. It was enough that:

> [i]n support of the request to search for photos on the phones, the affiant explains he "knows through training and experience that criminals often take photographs of co-conspirators as well as illicit drugs and currency derived the sale of illicit drugs."

Id. at 337; Pet. App. 9a.

In other words, the decision below relies not on evidence to suspect that Petitioner used his phone in connection with the offense, but on the axiom that "criminals," like everyone else, use their phones to take pictures of their activities.

Five Judges joined a concurrence, expressing concern about "a cell phone search premised solely on the simultaneous possession of drugs and a phone," which they characterized as a "meager showing." *Id.* at 341 (Higginson, J., concurring); Pet. App. 15a. These Judges were troubled by an outcome that would provide "unfettered access to all of 'the privacies of life,'" even in cases exhibiting a "lack of probable cause that evidence of drug possession or trafficking would be found on the phone." *Id.* (quoting *Riley*, 573 U.S. at 403 (quoting *Boyd v. United States*, 116 U.S. 616 (1886)); Pet. App. 15a. Three of these Judges even took the view that "if the fact that the arrestee was carrying a cell phone at the time of arrest is sufficient to support probable cause for a search, then the warrant requirement is merely a paperwork requirement," and the holding of *Riley* is "hollow." *Id.* at 340; Pet. App. 14a-15a.

Two more Judges dissented, finding neither probable cause to believe the phone contained evidence of a crime, nor good faith to think as much. *See id.* at 341-344 (Graves, J., dissenting); Pet. App. 17a-21a. The dissent argued that both probable cause and good faith required some nexus between phone and crime. *See id.* at 342-343; Pet. Ap. 18a-19a. And that nexus, it argued, cannot be "hinged … on general conclusions about cellphones and criminals." *Id.* at 343; Pet. App. 18a. Such a result, the dissent thought, would permit an intrusive search of a person's whole life upon the most "routine" situation: the case where "officers … find evidence of small

quantities of illicit drugs for personal use during an automobile stop." *Id.* at 344; Pet. App. 20a.

In short, the opinions below reflect discord as to both questions presented, and concern about the impact of the outcome for the Fourth Amendment, even among Judges who voted to affirm.

4. The three opinions discussed above show an urgent need for guidance.

A few observations can be made about these opinions, which emphasize the degree of conflict and the need for this Court's intervention. First, and as noted before, they display a high degree of conflict and splintering. In the proceedings below, two Judges even changed their own minds about the proper outcome of the same case. ***Compare*** *Morton*, 984 F.3d at 423; Pet. App. 22a (reciting votes) ***with*** *Morton*, 46 F.4th at 333; Pet. App 1a (reciting votes). None of these cases produced unanimity on any issue, and in two of them – *Smith* and the instant case -- they produced at least three different views on the questions presented.

Second, even among judges that voted to affirm convictions on the basis of the good faith doctrine, the outcome drew expressions of ambivalence, and even profound concern about their impact on privacy. *See Morton*, 46 F.4th at 338, 339; Pet App. 11a, 12a (describing probable cause determination as "close" and "borderline"), *id.* at. 340(Higginson, J., concurring); Pet. App. 14a ("If these three facts are sufficient to support probable cause for the search here, then any time an officer finds drugs (or other contraband for that matter) on a person or in a vehicle, there is probable cause

to search the entire contents of a nearby cell phone."); *id.*; Pet. App. 14a-15a (warning that "if the fact that the arrestee was carrying a cell phone at the time of arrest is sufficient to support probable cause for a search, then the warrant requirement is merely a paperwork requirement," and that "[i]t cannot be that *Riley*'s holding is so hollow."); *Smith*, 2022 WL 4115879, at *17 (Moore, J., concurring)("The breadth of a rule allowing the government to search an arrestee's cell phone as long as two people are allegedly involved in a crime concerns me as much as it concerns Judge Clay"). The judges adjudicating these issues thus clearly recognize profound stakes involved, and that the rule of the court below poses serious risks to constitutional liberties.

