No. 16-263

In the Supreme Court of the United States

STAVROS M. GANIAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in applying the good-faith exception to the exclusionary rule to evidence obtained pursuant to a warrant authorizing a search of electronic records seized by law enforcement agents under a valid prior warrant, where the government had allegedly violated the Fourth Amendment by retaining the records but the probable cause for the second warrant was independently derived.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1-91) is reported at 824 F.3d 199. The panel opinion of the court of appeals (Pet. App. 94-128) is reported at 755 F.3d 125. The ruling of the district court (Pet. App. 138-161) is not published in the Federal Supplement but is available at 2011 WL 2532396.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2016. The petition for a writ of certiorari was filed on August 25, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on two counts of tax evasion, in violation of

26 U.S.C. 7201. He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. A divided panel of the court of appeals vacated petitioner's convictions. On its own motion, the en banc court of appeals voted to rehear the case and affirmed the convictions. Pet. App. 1-91.

1. In August 2003, the U.S. Army Criminal Investigation Command (Army CID) received an anonymous tip that Industrial Property Management (IPM), a company providing security and maintenance for an Army facility in Connecticut, had engaged in misconduct. Among other things, the informant alleged that IPM, which was owned by James McCarthy, had billed the Army for work IPM employees did for one of McCarthy's other businesses, American Boiler, Inc. Further investigation revealed that petitioner, a former Internal Revenue Service (IRS) agent, performed accounting and bookkeeping services for IPM and American Boiler. Pet. App. 4.

In November 2003, agents from Army CID and its specialized computer-crimes unit executed a warrant to search petitioner's office for evidence of criminal activity by IPM and American Boiler. As authorized by the warrant, the agents created forensic images (also known as mirror images) of the hard drives from three of petitioner's computers, leaving the computers themselves with petitioner. A forensic image is an exact copy of the data contained on a hard drive created using specialized forensic imaging software. Pet. App. 5-8 & n.6.

The forensic images were ultimately copied onto a single hard drive secured by an evidence custodian, and onto two sets of DVDs for use as working copies. In February 2004, the Army CID case agent sent one

set of the DVDs to the Army's forensic computer lab for analysis. At around the same time, agents identified evidence of tax fraud and invited the IRS to join the investigation. In June 2004, Army CID provided the IRS with a set of the DVDs. Pet. App. 9-10.

The forensic examination of the DVDs by the Army and the IRS proceeded on parallel tracks. In June and July 2004, an Army forensic examiner performed searches for information within the scope of the 2003 warrant and ultimately copied several relevant files onto a separate DVD. Between June and October 2004, an IRS specialist also examined the forensic images and identified files that appeared to be within the scope of the warrant. Although the forensic images also contained petitioner's personal financial records and information about his other clients, Army and IRS agents viewed only files that were within the scope of the 2003 warrant authorizing a search for evidence of potential criminal activity by McCarthy, IPM, and American Boiler. Pet. App. 7-8, 10-14.

The investigation into McCarthy and his companies continued for several years and culminated in the indictment of McCarthy for a variety of offenses in 2008. That indictment rested in large part on the evidence found on the forensic images of petitioner's hard drives. After December 2004, the investigating agents did not conduct further examination of those forensic images under the 2003 warrant. But the agents preserved the forensic images because the investigation into McCarthy and his companies remained ongoing. Pet. App. 13-15 & n.12.

2. In 2005, while the investigation of McCarthy, IPM, and American Boiler was still in progress, one of the IRS agents working on the case uncovered evi-

dence that petitioner had committed tax-related crimes. At that point, the agent did not examine the forensic images of petitioner's hard drives from 2003. Instead, she obtained petitioner's bank records and personal tax returns, as well as other evidence. In July 2005, based on that evidence, the IRS officially expanded its investigation to include petitioner, who was suspected of evading taxes himself and acting as an accomplice or co-conspirator in tax crimes committed by others. Pet. App. 15-17.

In February 2006, the investigating agents met with petitioner and his attorney in a proffer session. The agents asked for petitioner's consent to review his personal financial records and other relevant information contained in the forensic images of his hard drives. Petitioner did not respond, and he did not at that time or at any other point request the return or destruction of the forensic images. Pet. App. 17; see Fed. R. Crim. P. 41(g) (allowing "[a] person aggrieved by * * * the deprivation of property" to "move for the property's return").

