No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO GONZALEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
JOHN M. PELLETTIERI
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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QUESTION PRESENTED

Whether evidence is admissible under the good faith exception to the exclusionary rule when the evidence was obtained during a search that was conducted in objectively reasonable reliance on precedent holding such searches lawful under the Fourth Amendment, but, after the search, that precedent was overturned by this Court.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 578 F.3d 1130. The order of the court of appeals denying rehearing en banc (App., *infra*, 23a) and opinions concurring in and dissenting from the denial of rehearing (App., *infra*, 24a-33a, 33a-52a) are reported at 598 F.3d 1095. A prior opinion of the court of appeals (App., *infra*, 7a-9a) is not published in the Federal Reporter but is reprinted at 290 Fed. Appx. 51. The order of the district court (App., *infra*, 10a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2009. A petition for rehearing was denied on March 16, 2010 (App., *infra*, 23a-52a). On June 7, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

Following a jury trial in the United States District Court for the Eastern District of Washington, respondent was convicted of possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court sentenced him to 70 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. App., *infra*, 7a-9a. This Court subsequently granted respondent's petition for a writ of certiorari, vacated the judgment, and remanded for further consideration in light of *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009). App., *infra*, 6a. On remand, the court of appeals reversed respondent's conviction and remanded for further proceedings. *Id.* at 1a-5a.

1. In the early morning of June 19, 2006, Officer Andy Garcia of the Yakima Police Department was on routine patrol in Yakima, Washington. C.A. E.R. 8, 10, 26. At approximately 2:18 a.m., Officer Garcia observed a red Pontiac being driven without its rear license plate illuminated. App., *infra*, 11a. The officer conducted a traffic stop based on that traffic infraction. *Ibid.*

Officer Garcia discussed the infraction with the driver, who stated that she did not own the car and was not aware that the license plate was not illuminated. C.A. E.R. 14-15. The officer also asked the vehicle's three other occupants for their names and for identification. App., *infra*, 11a; C.A. E.R. 11, 16-17. The passengers identified themselves, and Officer Garcia returned to his patrol car to check their names against federal and state warrant databases. App., *infra*, 11a-12a.

Officer Garcia learned from his patrol-car computer that a rear-seat passenger in the vehicle, Silviano Rivera, was the subject of multiple outstanding arrest warrants. App., *infra*, 12a. The officer provided that information to a backup officer (Officer Michael Henne) who had arrived on the scene, and the officers arrested Rivera based on the warrants. *Ibid.*; C.A. E.R. 12, 19, 24.

Officer Garcia then had the three other occupants, including respondent, get out of and move away from the car so that the officers could search it safely incident to Rivera's arrest. App., *infra*, 12a; C.A. E.R. 78-79. After they complied, Officer Garcia conducted a search of the passenger compartment and discovered a loaded 9mm Beretta handgun in the vehicle's unlocked glove compartment. App., *infra*, 12a; see C.A. E.R. 12-13, 35, 37. At that point, the officers secured the vehicle's three recent occupants in handcuffs and separated them for

questioning. *Id.* at 80. Officer Garcia also called a police dispatcher and requested a camera to photograph the handgun. *Id.* at 26, 39. Around 2:39 a.m., Officer Jared Nesary arrived on the scene, and he subsequently photographed and secured the handgun. *Id.* at 24, 26, 37, 44.

Officer Garcia questioned the vehicle's driver and the other female passenger, both of whom told him that the gun belonged to respondent. C.A. E.R. 30-31, 37-38. After the officer determined that respondent was a convicted felon, he arrested respondent for being a felon in possession of a firearm. *Id.* at 38.[1]

2. A federal grand jury indicted respondent on one count of possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g)(1). C.A. E.R. 1-2. Respondent moved to suppress the firearm. The district court held an evidentiary hearing and denied the motion. App., *infra*, 10a-15a. The court concluded that "Officer Garcia had authority under *New York* v. *Belton*, 453 U.S. 454, 460 (1981), to search the vehicle incident to Mr. Rivera's arrest." *Id.* at 14a. Respondent was convicted, and he appealed.

