No. 23-7321

IN THE
Supreme Court of the United States

BENTLEY A. STREETT,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITIONER'S REPLY BRIEF

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July 10, 2024

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REPLY BRIEF

The government would like this case to be about something else. It does not dispute that the Tenth Circuit went badly wrong by extending the inevitable-discovery doctrine to salvage facially defective warrants. Nor does it contest that the circuits are split on the question presented. And it admits that the decision below serves only to excuse the most egregious governmental misconduct.

Instead, the government constructs an imaginary world in which both this case *and the other cases forming the split* could all be resolved based on a doctrine—good faith—that was not dispositive in any of them. This deflection fails. There is a reason the Tenth Circuit skipped over the government's good-faith argument below in favor of a novel inevitable-discovery rule: Precedent in this and other circuits, which the government ignores, forecloses a finding of good faith here.

And precisely because the Tenth Circuit's novel rule is dispositive only when good faith does *not* apply, the decision below conflicts with *Leon* by excusing the most patently unreasonable government misconduct. It also risks significantly undermining the warrant requirement by reducing every case to a simple after-the-fact probable-cause inquiry. The question presented is thus vitally important, and this is an ideal vehicle to resolve it.

I. The government does not defend the decision below.

The government does not even try to defend the Tenth Circuit's expansion of inevitable discovery. Indeed, the government "assum[es] that the inevitable-discovery doctrine is *not* the applicable rule in a case like this." Opp. 12 (emphasis added); *id.* at 8. The government's reticence is understandable. As other courts and leading scholars agree, the decision below is dangerous and wrong.

As the petition showed, the Tenth Circuit botched both parts of *Nix*'s test. The court below neither (i) assessed what would have happened "if no police error or misconduct had occurred" nor (ii) asked whether the police would still have obtained the evidence "by

means sufficiently distinguishable to be purged of the primary taint." See *Nix* v. *Williams*, 467 U.S. 431, 442–44 (1984). Instead, the Tenth Circuit focused on the wrong actor (the magistrate instead of the police) and the wrong action (approving the warrant instead of obtaining and executing it). Thus—as the government nowhere disputes—the decision below conflicts with *Nix*.

The decision below also "conflicts with the reasoning of *Leon*." Orin S. Kerr, *Does the Inevitable Discovery Exception Include Imagined Revised Attempts to Get Warrants?*, Reason (Oct. 9, 2023), https://shorturl.at/SkhGE. The Tenth Circuit's rule allows the government to use evidence obtained through "a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"—exactly the situation where suppression has real deterrent value. See *United States* v. *Leon*, 468 U.S. 897, 923 (1984) (cleaned up). Indeed, the government *concedes* that the Tenth Circuit's rule "matters only if *Leon* doesn't apply" because "the probable cause defect is egregious." Kerr, *supra*; see Opp. 12. The Tenth Circuit's approach thus clashes with *Leon* by shielding the government even—and only—in the worst situations.

And the decision below "would emasculate the requirement for a search warrant under the Fourth Amendment." *E.g.*, *State* v. *Handtmann*, 437 N.W.2d 830, 837 (N.D. 1989). Under the Tenth Circuit's analysis, the decisive factor is the strength of the government's probable-cause information, even if none of it actually reached the magistrate. In turn—as the government again fails to dispute—it does not matter whether investigators did obtain or would have obtained a valid warrant, only whether they *could* have done so. It is thus unsurprising that the nation's leading Fourth Amendment scholars reject the Tenth Circuit's approach. See 6 Wayne R. LaFave, Search & Seizure § 11.4(a) (6th ed. 2024 update) (endorsing *Handtmann*'s reasoning and rejecting the "if we hadn't done it wrong, we would have done it right" approach); Kerr, *supra*.