In April 2006, IRS agents sought a warrant to search the forensic images of petitioner's hard drives. The affidavit supporting the warrant application explained that the forensic images had been seized pursuant to the 2003 warrant, but that the prior warrant had authorized only searches for information related to IPM and American Boiler. The warrant application made clear that the government was seeking records that were not responsive to the 2003 warrant but that would be found on the retained forensic images. To establish probable cause, the affidavit relied on petitioner's bank records, tax returns, and other evidence.

A magistrate judge issued the warrant. Pet. App. 17-18, 53-55.

The agents' searches of the forensic images pursuant to the 2006 warrant revealed additional evidence that petitioner had committed tax crimes. In particular, petitioner had taken a variety of steps to mischaracterize payments he received so that his accounting software would not recognize those payments as income. Pet. App. 19-20.

3. After petitioner was indicted on charges of tax evasion and other offenses, the district court denied his motion to suppress the evidence found under the 2006 warrant. Pet. App. 138-161. As relevant here, the court rejected petitioner's contention that the government violated the Fourth Amendment by retaining the forensic images created in 2003 for an unreasonable period of time. *Id.* at 150-157. The court explained that agents had "seized the computer data pursuant to a valid warrant" in 2003 and that the examination of the seized data "was conducted within the limitations imposed by the warrant." *Id.* at 156. The court also emphasized that petitioner "never moved for destruction or return of the data" under Federal Rule of Criminal Procedure 41(g). *Ibid.* And the court held that because the agents had "scrupulously avoided reviewing files that they were not entitled to review" and petitioner "had an alternative remedy pursuant to Rule 41(g) to avoid the complained of injury," the government's retention of the forensic images did not violate the Fourth Amendment. *Id.* at 157. Because the court found no violation, it did not address petitioner's contention "that the material covered by the 2006 Warrant must be suppressed as the fruit of the poisonous tree." *Ibid.*

A jury convicted petitioner on two counts of tax evasion.[1] The district court sentenced him to 24 months of imprisonment, to be followed by three years of supervised release. Pet. App. 20, 129-130.

4. A partially divided panel of the court of appeals reversed the denial of petitioner's motion to suppress and vacated his convictions. Pet. App. 94-128. As relevant here, the panel held that the government violated the Fourth Amendment by retaining forensic images of petitioner's hard drives that included records that were not responsive to the 2003 warrant. *Id.* at 108-122. The panel majority further held that the good-faith exception to the exclusionary rule did not apply. *Id.* at 122-124. Judge Hall concurred in part and dissented in part, concluding that the good-faith exception should have precluded suppression because the agents' conduct was objectively reasonable. *Id.* at 126-128.

5. On its own motion, the en banc court of appeals voted to rehear the case and affirmed petitioner's convictions. Pet. App. 1-91.

a. Although the en banc court ultimately "offer[ed] no opinion on the existence of a Fourth Amendment violation," it began its analysis with "some observations bearing on the reasonableness of the agents' actions." Pet. App. 21; see *id.* at 21-47. The court explained that the premise of petitioner's argument is that when law enforcement agents acting pursuant to a warrant seize electronic storage media containing both responsive and nonresponsive material, the Fourth Amendment requires them to return or destroy the nonresponsive material as soon as the responsive

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[1] The other charges against petitioner were dismissed on the government's motion. Gov't En Banc C.A. Br. 4.

material has been identified. *Id.* at 24-25. The court noted that petitioner relied primarily on *United States* v. *Tamura*, 694 F.2d 591 (9th Cir. 1982), a case involving the seizure of intermingled responsive and nonresponsive physical records. Pet. App. 25.

The court of appeals stated that there are "reasons to doubt" whether *Tamura*'s analysis of physical records applies to electronic storage media. Pet. App. 26. It explained that the government "plausibly argue[d] that, because digital storage media constitute coherent forensic objects with contours more complex than —and materially distinct from—file cabinets containing interspersed paper documents, a digital storage medium or its forensic copy may need to be retained, during the course of an investigation and prosecution," for a variety of reasons. *Id.* at 36-37.