In August 2008, a panel of the Ninth Circuit affirmed. App., *infra*, 7a-9a. As relevant here, the court concluded that the vehicle search was lawful, explaining that "[respondent] concedes that Officer Garcia's search of the passenger compartment of the vehicle, including the unlocked glove box, was a lawful search incident to the arrest of passenger Rivera under *New York* v. *Belton*." App., *infra*, 8a. In reaching that judgment, the

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[1] The traffic stop, arrests, and the search lasted approximately 40 minutes. Officer Nesary transported Rivera away from the scene in his patrol car around 2:56 a.m. C.A. E.R. 26-27, 29, 38; see *id.* at 13. Approximately two minutes later, Officer Garcia separately departed with respondent in his patrol car. *Id.* at 27, 29, 38.

panel cited (*ibid.*) the Ninth Circuit's prior decision in *United States* v. *Weaver*, 433 F.3d 1104 (2006), which affirmed a *Belton* search of a vehicle incident to an arrest and relies heavily on the Ninth Circuit's earlier decision in *United States* v. *McLaughlin*, 170 F.3d 889 (1999). See *Weaver*, 433 F.3d at 1106-1107 & n.1.

3. The panel's decision reflected the then-prevailing understanding of *Belton* among the lower courts. Before the Court's April 2009 decision in *Arizona* v. *Gant*, *Belton* was "widely understood" by lower courts across the nation to permit searches in which a recent occupant of a vehicle was arrested, handcuffed, and placed in a police car before the vehicle was searched. See *Gant*, 129 S. Ct. at 1718. The cases following that "widely accepted" understanding of *Belton* were "legion." *Id.* at 1718, 1722 n.11 (quoting *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment)).

The Ninth Circuit's decision in *McLaughlin* was among that "legion" of decisions. *Thornton*, 541 U.S. at 628 (Scalia, J., concurring) (citing *McLaughlin* and other cases). *McLaughlin* held that *Belton* established a "bright-line rule" authorizing officers to search a vehicle incident to an arrest, even when the arrestee was unable "to grab items" in the vehicle because he was "handcuffed and * * * in the back seat of the patrol car" at the time of the search. *McLaughlin*, 170 F.3d at 890-892; see *Weaver*, 433 F.3d at 1106-1107 (concluding that the *Belton* rule applied "where the arrestee was handcuffed and secured in a patrol car before police conducted the search"; citing *McLaughlin*).

On April 21, 2009, this Court's decision in *Gant* held that a search incident to the lawful arrest of a recent occupant of a vehicle may include the vehicle's passen-

ger compartment under *Belton* only when the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)). The majority opinion in *Gant* thus "reject[ed]" the lower courts' widely accepted understanding of *Belton*. *Ibid.*

4. Meanwhile, respondent petitioned for a writ of certiorari. The government's response suggested that the Court hold his petition pending this Court's decision in *Gant*. Following that decision, the Court granted the petition, vacated the judgment, and remanded for further consideration in light of *Gant*. App., *infra*, 6a. On remand, the government conceded that, "[p]ursuant to *Gant*, the search of the vehicle was improper" because "the arrestee was handcuffed and secured in a patrol vehicle at the time of the search." Gov't Supp. C.A. Br. 3-4. The government argued, however, that respondent's conviction should be affirmed because suppression would be unwarranted in light of the good faith exception to the exclusionary rule. *Id.* at 4-9.[2]

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[2] After this Court rendered its decision in *Gant*, respondent moved the district court to order his release pending the completion of his appeal. The district court denied that motion. App., *infra*, 16a-22a. The court explained that respondent was "a daily-heroin user and gang associate" who already had acquired a significant history of criminal convictions before his sentencing and had since "amassed a disciplinary record" in prison by, *inter alia*, "assaulting a [prison] staff member, stabbing an inmate, and possessing contraband." *Id.* at 20a-21a. The court noted respondent's then-impeding transfer to a "Special Management Unit where he will be in 'lock down'" based on his prison record and explained that, given respondent's "troubling criminal and social history," it was unable to find clear and convincing evidence that

5. a. The court of appeals then reversed. App., *infra*, 1a-5a. After accepting the government's "conce[ssion]" that the search was unlawful under *Gant*'s more restrictive reading of *Belton*, *id.* at 3a, the panel rejected the government's reliance on the good faith exception to the exclusionary rule. *Id.* at 3a-5a.