II. The lower courts are split.

The government also does not dispute the existence of a circuit split. Most importantly, it does not contest the square conflict with *United States* v. *Lauria*, 70 F.4th 106 (2d Cir. 2023). See Opp. 13. Nor could it. In the span of just four months, the Second and Tenth Circuits reached diametrically opposed results on materially identical facts. See Pet. 6–7. The Tenth Circuit then denied rehearing en banc, entrenching the split. By itself, this square split between recent, published circuit decisions would warrant review. See, *e.g.*, *Nichols* v. *United States*, 578 U.S. 104, 108 (2016) (resolving 1-to-1 split); *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 364 (2002) (same). In fact, the government itself has sought review of similar splits. See, *e.g.*, U.S. Pet. 11, *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, No. 15-290 (Sept. 8, 2015), 2015 WL 5265284 (urging review of "square but shallow" 1-to-1 split).

But there is more. The decision below also created an *intra-jurisdictional* split between the Tenth Circuit and New Mexico. See *State* v. *Haidle*, 285 P.3d 668 (N.M. 2012); Pet. 8. The government tries to brush aside *Haidle* as "decided under state law." Opp. 13 n.*. But the defendant there sought suppression under "both the Fourth Amendment" *and* "the New Mexico Constitution," and the court gave no indication that its inevitable-discovery analysis was limited to the latter. *Haidle*, 285 P.3d at 671–72, 678. So federal courts in New Mexico will now admit unconstitutionally obtained evidence that state courts there would exclude—even if the defendant invokes *only* the Fourth Amendment.

As for *Handtmann*, the government does not dispute that it applied federal constitutional law to reject the Tenth Circuit's precise view. See 437 N.W.2d at 838; Pet. 8–9. But, the government says, this case is thirty-five years old. Opp. 13 n.*. "Binding precedent does not, however, come with an expiration date." *Palin* v. *N.Y. Times Co.*, 482 F. Supp. 3d 208, 215 (S.D.N.Y. 2020). In North Dakota, the Fourth Amendment means what *Handtmann* says it means—especially

since the government can hardly point to a more recent trend away from the state high court's position.

The government's true response to these cases is that, *if* they had been decided on good-faith grounds, then their inevitable-discovery holdings would not matter. Opp. 13 & n.*. But they weren't, so inevitable discovery was dispositive in each case. The government cannot avoid a circuit split by positing alternative grounds for affirmance not only in the present case but also in the past cases forming the split.

As for *Lazar* and *Young*, the government claims that they "involve different contexts; they are therefore not directly in conflict with the decision below." *Id.* at 13. But the government does not dispute that these decisions would compel the Sixth and Ninth Circuits to reject the Tenth Circuit's reasoning below. See Pet. 9–10; *United States* v. *Lazar*, 604 F.3d 230, 238–39, 241 (6th Cir. 2010); *United States* v. *Young*, 573 F.3d 711, 722–23 (9th Cir. 2009).

Finally, on the other side of the ledger, the government says *State* v. *Johnson*, 131 P.3d 173 (Or. 2006), which seemingly endorsed the Tenth Circuit's approach, may not be "analogous to this case." Opp. 12. But see Pet. 11. But even if that were true, it would just mean the Tenth Circuit is a lone outlier; it would not avoid the split.

III. This case is an ideal vehicle.

Good faith is also the government's only real defense of the decision below. The government does not dispute that the question presented was preserved, litigated, and decided at each level, proving decisive in the court of appeals. But, it says, the judgment below is correct even if the reasoning is all wrong, Opp. 12, because suppression could be denied on good-faith grounds instead.

This assertion is meritless. If good faith so plainly applied here, the Tenth Circuit would have ruled on that basis. That it didn't do so—instead stretching to adopt an indefensible new inevitable-discovery rule——reflects that the government's position is untenable.

Nor can the government identify anything in the affidavit to support good faith under *Leon*. The language it plucks out to try to tie the Plume Road address to Mr. Streett's phone records is actually just a boilerplate description of what "state ICAC coordinator[s]" do "in some cases . . . to find out what country or city has jurisdiction over the case." 1 C.A. App. 177; see Opp. 9. This passage does not purport to describe the actual investigative process or the facts of this case. As the court of appeals explained, the affidavit "did not discuss information gleaned from the phone records, why [the detective] decided to search the . . . residence, or why he believed evidence of [Mr. Streett's alleged] criminal activity would be found there." Pet. App. 5a. Given these glaring holes, the fact that the affidavit identified the *county* where Mr. Streett lived, Opp. 9, is not nearly enough.