A complete copy of the digital storage medium may, for example, be essential "to permit the accurate extraction of the primary evidentiary material sought pursuant to the warrant; to secure metadata and other probative evidence stored in the interstices of the storage medium; and to preserve, authenticate, and effectively present at trial the evidence thus lawfully obtained." Pet. App. 37. Furthermore, while the court of appeals acknowledged the significant "privacy concerns implicated when a hard drive or forensic mirror is retained," *id.* at 39-40, it also noted that petitioner did not seek the return of the forensic images at issue here "either by negotiating with the government or by motion to the court" under Rule 41(g), *id.* at 42. The court noted, but declined to resolve, the possibility that petitioner's "failure to make such a motion" may have "forfeited any Fourth Amendment objection he might otherwise have." *Id.* at 43.

b. Rather than deciding whether the government's retention of the forensic images violated the Fourth Amendment, the court of appeals affirmed petitioner's convictions on the ground that any violation would not require suppression because the investigating agents relied in good faith on the 2006 warrant. Pet. App. 47-57. The court explained that, under *United States* v. *Leon*, 468 U.S. 897 (1984), "the exclusion of evidence is inappropriate when the government acts 'in objectively reasonable reliance' on a search warrant, even when the warrant is subsequently invalidated." Pet. App. 48 (quoting *Leon*, 468 U.S. at 922).

The court of appeals rejected petitioner's contention "that good faith reliance on a warrant is never possible" where "a predicate constitutional violation has occurred." Pet. App. 52. In this case, the court emphasized, the application for the 2006 warrant "appris[ed] the magistrate judge of the pertinent facts" about the alleged predicate violation—the "retention of the mirrored copies of [petitioner's] hard drives." *Id.* at 53. In addition, the court noted that it was "clear" that the agents "did not have any significant reason to believe that what they had done was unconstitutional." *Id.* at 55-56 (brackets and citation omitted). The court emphasized that, at the relevant time, no case law had held "that retention of a mirrored hard drive during the pendency of an investigation could violate the Fourth Amendment." *Id.* at 56. And it also noted that "the record here is clear that the agents acted reasonably throughout the investigation." *Id.* at 57. Accordingly, the court held that this case "fits squarely within *Leon*." *Ibid.*

c. Judge Lohier, joined by Judge Pooler, concurred. Pet. App. 58. He emphasized that the en banc

court affirmed petitioner's conviction on "the narrow ground that the Government relied in good faith on the 2006 search warrant," which was "the only holding" in the court's opinion. *Ibid.*

d. Judge Chin dissented, explaining that he would have adhered to the panel's conclusions that the government's retention of the forensic images violated the Fourth Amendment and that the good-faith exception did not apply. Pet. App. 59-91.

ARGUMENT

Petitioner contends (Pet. 12-23) that this Court should grant review to resolve a disagreement in the lower courts over whether the good-faith exception to the exclusionary rule recognized in *United States* v. *Leon*, 468 U.S. 897 (1984), can apply when police secure a warrant using information obtained in violation of the Fourth Amendment. That question is not presented here. The court of appeals correctly held that even if the government's retention of forensic images of petitioner's hard drives could be said to have violated the Fourth Amendment, suppression would be inappropriate because the government secured the evidence at issue here through "objectively reasonable reliance" on the 2006 warrant. *Id.* at 922. Unlike the warrants at issue in the cases on which petitioner relies, the 2006 warrant did not rely on information obtained through the asserted Fourth Amendment violation—instead, the warrant rested on "independent probable cause." Pet. App. 16 n.14. Furthermore, this unusual case would be a poor vehicle in which to take up the question petitioner seeks to raise even if that question were properly presented. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that any Fourth Amendment violation associated with the government's retention of forensic images of petitioner's hard drives would not require suppression because the government obtained the evidence at issue here in objectively reasonable reliance on the 2006 warrant.

a. "The fact that a Fourth Amendment violation occurred * * * does not necessarily mean that the exclusionary rule applies." *Herring* v. *United States*, 555 U.S. 135, 140 (2009). To the contrary, this Court has "repeatedly held" that "the rule's sole purpose * * * is to deter future Fourth Amendment violations," and the Court has therefore "limited the rule's operation to situations in which this purpose is 'thought most efficaciously served.'" *Davis* v. *United States*, 564 U.S. 229, 236-237 (2011) (citation omitted). Where, in contrast, "suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.'" *Id.* at 237 (citation omitted); see *Herring*, 555 U.S. at 141.

"Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." *Davis*, 564 U.S. at 237 (citation omitted). "The analysis must also account for the 'substantial social costs'" of the exclusionary rule. *Ibid.* (citation omitted). "Exclusion exacts a heavy toll" because "[i]t almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence" and because "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Ibid.* This Court's decisions "hold that society must swallow this bitter pill when necessary, but only as a 'last resort.'" *Ibid.* (citation omitted). Exclusion can be an appropriate remedy only when "the deter-

rence benefits of suppression * * * outweigh its heavy costs." *Ibid.*

Those principles are reflected in this Court's decision in *Leon*, which held that evidence should not be suppressed if it was obtained "in objectively reasonable reliance" on a search warrant, even if that warrant is subsequently held invalid. 468 U.S. at 922. Under *Leon*, suppression of evidence seized pursuant to a warrant is not justified unless (1) the issuing magistrate was misled by affidavit information that the affiant either "knew was false" or offered with "reckless disregard of the truth"; (2) "the issuing magistrate wholly abandoned his judicial role"; (3) the supporting affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; or (4) the warrant was "so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers could not reasonably presume it to be valid." *Id.* at 923 (citation omitted).

b. In this case, the search at issue was unquestionably authorized by the 2006 warrant, and petitioner does not contend that any of the four exceptions recognized in *Leon* apply. Instead, petitioner has sought to rely on an additional exception, asserting "that good faith reliance on a warrant is never possible in circumstances in which a predicate constitutional violation has occurred." Pet. App. 52.

The court of appeals correctly rejected that argument. The court concluded that in this case, it is "clear" that the investigating agents "'did not have any significant reason to believe'" that their retention of the forensic images of petitioner's hard drives violated the Fourth Amendment. Pet. App. 55-56 (citation omit-

ted). The court also concluded that the agents had fully apprised the magistrate judge of "the pertinent facts regarding the retention of the mirrored copies of [petitioner's] hard drives," thereby allowing the magistrate judge to "determine whether any predicate illegality precluded issuance of the warrant." *Id.* at 52. In circumstances like these, the court of appeals explained, the application of the good-faith exception "simply reaffirms *Leon*'s basic lesson: that suppression is inappropriate where reliance on a warrant was 'objectively reasonable.'" *Id.* at 53 (quoting *Leon*, 468 U.S. at 922).

This Court's decisions confirm the correctness of the court of appeals' conclusion. As this Court has emphasized, "[t]he basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion 'vary with the culpability of the law enforcement conduct' at issue." *Davis*, 564 U.S. at 238 (brackets omitted) (quoting *Herring*, 555 U.S. at 143). "When police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights," exclusion serves a meaningful deterrent function. *Ibid.* (quoting *Herring*, 555 U.S. at 144). "But when," as in this case, "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, * * * the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" *Ibid.* (quoting *Leon*, 468 U.S. at 908 n.6, 909, 919).

Petitioner does not challenge the court of appeals' holding that the agents in this case had no reason to believe that their retention of the forensic images of petitioner's hard drives violated the Fourth Amendment. He also does not question the court's factbound conclusion that the agents fully apprised the magis-

trate judge of the relevant facts in seeking the 2006 warrant. And petitioner does not attempt to explain how the application of the exclusionary rule to evidence obtained in those circumstances could be reconciled with this Court's admonition that "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Davis*, 564 U.S. at 241 (quoting *Leon*, 468 U.S. at 919).

2. Petitioner contends that this Court should grant review to resolve a disagreement among the lower courts over whether the good-faith exception can apply when a warrant was obtained "based on" an earlier Fourth Amendment violation. Pet. 12; see Pet. 1-2, 12-20. That disagreement is not implicated here.

a. Several courts of appeals have correctly applied the good-faith exception to hold that suppression is not appropriate where a "search warrant application cite[d] information gathered in violation of the Fourth Amendment," but the earlier violation was "'close enough to the line'" to "'make the officers' belief in the validity of the warrant objectively reasonable.'" *United States* v. *Cannon*, 703 F.3d 407, 413 (8th Cir.) (citation omitted), cert. denied, 133 S. Ct. 2375 (2013); see, *e.g.*, *United States* v. *Massi*, 761 F.3d 512, 528 (5th Cir. 2014), cert. denied, 135 S. Ct. 2377 (2015); *United States* v. *McClain*, 444 F.3d 556, 565-566 (6th Cir. 2005), cert. denied, 549 U.S. 1030 (2006); *United States* v. *Diehl*, 276 F.3d 32, 44-45 (1st Cir.), cert. denied, 537 U.S. 834 (2002); *United States* v. *Thomas*, 757 F.2d 1359, 1368 (2d Cir.), cert. denied, 474 U.S. 819 (1985), and 479 U.S. 818 (1986).