The panel observed that this Court has not yet applied the good faith exception when "a search [was] conducted under a then-prevailing interpretation of a Supreme Court ruling, but [was] rendered unconstitutional by a subsequent Supreme Court ruling announced while the defendant's conviction was on direct review." App., *infra*, 3a. It also explained that the Court has held that its Fourth Amendment decisions "retroactively" apply to searches in all cases on direct review at the time of decision. *Id.* at 4a (discussing *United States* v. *Johnson*, 457 U.S. 537 (1982), and *Griffith* v. *Kentucky*, 479 U.S. 314 (1987)). Based on those observations, the panel reasoned that applying the good faith exception in pending cases "would conflict with the Court's retroactivity precedents," which, the panel concluded, "require[] us to apply *Gant* to the current case without" that exception. *Ibid.*

The panel emphasized that its exclusionary rule holding was ultimately "concerned * * * with the Fourth Amendment rights of the defendant," App., *infra*, 5a n.1, and that applying the good faith exception here would improperly lead to disparate results by "treating similarly situated defendants" differently. *Id.* at 5a. Because the Arizona Supreme Court in *Gant* had "ordered the suppression of the evidence found as a result of the

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respondent would not "pose a danger to the community's safety if released" pending appeal. *Ibid.*

unconstitutional search" and this Court affirmed that judgment, the panel concluded that the same outcome was required here. *Ibid.*

b. The government petitioned for rehearing, arguing that the panel had erred in its good faith analysis and created a circuit conflict with both *United States* v. *McCane*, 573 F.3d 1037, 1042-1045 (10th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010), and *United States* v. *Jackson*, 825 F.2d 853, 865-866 (5th Cir. 1987) (en banc), cert. denied, 484 U.S. 1011, and 484 U.S. 1019 (1988). While that petition was pending, the Eleventh Circuit and the Utah Supreme Court held that the good faith exception to the exclusionary rule applies to pre-*Gant Belton* searches, expressly disagreeing with the panel's decision in this case. See *United States* v. *Davis*, 598 F.3d 1259, 1263-1268 (11th Cir. 2010), petition for cert. pending, No. 09-11328 (filed June 8, 2010); *State* v. *Baker*, 229 P.3d 650, 663-664 (Utah 2010).

The Ninth Circuit denied rehearing, with seven judges dissenting. App., *infra*, 23a-52a. Judge Betty Fletcher authored an opinion concurring in the denial of rehearing that the two other members of the panel joined. *Id.* at 24a-33a. Judge Bea authored a dissent that was joined by six other judges of the court of appeals. *Id.* at 33a-52a.

i. Judge Fletcher recognized that, before *Gant*, the Ninth Circuit had interpreted *Belton* to allow searches such as those in this case, and she acknowledged that the panel had previously held that the search here "did not violate the Fourth Amendment." App., *infra*, 24a. But, she reasoned, the Court in *Gant* determined that "our precedent had misinterpreted *Belton*" and, in addition, that the "deterrence of such searches [resulting from a court's subsequent exclusion of evidence] trumps

the costs of exclusion." *Id.* at 24a-25a. Judge Fletcher added that, in her view, the Court's 1982 decision in *Johnson* had confronted the "precise[]" question in this case and had "held that the exclusionary rule applied to cases pending on direct appeal." *Id.* at 30a; see *id.* at 27a-29a.

Judge Fletcher found it important to "bear in mind that this case deals with a defendant's right to suppress evidence obtained by an unconstitutional search." App, *infra*, 26a. Thus, in her view, the seven dissenting judges would incorrectly deny that "individual right[]" to suppression. *Ibid.*

ii. Judge Bea's dissent explained that the "exclusionary rule is not an individual right and applies only where it results in appreciable deterrence [of police misconduct]." App., *infra*, 34a (quoting *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009)) (brackets in original). Judge Bea explained that this Court's decisions demonstrate that "the sole justification" for exclusion is "to deter future police misconduct," and, in light of that deterrence function, he was "at a loss to grasp how suppression of the evidence Officer Garcia discovered while properly doing his job, within the boundaries set by the law as it then existed, will deter other police officers from violating other individuals' Fourth Amendment rights." *Id.* at 34a, 37a. In his view, a "police officer's reliance on settled case law" was not "different from a police officer's reliance on a reasonable warrant (*Leon*) or statute (*Krull*)," circumstances in which this Court has applied the good faith exception. *Id.* at 36a (citing *United States* v. *Leon*, 468 U.S. 897 (1984), and *Illinois* v. *Krull*, 480 U.S. 340 (1987)); see *id.* at 40a-44a.