Likewise, it does not matter that the detective claimed he made a "mistake." Opp. 11. *Leon*'s good-faith test is objective. 468 U.S. at 922. So, as the government's cited cases confirm, "[a]n obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge." *United States* v. *Hove*, 848 F.2d 137, 140 (9th Cir. 1988) (cited at Opp. 10). In any event, the detective did not omit a mere "formalit[y]," Opp. 10; linking the defendant and the alleged offense with the place to be searched is the *most basic requirement* for a search warrant. A "holistic, commonsense" review by a reasonable officer, *id.*, would have revealed this blatant error.

It is no surprise, then, that the government's only support for its "implicit[]" probable-cause theory is a single Fifth Circuit decision and an Alaska state-court case. See *id.* And the Fifth Circuit case is far afield; it merely held that the affidavit's description of a controlled drug buy necessarily meant the buyer went inside without drugs and emerged with drugs. See *United States* v. *Harper*, 802 F.2d 115, 120 (5th Cir. 1986). The court did not suggest that an affiant can in good faith omit the most basic facts linking a defendant to the place to be searched. The Alaska case did not even address good faith; it held that the affidavit there "did not . . . fail[] to establish probable cause" in

the first place. *State* v. *Koen*, 152 P.3d 1148, 1153 (Alaska 2007) (per curiam). Here, the government has conceded the opposite. See Pet. App. 7a–8a.

Equally telling is the government's silence on Tenth Circuit precedent—presumably because the court has already rejected its theory. In *United States* v. *Gonzales*, as here, the affidavit lacked "facts establishing the residence [to be searched] belonged to or was otherwise linked to" the defendant. 399 F.3d 1225, 1231 (10th Cir. 2005). The court affirmed suppression even though—much as the government emphasizes here—the affidavit asserted that, in the detective's experience, "firearm[s] are often kept at the residence." *Id.* Thus, in the Tenth Circuit, "the good-faith exception [does] not apply when the affidavit list[s] an address to be searched but contain[s] 'no facts explaining how the address was linked to' the defendant." *United States v. Cotto*, 995 F.3d 786, 797 (10th Cir. 2021). In other words, without "*some* factual basis connecting the place to be searched to the defendant . . . the affidavit and resulting warrant are 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Gonzales*, 399 F.3d at 1231 (quoting *Leon,* 468 U.S. at 923).

IV. This important issue warrants review.

The government's bottom line is that this issue is academic because Mr. Streett "fails to show that any decision of a federal appellate court or a state court of last resort has relied on the inevitable-discovery doctrine" where good faith does not apply under *Leon*. Opp. 12. But as just explained, *this is such a case*. That is why the Tenth Circuit ruled as it did.

Beyond that, cases like *Lauria*, *Haidle*, and *Handtmann* confirm that this issue arises more often than the government admits. Prosecutors have been making this argument for years, and now they have finally persuaded a federal appellate court to accept it—even as another squarely rejected it just months earlier. Now armed with the Tenth Circuit's decision, they will have more success. And they will have many chances; even if the issue arises in relatively few Fourth Amendment cases, so many warrants are issued each year that a sizable number will fail *Leon*'s test.

And the government ultimately cannot dispute the importance of a rule whose sole function is—as the government concedes—to allow the use of evidence obtained through governmental misconduct so egregious that the (generous) good-faith exception is unavailable. See *Leon*, 468 U.S. at 919. In this situation, the deterrent effect more than justifies suppression. Conversely, the Tenth Circuit's approach "will encourage unconstitutional shortcuts." LaFave, *supra*, § 11.4(a). This is a vitally important issue that this Court should resolve.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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