In contrast, as petitioner observes (Pet. 14-15), decisions by other courts of appeals and some state courts of last resort have held the good-faith exception inap-

plicable to warrants obtained using information derived from prior Fourth Amendment violations, without asking whether the officers' conduct was objectively reasonable. See *United States* v. *McGough*, 412 F.3d 1232, 1240 (11th Cir. 2005); *United States* v. *Scales*, 903 F.2d 765, 767-768 (10th Cir. 1990); *United States* v. *Wanless*, 882 F.2d 1459, 1466-1467 (9th Cir. 1989); *United States* v. *Vasey*, 834 F.2d 782, 789-790 (9th Cir. 1987); *State* v. *DeWitt*, 910 P.2d 9, 12-15 (Ariz. 1996); *People* v. *Machupa*, 872 P.2d 114, 123-124 (Cal. 1994); *State* v. *Johnson*, 716 P.2d 1288, 1301 (Idaho 1986).

b. It is not clear that this disagreement would warrant this Court's intervention even if it were properly presented here. The decisions holding that the good-faith exception is categorically inapplicable to warrants issued based on information obtained in violation of the Fourth Amendment have rested on the assumption that the good-faith doctrine applies only where law enforcement officers relied on a third party's judgment in violating the Fourth Amendment. See, *e.g.*, *Scales*, 903 F.2d at 767-768; *Vasey*, 834 F.2d at 789; *DeWitt*, 910 P.2d at 14-15; see also Pet. 15-16 (echoing this reasoning). But this Court's subsequent decision in *Herring* rejected that assumption and applied the good-faith doctrine to authorize the admission of evidence obtained as a result of a negligent constitutional violation by law enforcement officers. 555 U.S. at 147-148. And, more generally, this Court's recent good-faith decisions have admonished that suppression is inappropriate where "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Davis*, 564 U.S. at 238 (citation omitted). The lower courts that have deemed the

good-faith exception categorically inapplicable thus may revisit that conclusion if given an opportunity to do so with the benefit of this Court's recent decisions.

c. In any event, the disagreement petitioner identifies is not implicated here. In each of the decisions on which he relies (Pet. 14-15), a court declined to apply the good-faith exception because "the search warrant affidavit was tainted with evidence obtained as a result of [the] prior" Fourth Amendment violation. *McGough*, 412 F.3d at 1240 (citation omitted). In *McGough*, for example, an officer saw the gun and drugs that established probable cause for the warrant after unlawfully entering an apartment. *Id.* at 1234-1235. The other decisions petitioner cites involve similar facts.[2] The decision on which petitioner relies in characterizing the disagreement (Pet. 1, 17) thus describes the question that has divided the lower courts as "whether the good faith exception to the exclusionary rule can apply in a situation in which the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment." *McClain*, 444 F.3d at 565.

That question is not presented here. The asserted "predicate Fourth Amendment violation" (Pet. 1) on which petitioner relies is the government's retention of the forensic images of his hard drives. But that retention did not taint the affidavit supporting the

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[2] See *Scales*, 903 F.2d at 767-768 (warrant affidavit relied on evidence from dog sniff conducted after an illegal luggage seizure); *Wanless*, 882 F.2d at 1466-1467 (warrant affidavit relied on evidence from illegal car search); *Vasey*, 834 F.2d at 789-790 (same); *DeWitt*, 910 P.2d at 12-15 (warrant affidavit relied on evidence obtained during illegal home entry); *Machupa*, 872 P.2d at 123-124 (same); *Johnson*, 716 P.2d at 1301 (same).