Judge Bea concluded that the Ninth Circuit's decision in this case "creates a split among the circuits" be-

cause its holding is "in direct conflict" with both *McCane* and *Jackson*. App., *infra*, 33a, 38a-39a, 44a-46a. He also concluded that the court's decision "disregards" and "conflict[s]" with *Herring*. *Id.* at 33a-34a. Judge Bea added that, "[i]f there is a silver lining to the panel's decision to flout Supreme Court case law in *Herring* and *Krull*, it is that the panel has set the stage for the Supreme Court to review the scope of the exclusionary rule." *Id.* at 38a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's refusal to apply the good faith exception to the exclusionary rule warrants this Court's review. Society expects police officers to try to comply with the law. A police officer who reasonably relies on settled circuit precedent that authorizes the search of a car acts entirely in objective good faith. That remains true even if a higher court later upsets the settled interpretation of the law and finds a violation. The question then becomes a remedial one: Should the evidence be suppressed? Under the logic of this Court's decisions, the answer is "no": Suppression of the fruits of the search in light of a subsequent change in the law cannot serve the purpose of the exclusionary rule, which is "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring* v. *United States*, 129 S. Ct. 695, 702 (2009).

Despite these principles, the Ninth Circuit held that suppression is mandated because a new Fourth Amendment decision applies to all cases pending on direct review. That decision, which confuses the Fourth Amendment right with the exclusionary rule remedy, squarely conflicts with decisions of the Fifth, Tenth, and Eleventh

Circuits and the Utah Supreme Court. Those courts have correctly held that the good faith exception to the exclusionary rule applies when law enforcement officers conduct a search in objectively reasonable reliance on binding appellate precedent that, after the search, is overturned by this Court. Because the question presented in this case is both important and recurring, and because the Ninth Circuit's decision is wrong, this Court's resolution of the conflict is warranted.

A. The Ninth Circuit Erred In Refusing To Apply The Good Faith Exception

1. This Court recently emphasized that "the exclusionary rule is not an individual right" and "applies *only* where it 'result[s] in appreciable deterrence.'" *Herring*, 129 S. Ct. at 700 (emphasis added; brackets in original) (quoting *United States* v. *Leon*, 468 U.S. 897, 909 (1984)). Because the exclusion of probative evidence both imposes a "costly toll upon truth-seeking and law enforcement objectives" and "offends basic concepts of the criminal justice system" by "letting guilty and possibly dangerous defendants go free," the Court has made clear that "the benefits of deterrence must outweigh the costs" in order to warrant the exclusion of evidence obtained in violation of the Fourth Amendment. *Id.* at 700-701 (citations omitted). It is not sufficient that exclusion would have some deterrent effect. *Id.* at 702 n.4. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 702. As a result, "evidence should be suppressed '*only* if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowl-

edge, that the search was unconstitutional under the Fourth Amendment.'" *Id.* at 701 (emphasis added) (quoting *Illinois* v. *Krull*, 480 U.S. 340, 348-349 (1987)).

2. Applying the exclusionary rule in this case would have no such deterrent effect. At the time Officer Garcia acted, his actions were in compliance with the law; there was no conduct to "deter" through the strong medicine of a suppression remedy. The Ninth Circuit was among the legion of courts that had interpreted *New York* v. *Belton*, 453 U.S. 454 (1981), "to allow a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search." *Arizona* v. *Gant*, 129 S. Ct. 1710, 1718 (2009). Justice Scalia's concurring opinion in *Thornton* v. *United States*, 541 U.S. 615 (2004), specifically illustrates the "legion" of decisions so holding by citing the Ninth Circuit's decision in *McLaughlin*. See *id.* at 628 (Scalia, J., concurring). And five members of this Court in *Gant* concluded that the lower courts had, in fact, adopted the best understanding of *Belton*'s rule.[3] That pre-*Gant* understanding of the *Belton* rule accorded with what "ha[d] been widely taught in police academies" for over a quarter century and had been followed by law enforcement officers in the field "in conducting vehicle searches during [that

[3] For Justice Scalia, the lower courts had adopted the best reading of "the rule set forth in * * * *Belton*" as "automatically permitting a [vehicle] search when the driver or an occupant is arrested," *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring), but he concurred in the majority opinion in order to provide the Court with a majority for its decision. *Id.* at 1725 (explaining that "a 4-to-1-to-4 opinion" would be unacceptable). The four dissenting Justices agreed with that reading of *Belton* and would have retained it. See *id.* at 1725 (Breyer, J., dissenting); *id.* at 1726-1727 (Alito, J., dissenting) (joined by the Chief Justice, Justice Kennedy, and, in pertinent part, Justice Breyer).

period]." *Gant*, 129 S. Ct. at 1722; see *id.* at 1718; cf. 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c) at 517 & n.89 (4th ed. 2004) ("[U]nder *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car.") (collecting cases).

