No. 22-6489

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Constitutional Provisions

Other Authorities

REPLY IN SUPPORT OF PETITION

I. The case presents an important constitutional question that has divided the federal judiciary.

To secure a search warrant for a cell phone, do police need to show more than the target's possession of that cell phone during a crime, here simple drug possession? How this Court answers that question will have resounding implications with respect to protecting our privacy rights, and, indeed, to the relationship of a free people to their government in the 21st century. After all, police will never want for arrestable offenses, including simple possession of drugs (committed by more than 43 million people *a month*, *see* Centers for Disease Control, *Fast Stats, Illicit Drug Use* (Last Reviewed October 20, 2022), *available at* https://www.cdc.gov/nchs/fastats/drug-use-illicit.htm, *last visited April 19, 2023*), resulting in 1.16 million arrests a year, see National Center for Drug Abuse Statistics, *Drug Related Crime Statistics* (2023), *available at* https://drugabusestatistics.org/drug-related-crime-statistics/, *last visited April 24, 2023*, and even minor traffic violations, *see Atwater v. City of Lago Vista*, 542 U.S. 318 (2000). And because cell phones contain an unparalleled quantity of sensitive information, *see Riley v. California*, 573 U.S. 373, 385, 393-394 (2014), a negative answer to the question posed above would effectively authorize a back-door-surveillance state, in which law enforcement can freely access the most private beliefs, predilections, and associations of any person who breaks any criminal law, however minor. As this Court observed in its unanimous decision in *Riley*:

> [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.

Riley, 573 U.S. at 399.

As the flagrantly pretextual search conducted here demonstrates, giving police such unfettered authority will expose the citizenry to abuse and bias. *See United States v. Morton*, 46 F.4th 331, 334 (5th Cir. 2022) (*en banc*); Pet. App. 1a-3a; *see also* (ROA.275, 278, 279); Pet. App.2a, 68a, 71a, 72a. And while the target here happened actually to possess images of child sexual abuse, the next target may be a critic of the law enforcement agency or their political allies, a journalist conducting an investigation of them, or simply an ethnic, cultural, or political minority subjected to the abusive whim of an individual law enforcement officer. Notably, the existence of such a pretext will probably not invalidate law enforcement activity premised on the presence of probable cause, *see Ashcroft v. al-Kidd*, 563 U.S. 731, 734 (2011), even if the officers' true motive is to punish constitutionally protected activity, *see Nieves v. Bartlett*, __U.S.__, 139 S.Ct. 1715, 1724-1725 (2019). As such, the enforcement of a meaningful nexus requirement between a phone and criminal activity stands as the only potential protection left to the public against this tactic.

This case well satisfies the traditional criteria for certiorari. As the foregoing illustrates, it involves a question of surpassing importance. Were it otherwise, the government would not have sought *en banc* review, would not have mustered the signatures of every United States Attorney's Office in the Fifth Circuit, *see* Petition

for Rehearing En Banc in *United States v. Morton*, No. 19-10842, at *1-2 (5th Cir. Filed March 11, 2021), and would not have secured review. The importance of the issue is likewise attested to by the numerous expressions of concern regarding the upshot of the case: that the mere possession of a phone— which nearly everyone owns, *see Riley*, 573 U.S. at 385—during the commission of a crime at least minimally justifies the issuance of a warrant to search the phone. *See Morton*, 46 F.4th at 340 (Higginson, J., concurring) ("[I]f 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."); Pet. App. 14a-15a; *id.* ("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."); *United States v. Smith*, __F.4th__, 2022 WL 4115879, at *17 (6th Cir. 2022) (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"), *cert. pending Smith v. United States*, 22-6777 (Feb. 14, 2023).

The issue has also proven exceedingly divisive in the courts of appeals. Most saliently, it has produced a high degree of splintering. Three cases that address the necessary nexus between a phone and criminal activity have produced *no unanimous opinion* as to *either* the question of probable cause or the application of the good faith doctrine in the absence of a more significant nexus. *See Smith*, __F.4th__, 2022 WL

4115879, at *8 (Guy, J., concurring); *id.* at *10, *15 (Clay, J., concurring and dissenting); *id.* at *16 (Moore, J., concurring); *United States v. Griffith*, 867 F.3d 1265, 1268, 1279 (D.C. Cir. 2017); *Griffith*, 867 F.3d at 1284 (Brown, C.J., dissenting); *Morton*, 46 F.4th at 337; Pet. App. 9a; *Morton*, 46 F.4th at 340 (Higginson, J., concurring); Pet. App. 14a-15a; *id.* at 341-344 (Graves, J., dissenting); Pet. App. 17a-21a.