2006 warrant. When agents began to suspect that petitioner had committed tax crimes, they did not "open any of [petitioner's] digital financial documents or files" on the retained forensic images. Pet. App. 16-17. Instead, they secured petitioner's bank records and tax returns, and thereby amassed "extensive evidence" suggesting that petitioner had engaged in criminal activity "without once looking at any non-responsive information on the mirror[ed] images." *Id.* at 16 n.14. The 2006 warrant was thus issued based upon "independent probable cause," not on any information that the agents obtained as a result of the asserted constitutional violation. *Ibid.*[3]

d. The government's retention of the forensic images seized in 2003 did, of course, prevent petitioner from deleting or altering the records that were ultimately discovered in the searches of those images conducted under the 2006 warrant. Indeed, just days after the execution of the original warrant in 2003,

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[3] The court of appeals rejected petitioner's argument that the good-faith principle adopted in its earlier decision in *Thomas* was inapplicable here because *Thomas* involved a prior unlawful search as opposed to "a seizure or unlawful retention of data." Pet. App. 53 n.44. The court saw "no justification for this distinction." *Ibid.* Certainly, no justification exists for limiting the good-faith exception to prior unlawful searches and excluding from good-faith analysis the unlawful retention of data that is later searched pursuant to a warrant. *Ibid.* In fact, the difference between prior unlawful searches and (allegedly) unlawful seizures or retentions cuts the other way: far less reason exists to regard a warrant as tainted by the unlawful retention of data than by a prior unlawful search. As discussed below, the retention of data may be but-for condition of the subsequent search only in the sense that it prevents the defendant from destroying evidence—which is not a protected act, and which constitutes a reason to reject exclusion rather than grant it. See pp. 17-18, *infra*.

petitioner altered more than 90 different entries in the financial records stored on his hard drives in an apparent effort to conceal his tax evasion. Pet. App. 19-20 & n.19; see *id.* at 9 n.8. A warrant to search those drives in 2006 thus would not have revealed the same information, and the retention of the forensic images can be said to be a but-for cause of the discovery of the evidence at issue here. But this Court's decision in *Segura* v. *United States*, 468 U.S. 796 (1984), makes clear that suppression is not required where a defendant claims that evidence is the fruit of a prior Fourth Amendment violation because that violation prevented the evidence from being destroyed or altered.

In *Segura*, law enforcement officers illegally entered a home without a warrant and remained there for 19 hours before obtaining and executing a search warrant for the premises. 468 U.S. at 800-801. The Court held that the illegal entry did not require suppression of the evidence obtained under the warrant because "[n]one of the information on which the warrant was secured was derived from or in any way related to the initial [unlawful] entry." *Id.* at 814. In so doing, the Court rejected the contention that suppression was required based on the sort of predicate "taint" that petitioner hypothesizes here—that is, the theory that the illegal entry prevented the later-discovered evidence from being "removed or destroyed" before the warrant was issued. *Id.* at 815.

The Court acknowledged that the officers' actions "could be considered the 'but for' cause of the discovery of the evidence" because, absent the illegal entry, the defendants "might have arranged for the removal or destruction of the evidence." *Segura*, 468 U.S. at 816. But the Court "decline[d] to extend the exclusio-

nary rule, which already exacts an enormous price from society and our system of justice, to further 'protect' criminal activity" in such a fashion. *Ibid.* The Court explained that to require suppression on the theory that a Fourth Amendment violation prevented the destruction or removal of evidence would be to recognize "some 'constitutional right' to destroy evidence" —a result that "defies both logic and common sense." *Ibid.*

A number of courts of appeals have relied on *Segura* to deny suppression where a predicate Fourth Amendment violation prevented evidence from becoming unavailable to the government. See *United States* v. *Etchin*, 614 F.3d 726, 731, 734 (7th Cir. 2010), cert. denied, 562 U.S. 1156 (2011); *United States* v. *Carrion*, 809 F.2d 1120, 1128-1129 (5th Cir. 1987); *United States* v. *Silvestri*, 787 F.2d 736, 744-746 (1st Cir. 1986), cert. denied, 487 U.S. 1233 (1988). *Segura* thus refutes any contention that the records discovered under the 2006 warrant are "tainted" simply because the government's retention of forensic images containing those records prevented petitioner from altering or destroying them.

3. Finally, this unusual case would be a poor vehicle in which to resolve the question petitioner seeks to raise even if that question otherwise warranted review and were properly presented here. That is true for at least two reasons.

First, this case differs from the decisions on which petitioner relies because the asserted predicate Fourth Amendment violation—the retention of the forensic images of petitioner's hard drives—*itself* arose from a warrant. The 2003 warrant authorized the creation of the forensic images and allowed the government to

search those images for responsive information. Pet. App. 8 n.6; see *id.* at 5 n.3. The agents "scrupulously" adhered to the limitations in the warrant. *Id.* at 157. But the warrant did not contain any restrictions on the length of time that the forensic images could be retained, and petitioner never asked that those images be returned or destroyed. *Id.* at 8 n.7.