Before *Gant*, a trained officer in Officer Garcia's position would have had an objectively reasonable belief that a search of the car was authorized incident to the occupant's custodial arrest. Even the court of appeals thought so before *Gant*: The panel in this case held the very same search to be "a lawful search incident to the arrest of passenger Rivera." App., *infra*, 8a. Officer Garcia thus did not engage in any culpable conduct. To the contrary, law enforcement officers must be able to follow governing precedents in performing their public functions and should be encouraged to do so. See *id.* at 36a-37a (Bea, J., dissenting) (citing *United States* v. *Peltier*, 422 U.S. 531, 542 (1975)). Suppression of evidence when an officer follows the law as expounded in governing appellate precedent would serve no valid purpose under this Court's exclusionary rule precedents.

3. In comparable settings, this Court has often held that suppression is not an appropriate remedy for an unconstitutional search. In *Leon*, the Court declined to require suppression when an officer reasonably relied on an invalid warrant to conduct the search because "[p]enalizing the officer for the [court's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." 468 U.S. at 920-921. The same holding applies when an officer relies on a statute later declared invalid, *Krull*, *supra*; on judicial records that erroneously reflect an outstanding warrant, *Arizona* v. *Evans*, 514 U.S. 1 (1995); or on the police's

own warrant database that, through police negligence, erroneously contains a withdrawn warrant. *Herring*, 129 S. Ct. at 704. And an equal result must occur when an officer reasonably relies on the court of appeals' then-binding precedent to conduct a search. The fact that appellate precedent is later overturned is not enough to justify suppression, since the "exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges," *Leon*, 468 U.S. at 916, and there is "no meaningful distinction" between relying on an invalid search warrant issued by a court and relying on settled precedent that, at the time of the search, held such warrantless searches to be lawful. *United States* v. *Davis*, 598 F.3d 1259, 1266 (11th Cir. 2010), petition for cert. pending, No. 09-11328 (filed June 8, 2010); see *United States* v. *McCane*, 573 F.3d 1037, 1044 (10th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010).

Gant itself underscored the reasonableness of an officer's reliance on settled law, even if that law is later overturned. The Court noted that qualified immunity will shield officers from liability in civil suits challenging unconstitutional vehicle searches conducted before *Gant* because such officers acted in "reasonable reliance" on the then-prevailing and "widely accepted" understanding of *Belton*. 129 S. Ct. at 1722 n.11. That observation directly supports the conclusion that the good faith exception to the exclusionary rule applies in criminal prosecutions because the qualified immunity test turns on the same standard of reasonableness as the good faith exception. See *Groh* v. *Ramirez*, 540 U.S. 551, 565 n.8 (2004) (citing *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986)); see also *Davis*, 598 F.3d at 1264 n.4.

4. The court of appeals erred in concluding that suppression was compelled by this Court's decisions in

United States v. *Johnson*, 457 U.S. 537 (1982), *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and *Gant*. *Johnson* and *Griffith* hold that this Court's new constitutional decisions govern the legality of criminal procedures at issue in all cases that, at the time, are still pending on direct review. Those decisions reflect "the principle that this Court does not disregard current law" when it adjudicates such cases. *Griffith*, 479 U.S. at 323, 326 (citing *Johnson*, 457 U.S. at 456-457 & n.16). That retroactivity jurisprudence, however, is not at all about the good faith exception to the exclusionary rule. Indeed, this Court had not even recognized the good faith exception at the time of *Johnson*; it did so only two years later when it decided *Leon*. See *Leon*, 468 U.S. at 905, 913 & n.11, 918-920; *id.* at 927 (Blackmun, J., concurring). And unlike the rights established by the Fourth Amendment, individuals have no personal right to suppression of evidence. *Herring*, 129 S. Ct. at 700. Rather, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983); accord *Herring*, 129 S. Ct. at 700; *Hudson* v. *Michigan*, 547 U.S. 586, 591-592 (2006); *Evans*, 514 U.S. at 10; *Leon*, 468 U.S. at 906; *Davis*, 598 F.3d at 1263; see *McCane*, 573 F.3d at 1044 n.5.