More concerning, judges of the federal courts of appeals have employed diametrically opposite reasoning. Some treat *Riley*'s observations about the power and ubiquity of cell phones as a reason to assume a nexus between crimes and phones, while others treat it as a reason for vigilance against cell phone searches. ***Compare*** *Smith*, __F.4th__, 2022 WL 4115879, at *8 (Guy, J., concurring) (concluding that cell phone was likely to contain evidence because "[a]s 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.'") (quoting *Riley*, 573 U.S. at 385, 401); *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)) ***with*** *Smith*, __F.4th__, 2022 WL 4115879, at *15 (Clay, J., concurring and dissenting) ("[T]hat people involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission, or the concealment of crime" cannot "establish a nexus between the thing to be searched (Smith's cell phone) and the evidence sought (involvement in a homicide).") (parentheses in original); *Griffith*, 867 F.3d at 1279 ("…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."); *Morton*, 46 F.4th at 343 (Graves, J., dissenting) (required nexus between crime and phone cannot be "hinged … on general conclusions about cellphones and criminals."); Pet. App. 18a.

In other words, it is undisputed that cell phones are everywhere, documenting everything. The federal judiciary, however, has taken radically divergent positions about the legal significance of this fact.

II. The *en banc* court's decision to resolve the case applying the good faith doctrine should not prevent review.

Resisting review, the government relies chiefly on the absence of a formal probable cause holding in the decision below. *See* (Brief in Opposition, at 11-12). It is correct that the *en banc* opinion below classified the warrant at issue as "borderline" and never decided whether the affidavit set forth probable cause. *See Morton*, 46 F.4th at 338, 339; Pet App. 11a, 12a. For at least three reasons, however, this should not prevent review. **First**, certiorari would be warranted solely to decide whether officers may rely in good faith on a warrant that omits any particularized nexus between a phone and a crime. **Second**, the heavy overlap between the probable cause and good faith questions make it impossible to address either without shedding significant light on the other. **Third**, if the absence of a formal probable cause holding defeats review in this case, the government will be able to postpone review indefinitely, depriving the citizenry of a chance to vindicate our privacy interests against the dangerous tactic of pretextual cell phone searches stemming from minor offenses.

A. Certiorari would be warranted solely to determine whether a warrant to search a cell phone merits good faith reliance in the absence of any particularized nexus between the phone and a crime.

Relying heavily on the absence of a probable cause holding below, the government simply ignores the second question presented:

> [w]hether 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?

(Petition for Certiorari, at i). That question was undeniably reached by the court below. *See Morton*, 46 F.4th at 337-338; Pet. App. 7a-11a. Further, it has produced divergent opinions among the federal judiciary. ***Compare*** *Smith*, __F.4th__, 2022 WL 4115879, at *8 (Guy, J., concurring); *id*. at *16 (Moore, J., concurring); *Griffith*, 867 F.3d at 1284 (Brown, C.J., dissenting); *Morton*, 46 F.4th at 337; Pet. App. 9a; *id.* at 340 (Higginson, J., concurring); Pet. App. 14a-15a ***with*** *Smith*, __F.4th__, 2022 WL 4115879, at *10, *15 (Clay, J., concurring and dissenting); *Griffith*, 867 F.3d at 1268, 1279); *Morton*, 46 F.4th at 341-344 (Graves, J., dissenting); Pet. App. 17a-21a.

The government suggests that the affidavits clearly satisfied the threshold for the good faith doctrine, (Brief in Opposition, at 12-13), but it is wrong about that. The affidavit showed nothing of substance to connect the phone to drug possession (nor to trafficking), save the truism that phones often reveal the commission of crimes in all of its various features. *See* (ROA.270-271); *Morton*, 46 F.4th at 334; Pet. App. 3a, 63a-64a. The adequacy of that truism—for the purpose of either probable *cause or the good faith doctrine*—is an important and divisive issue.