Accordingly, as the government argued below, the agents acted in "objectively reasonable reliance," *Leon*, 468 U.S. at 922, on the 2003 warrant in retaining the images while the relevant investigation remained open. Gov't En Banc C.A. Br. 53-58. The court of appeals had no occasion to address that argument because it held that the government's good-faith reliance on the 2006 warrant was an independently sufficient basis for denying suppression. Pet. App. 48 n.43. But the presence of the 2003 warrant makes this case an unsuitable vehicle for resolving the question presented because it could complicate the good-faith analysis or provide an alternative basis on which to conclude that suppression is not required.

Second, petitioner would not be entitled to relief even if this Court deemed the good-faith exception inapplicable. The court of appeals assumed without deciding that the government violated the Fourth Amendment by retaining the forensic images of petitioner's hard drives. Pet. App. 26, 47. As the government argued below, however, no Fourth Amendment violation occurred. Gov't En Banc C.A. Br. 28-48.

The court of appeals recognized the force of that argument, observing that the government had presented several legitimate reasons for its retention of complete forensic images of petitioner's hard drives during the pendency of its investigation. Pet. App. 37.

The court explained that those interests would not be served by attempting to extract and retain only the materials that were responsive to the 2003 warrant because "the extraction of specific data files to some other medium can alter, omit, or even destroy portions of the information contained in the original storage medium." *Id.* at 34. The court stated that "preservation of the original medium or a complete mirror may therefore be necessary in order to safeguard the integrity of evidence that has been lawfully obtained or to authenticate it at trial." *Ibid.* In addition, the court reasoned that "[r]etention of the original storage medium or its mirror may be necessary to afford criminal defendants" the opportunity to "challenge the authenticity or reliability of evidence allegedly retrieved"—"or to locate exculpatory evidence that the government missed." *Id.* at 35-36.

In this case, the government retained the forensic images of petitioner's hard drives while its investigation of McCarthy and his companies remained ongoing. During that time, the agents protected the privacy interests in the nonresponsive information contained in the images and carefully "avoided reviewing files that they were not entitled to review." Pet. App. 157. As the district court held, the government's retention of the forensic images under these circumstances was reasonable—particularly because petitioner never availed himself of the prescribed judicial remedy for seeking the return of seized property, see Fed. R. Crim. P. 41(g), or otherwise sought the return or destruction of the forensic images. Pet. App. 156-157.

Petitioner contends (Pet. 20-21) that the availability of this alternative ground for affirmance does not make this case an inappropriate vehicle for resolving

the good-faith question because this Court could simply assume without deciding that a Fourth Amendment violation occurred. But the significant possibility that petitioner would not be entitled to relief on remand even if this Court agreed with his position on the exclusionary-rule question presented provides further reason not to grant review.[4]

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[4] Petitioner alternatively suggests (Pet. 21-22) that this Court should "add the substantive Fourth Amendment issue as an additional question presented." That suggestion in the body of the petition is not sufficient to preserve the issue for this Court's review. Sup. Ct. R. 14.1(a); see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010). Petitioner also does not suggest that the substantive Fourth Amendment question implicates any disagreement among the courts of appeals. And in any event, several features of this case would make it a poor vehicle for addressing that question. First, as the court of appeals observed, petitioner's failure to seek the return or destruction of the forensic images may have forfeited any Fourth Amendment objection he might otherwise have had. Pet. App. 43. Second, petitioner's argument that the retention of the forensic images was unreasonable rests on the premise that "by January 2005 * * * the government had determined * * * that it had performed all forensic searches of data responsive to the 2003 warrant that might prove necessary over the course of the investigation," thereby triggering the asserted obligation to return or destroy the nonresponsive material. *Id.* at 55. But as the court of appeals explained, the record does not support that premise. *Ibid.*; see *id.* at 13-14 & n.12. Third, this case involves events that occurred more than a decade ago. That would make it a poor vehicle in which to address a Fourth Amendment question that may turn in part on "technological specifics" about the characteristics of digital storage media and the techniques for searching and preserving them, because those "technologies rapidly evolve" and "the specifics change." *Id.* at 38 & n.37.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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