Third, those judges that find probable cause do so in a way that runs headlong into the logic of *Riley*, and that uses its observations to justify fewer protections against the searches of cell phones. *See Smith*, 2022 WL 4115879, at *8 (Guy, J., concurring) ("Given that Smith and Walker 'both fired guns at the deceased,' it seems a judge could reasonably infer that there is a fair probability that Smith and Walker used their cell phones to communicate, at some time, about some aspect of the shooting because that is how people in our modern society generally communicate when they do anything together."); *Griffith*, 867 F.3d at 1285 (Brown, C.J., dissenting)(citing *Riley* for the proposition that most people own cell phones); *Morton*, 984 F.3d at 427; Pet. App. 29a ("To possess drugs, one must have purchased them; contacts, call records, and text messages could all easily harbor proof of this purchase…. For this reason, we hold that there was probable cause to search Morton's contacts, call records, and text messages for evidence relating to his illegal drug

possession."); *Morton*, 46 F.4th at 337; Pet. App. 9a (accepting general proposition that criminals use phones to document criminal activity). That is, the problem is not simply a failure to extend *Riley*, but an affirmative inversion of it reasoning.

5. The conflict is pervasive.

While the three authorities discussed above most vividly illustrate the conflict, dissension, and splintering associated with the questions presented, they by no means exhaust the examples. Thus, the Southern District of Texas and the Western District of Kentucky have held that the mere possession of a phone by a person suspected or known to have committed a crime establishes neither probable cause nor a good faith basis to search the phone. *See Oglesby*, 2019 WL 1877228, at *7 ("The fact that a phone was present at the crime scene, plus Affiant's generalizations about phones often containing evidence of "crimes," fails to establish that nexus."); *United States v. Ramirez*, 180 F. Supp. 3d 491, 495 (W.D. Ky. 2016)("Possessing a cell phone during one's arrest for a drug-related conspiracy is insufficient by itself to establish a nexus between the cell phone and any alleged drug activity."). Similarly, the District of Columbia Court of Appeals has found that a detective's general statement about the function of a could not support an unrestricted search of the phone. *Burns v. United States*, 235 A.2d 758, 774 (D.C. App. 2020).

By contrast, the First and Fourth Circuits have concluded that the pervasive role of cell phones in contemporary society may alone establish a nexus between a crime and a targeted phone. See *United States v. Lindsey*, 3 F.4th 32, 39–40 (1st Cir. 2021)("The affidavit also explained that Lindsey had more than one cellphone and

that it is common for drug dealers to use multiple cellphones to conceal their drug business. This was enough to support a fair inference that the cellphones would contain evidence of drug dealing."); *United States v. Orozco*, 41 F.4th 403, 411 (4th Cir. 2022) ("The all-encompassing information on cellphones explains why unconstrained warrantless cellphone searches, like warrantless home searches, contravene the Fourth Amendment. But it is also why phones 'can provide valuable incriminating information about dangerous criminals.' So just as it is sometimes reasonable to believe that a suspect's home may contain evidence of their crimes, it might be reasonable to believe that his cellphone will.")(quoting and citing *Riley*, 573 U.S. at 403 and citing *United States v. Lindsey*, 3 F.4th 32, 39–40 (1st Cir. 2021).

Many courts have weighed in since *Riley*, providing valuable insight, and the conflict is very unlikely to resolve spontaneously. Guidance from this Court is now appropriate.

C. The present case is an excellent vehicle to address both questions presented.

The instant case well presents both questions presented: 1) whether probable cause to search a phone requires particularized evidence linking it to criminal activity, and 2) whether generalizations about the uses to which criminals (or anyone else) typically put phones are sufficient to invoke the good faith doctrine. The issue is fully preserved both in district court and on appeal. And here, no evidence links Petitioner's phones to a drug offense, save the fact that he possessed three phones and drugs. To connect the dots, the majority below relied on a sweeping

generalization regarding the use to which "criminals" put phones, namely that they document criminal activity with them. *See Morton*, 46 F.4th at 337; Pet. App. 9a.