Arguing for a different conclusion, the government points to the affidavit's claim of "training and experience," which it appears to classify, audaciously, as a "case-specific detail." (Brief in Opposition, at 12-13). But the proposition asserted by virtue of "training and experience" was little more than that "individuals" use phones to commit "criminal activity," (ROA.269); Pet. App. 62a ("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."), which activity can be reflected in the various features of the phone, *see* (ROA.270-271); *Morton*, 46 F.4th at 334; Pet. App. 3a, 63a-64a. The power of cell phones to reveal the user's activity is simply an undisputed truism dressed up as expertise, one that will likely be attested in any case where there is probable cause to believe that any cell phone user has committed any crime at all. The question presented is precisely whether this truism should defeat a challenge to a search warrant, or whether some more particularized nexus is necessary. At any rate, the ability of an affiant to recount the basic operation of cell phones is hardly a "case specific detail."

The government also points to the presence of multiple phones in the car. *See* (Brief in Opposition, at 12). But as the concurrence points out "…the affidavits here did not mention that multiple phones were found in the car, let alone rely on that fact to support probable cause." *Morton*, 46 F.4th at 340, n.1; Pet. App. 14a-15aAbsent oral testimony, a magistrate considering a search warrant is limited to the four corners of the affidavit. *See Whiteley v. Warsen*, 401 U.S. 560, 565, n. 8 (1971). The failure of the affiant, whose expertise and training the government touts, even to mention this consideration suggests that it does not provide a meaningful reason to believe the phone contained evidence of a crime.

Stripped of two points—the general tendency of phones to document the lives of their users, and the presence of multiple phones in the car (a fact the affiant did

not even mention)—the government's defense of the warrant becomes very feeble indeed. The government points to the fact that Petitioner was speeding, and to the fact that he was doing so after midnight. *See* (Brief in Opposition, at 12). It offers no explanation as to why this would cause anyone to think that the phone was more likely to contain evidence of a crime. *See* (Brief in Opposition, at 12). It cannot even muster a single judicial citation linking the act of speeding at night to drug dealing. *See* (Brief in Opposition, at 12). If there is any meaningful connection, it is not one that marks the speeder as a likely drug dealer with any specificity. Rather, it is a fact so common as to expose much of the population's phones to exploration by law enforcement, aggrandizing governmental power at the expense of the individual. Indeed, it is not far from this Court's warning in *Riley*: that a traffic offense could be used by law enforcement to access a phone. *See Riley*, 573 U.S. at 399.

The government assumes that the good faith exception applies if the facts show that a cell phone "could" contain evidence. (Brief in Opposition, at 13) ("…those case-specific details were sufficient to allow a neutral magistrate to reasonably infer that petitioner's phones could contain information connected to his purchase and possession of controlled substances, such that the good-faith exception applies."). That watered-down standard offers no protection against an unjustified search of this extremely sensitive information, and is not compelled by this Court's precedent. *United States v. Leon*, 468 U.S. 897, 915 (1984) (cautioning that "reviewing courts will not defer to a warrant based on an affidavit that does not

'provide the magistrate with a substantial basis for determining the existence of probable cause.'") (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

A random selection of phones taken off the street will contain evidence of some crime much of the time an officer must have something more than a justifiable belief that the phone "could" harbor evidence. Otherwise, *Riley* becomes nothing more than a "paperwork requirement." Here, the officers had nothing but evidence of drug possession – no scales, no large reserve of currency, no firearm -- and nothing linking the drugs to the phone.

In short, the second question presented has divided the courts of appeals, and would be squarely before the Court in the instant case.

B. Resolution of either question presented would shed substantial light on the other.

The absence of a formal probable cause holding in the opinion below is of little practical significance because the good faith and probable cause inquiries so heavily overlap. The two questions presented in the Petition share a single operative core. Specifically, both ask whether the police must allege something more than the general tendency of phones to document the life of the user. To the extent they differ, it is only in the sense that each compels a different consequence in the event an affirmative answer: whether magistrates should issue search warrants in the absence of a specific nexus to the phone, and whether judges should suppress evidence if magistrates issue warrants without such a nexus.

It will be well nigh impossible to decide the case without providing substantial guidance to magistrates, officers, and reviewing courts on both questions. Certainly, if Petitioner prevails on the merits, the Court cannot fail to conclude that the warrants failed to set forth probable cause. But even if the government prevails, and does so on the good faith exception alone, the opinion may warn magistrates and officers that cell phone warrants issued without a nexus between the crime and the phone rest on shaky ground. The opinion below, for example, warned arresting officers that comparable affidavits may be regarded as "borderline." *Morton*, 46 F.4th at 338, 339; Pet. App. 11a-12a.