Because of its misinterpretation of *Griffith* and *Johnson* and its assumption that the question before it pertained to the substance of Fourth Amendment rights, the court of appeals disregarded well-established principles requiring consideration of deterrence before suppressing evidence. The court emphasized, for instance, that its suppression decision "concerned * * * the

Fourth Amendment rights of [respondent]." App., *infra*, 5a n.1. Judge Fletcher's opinion for the panel concurring in the denial of rehearing confirms the panel's view that this case concerns respondent's "right to suppress evidence obtained by an unconstitutional search." *Id.* at 26a. But this Court has long held that "the exclusionary rule is not an individual right." *Herring*, 129 S. Ct. at 700; see, *e.g.*, *Krull*, 480 U.S. at 347; *Leon*, 468 U.S. at 906; *Stone* v. *Powell*, 428 U.S. 465, 486, 495 n.37 (1976). The rule is simply a "judicially created remedy," *Leon*, 468 U.S. at 906 (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)), that "has never been applied except 'where its deterrence benefits outweigh its 'substantial social costs.'" *Hudson*, 547 U.S. at 594 (quoting *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 363 (1998)).

Nothing in the Court's *Gant* decision justifies an exemption from this Court's good faith precedent, as the court of appeals believed. See App, *infra*, 5a; see *id.* at 33a (B. Fletcher, J., concurring in the denial of rehearing en banc). *Gant* had no occasion to address remedial issues because the question presented in *Gant* addressed only the underlying Fourth Amendment issue governing the constitutionality of the vehicle search. See Pet. at i, *Gant*, *supra* (No. 07-542). The State's briefs on the merits thus focused entirely on that constitutional question and did not suggest, much less argue as an alternative, that the good faith exception would warrant reversal. See Pet. Br. at 15-44, *Gant*, *supra*; Reply Br. at 1-30, *Gant*, *supra*; see also *Davis*, 598 F.3d at 1264. Judge Fletcher's concurrence quotes from Justice Alito's dissenting opinion in *Gant* and the response of the *Gant* majority. App., *infra*, 31a-32a. But those quotations addressed reliance interests and *stare decisis*

principles; they did not address the propriety of suppression or cite any of the Court's suppression decisions. See *Gant*, 129 S. Ct. 1722-1723; *id.* at 1728 (Alito, J., dissenting).

B. The Ninth Circuit's Holding Creates A Conflict In the Circuits

The Fifth, Tenth, and Eleventh Circuits and the Utah Supreme Court have held that the good faith exception to the exclusionary rule applies where, as here, law enforcement officers have conducted searches in objectively reasonable reliance on binding appellate precedent that is subsequently overruled. See *Davis*, 598 F.3d at 1263-1268 ("hold[ing] that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned"; concluding that the Ninth Circuit panel's contrary decision in this case was not "persuasive"); *McCane*, 573 F.3d at 1042-1045 & n.5 (holding that the exclusionary rule does not apply "when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals" because such reliance "certainly qualifies as objectively reasonable law enforcement behavior" and because of "[t]he lack of deterrence likely to result" from suppression); *United States* v. *Jackson*, 825 F.2d 853, 865-866 (5th Cir. 1987) (en banc) (holding that "the exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to [a] change in that law" because "exclusion would have no deterrent effect" in that context), cert. denied, 484 U.S. 1011, and 484 U.S. 1019 (1988); *State* v. *Baker*, 229 P.3d 650, 663-664 (Utah 2010) (following *McCane* and rejecting the panel's decision in

this case); cf. App, *infra*, 33a-52a (Bea, J., dissenting from the denial of rehearing en banc) (opinion for seven judges agreeing with *McCane* and *Jackson*). Three of those decisions—*Davis*, *McCane*, and *Baker*—specifically concluded that the good faith exception applies where evidence was obtained from vehicle searches incident to arrests conducted pursuant to settled (pre-*Gant*) appellate precedent.[4]

The Ninth Circuit's contrary decision in this case creates a division of authority. Although *McCane* predated the panel's decision by a month, neither the panel's decision nor Judge Fletcher's concurring opinion respecting rehearing acknowledges the contrary hold-

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[4] In *United States* v. *Debruhl*, 993 A.2d 571 (D.C. 2010), petition for reh'g pending (filed May 20, 2010), the D.C. Court of Appeals also agreed that the good faith exception applies "when a Supreme Court ruling upsets clearly settled law on which [a law enforcement] officer had reasonably relied before the high Court's decision." *Id.* at 578. But the court concluded that its own pre-*Gant* interpretation of the *Belton* rule for vehicle searches was not sufficiently settled to warrant application of the good faith exception. *Id.* at 586 (explaining that the D.C. Court of Appeals "might well have held the search of Debruhl's car unlawful and the evidence inadmissible" before *Gant*). The government's rehearing petition in *Debruhl* is pending.

The Wisconsin Supreme Court has similarly held that the good faith exception applies where officers have executed a search warrant consistent with the state supreme court's then-existing precedent allowing no-knock entries for all searches involving felony drug dealing, even though this Court subsequently overturned that per se rule in *Richards* v. *Wisconsin*, 520 U.S. 385, 388 (1997). See *State* v. *Ward*, 604 N.W.2d 517, 526-529 (Wis. 2000). *Ward*'s rationale thus closely parallels that of the decisions discussed above. In its own context, however, *Ward* has limited prospective application in light of this Court's holding that a violation of the knock-and-announce rule will not require suppression when, as in *Ward*, the police are executing a valid search warrant. See *Hudson*, 547 U.S. at 590-599.

ings of the other courts of appeals. See App., *infra*, 1a-5a; *id.* at 24a-33a. The court, however, was aware of the conflict when it denied rehearing en banc over seven dissents. See *id.* at 33a, 44a-46a (Bea, J, dissenting) (explaining the conflict). And the Colorado Supreme Court has recently issued a divided opinion that follows the Ninth Circuit's decision in this case and self-consciously creates an intra-state conflict in Colorado with the Tenth Circuit. *People* v. *McCarty*, 229 P.3d 1041, 1044 (Colo. 2010) (following the Ninth Circuit's decision in this case and not *McCane*); see *id.* at 1043-1046.

The division of authority is now entrenched and merits this Court's review. Although the United States previously opposed certiorari in *McCane*, it did so before the Ninth Circuit had denied the government's rehearing petition in this case and before any other decision had created a lasting division of authority. See Br. in Opp. at 10-11, *McCane*, *supra* (No. 09-402) (explaining that review would be premature because the Ninth Circuit might "eliminate the current conflict on the question presented" if it were to grant the government's then-pending petition for rehearing). Now that the Ninth Circuit has denied en banc rehearing and the Colorado Supreme Court has followed its lead, an intractable division of authority exists. See App., *infra*, 33a, 38a (Bea, J., dissenting from the denial of rehearing en banc) (explaining that the Ninth Circuit "create[d] a split among the circuits" that has "set the stage for the Supreme Court to review the scope of the exclusionary rule").

C. The Application Of The Good Faith Exception Presents An Important And Enduring Legal Question

The conflict over suppression motions arising from pre-*Gant* searches is itself important. Because officers routinely conducted vehicle searches incident to arrest under the pre-*Gant* understanding of *Belton*, the good-faith-exception question presented in this case is pending in numerous federal and state courts around the country. See, *e.g.*, *United States* v. *Shakir*, No. 09-2665 (3d Cir.) (argued Apr. 13, 2010); *United States* v. *Wilks*, No. 09-5166 (4th Cir.) (briefing completed May 10, 2010); *United States* v. *Peoples*, 668 F. Supp. 2d 1042, 1045, 1047-1051 (W.D. Mich. 2009), appeal pending, No. 09-2507 (6th Cir.) (briefing completed June 1, 2010); *United States* v. *Salamasina*, No. 09-2186 (8th Cir.) (argued Jan. 15, 2010); *People* v. *Branner*, No. S179730 (Cal.) (review granted Mar. 10, 2010); *State* v. *Littlejohn*, No. 2007AP0900-CR (Wis.) (argued Apr. 13, 2010).

More broadly, the basic principles of this Court's exclusionary rule jurisprudence are designed to strike a proper balance between the interest in deterring culpable police conduct and the protection of society from criminal conduct uncovered during a search. This Court has recently decided two cases examining the exclusionary rule in order to ensure that the balance is properly struck, see *Herring*, *supra*; *Hudson*, *supra*, and has decided many cases applying the good faith exception. Further consideration in the lower courts is not likely to advance significantly this Court's consideration of the question presented. This case cleanly presents that question and provides an ideal vehicle for the Court to resolve the division of authority. This Court's review is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
JOHN M. PELLETTIERI
Attorney

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