The Troopers here did not observe Petitioner use the phone to conduct a drug deal, nor receive any information to this effect. *See id*. at 334; Pet. App. 1a-3a. Rather, the ostensible search for evidence of drug offenses was a simple pretext for the officers true intention: to search the phone for evidence of child pornography, based on a hunch that men wearing women's underwear and using sex toys tend to be "sexual predators." *See id.*; *see also* (ROA.275, 278, 279); Pet. App.2a, 68a, 71a, 72a. Accordingly, the case does not merely present the questions presented cleanly, it well displays the potential for abuse inherent in a rule that permits officers to search a phone any time they uncover evidence of a less serious crime. In this case, the officers used the absence of any enforceable nexus requirement to indulge stereotypes about people with non-standard sexual presentations. In the next case, it may be a political, racial, or other cultural minority, and the hunch may not happen to bear out.

The *en banc* majority's reliance on the good faith doctrine, rather than an explicit holding as to probable cause, should not prevent review. The requirement of a nexus to the place to be searched is well-settled. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). Likewise, the duty of officers and Magistrates to "prevent[] the issue of warrants on loose, vague or doubtful bases of fact," so "to protect against all general searches." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). The case is manifestly devoid of any evidence linking the phone to Petitioner's drug possession offense, save the possession of drugs and phones. While the officers

certainly possessed and presented evidence that Petitioner engaged in the offense of simple drug possession, the affidavit was effectively bare bones as to the nexus requirement. As such, it did not trigger the good faith exception to the exclusionary rule. *See United States v. Leon*, 486 U.S. 897 922-923 (1984).

Further, if the majority's use of the good faith doctrine defeats review in this case, there is no reason to think it will not do so indefinitely. This has two deleterious consequences. First, it will essentially render the Fourth Amendment unenforceable as to cell phones, and permit an unprecedented expansion of state surveillance into the most intimate details of the life of the targeted citizenry. As the concurrence below suggested, the outcome below, if repeated indefinitely, threatens to render *Riley* "hollow" and to make of it a "mere[] paperwork requirement." *Morton*, 46 F.4th at 341 (Higginson, J., concurring).

Second, a lengthy denial of review will deprive officers who wish to comply with the Fourth Amendment of definitive guidance on the subject. Thus, the failure to resolve the first question presented will expand the powers of those police departments that need deterrence, while leaving those police departments that want to honor the Fourth Amendment to guess about the legality of contemplated conduct.

The decisions discussed above well illustrate the risk of indefinite delay. The first three authorities show a repeated pattern: judges inclined to find probable cause stop just short of doing so, invoking the good faith doctrine instead. *See Smith*, 2022 WL 4115879, at *8 (Guy, J., concurring) ("But we elect to not decide whether the state judge arbitrarily found probable cause to issue the warrant. [W]e conclude this case

qualifies for the good-faith exception …"); *id*. at *16 (Moore, J., concurring)("Although the lead opinion purportedly 'elect[s] to not decide' whether probable cause supported the warrant at issue in this case, many pages of the opinion are devoted to an argument that nonetheless endorses the issuing state-court judge's probable-cause finding."); *Griffith*, 867 F.3d at 1284 (Brown, C.J., dissenting).

There is, in other words, no reason for courts inclined to find probable cause without a particularized nexus ever to reach the issue. In any case, the courts of appeals have divided on the question of good faith in this context. ***Compare*** *Morton*, 46 F.4th at 337-339; Pet App. 9a, ***and*** *Smith*, 2022 WL 4115879, at **9, 17, ***with*** *Griffith*, 867 F.3d at 1279. So even if this Court reached only the good faith question, it would resolve a circuit split.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 5th day of December, 2022.

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