Nothing prevents this Court from agreeing to decide the case and deciding the probable cause issue first. Probable cause is a potentially dispositive basis for ruling in favor of the government, so both parties will have ample incentive to contest it vigorously. The Reporters contain innumerable cases in which this Court proceeds to answer all questions that might determine the outcome, rather than focusing narrowly on the one that ultimately does so. Indeed, this Court has said in this very context that "[t]here is no need for courts to adopt 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."

Leon, 468 U.S. at 924.

C. If the government's argument against review prevails here, it will enjoy the unilateral power to prevent review of the probable cause question, to its great advantage, and to the detriment of our privacy rights.

If the absence of a formal probable cause holding prevents review here, the government will be able to defeat review indefinitely. Consider each of three possible postures in which this issue may arise in petitioners to this Court: 1) the government has prevailed below in an opinion that dodges any explicit holding as to probable cause, and relies exclusively on the good faith doctrine, 2) the government has prevailed below in an opinion that finds probable cause, and 3) the defendant has prevailed below. None of these situations will better present the issue than Petitioner's case.

If the government prevails below on good faith grounds, it will be able to make the same argument it presses now. Accordingly, if the government's argument against review succeeds here, there is no reason to believe that another case will garner review from this posture.

If the government prevails below on the explicit ground that a warrant rests on probable cause, the losing defendant will be no better positioned to seek review than Petitioner. In such a case, the government could argue that resolution of the probable cause issue is unnecessary to the outcome, because this Court might resolve the issue on good faith grounds. Indeed, the government would be better positioned to oppose review in such a case than it is here—if a court of appeals finds that a

warrant rests on probable cause, it is very unlikely that this Court will find that no reasonable officer could have relied on the warrant. Certainly, a defendant is less likely to defeat the good faith doctrine in such a case than one in Petitioner's position, where an *en banc* majority characterized the warrant as "borderline," *Morton*, 46 F.4th at 338, 339; Pet. App. 11a-12a, and a panel reversed the conviction, *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. Accordingly, the government is not correct in its assertion that the "various cases in which courts have decided whether probable cause supported warrants to search cell phones" show that review cannot be postponed indefinitely. (Brief in Opposition, at 13-14).

Finally, if the government does not prevail in the court of appeals, it will enjoy the unilateral power to defeat review by declining to file a petition at all. That is unacceptable. The government possesses substantial incentive to prevent review of the tactic at issue here, which offers it immense power over the citizenry, and should not get to decide when that review occurs.

III. Factual differences between this case and *Griffin* do not disprove the existence of a circuit split on the questions presented, nor of extensive dissension and splintering in the federal judiciary.

The government separately contends that review should be denied for want of a true circuit split. *See* (Brief in Opposition, at 14-16). In support, it points up factual differences between Petitioner's case and *Griffin*. *See* (Brief in Opposition, at 14-16).

All cases will differ factually to some extent; the significant point is that the Fifth, Sixth and D.C. Circuits are utilizing opposite *propositions of law*. The D.C. Circuit clearly rejected the proposition that the mere tendency of cell phones to document criminal activity permitted officers to rely on a warrant in good faith, without any particularized nexus:

> 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.

Griffith, 867 F.3d at 1279. This is the opposite reasoning from the court below, which accepted the simple general tendency of phones to provide such evidence as adequate. *See Morton*, 46 F.4th at 337; Pet. App. 9a. Other courts have done so as well. *See Lindsey*, 3 F.4th 3at 39–40; *Orozco*, 41 F.4th at 411.

In any case, there can be little doubt that the questions presented have proven incredibly divisive within the federal judiciary. The extent of division below is evident in the remarkable degree of splintering within panels, and the vertical dissension (two reversals) in this case's posture. Notably as well, district courts and the D.C. Court of Appeals have resolved the questions presented in way that is not consistent with the decision below. *United States v. Oglesby*, No. 4:18-CR-0626, 2019 WL 1877228, at *7 (S.D. Tex. Apr. 26, 2019) ("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 cell phone could not support an unrestricted search of the phone. *Burns v. United States*, 235 A.2d 758, 774 (D.C. App. 2020).

The questions presented are critical constitutional questions which the lower courts have found exceedingly difficult to answer. This Court should grant certiorari to resolve one, or both, of them.

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 24th day of April, 2023.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner