No. 16-263

In the Supreme Court of the United States

STAVROS M. GANIAS,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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The key evidence used to convict petitioner Stavros Ganias of tax evasion—his personal financial records—was seized outside "the scope of [a] 2003 warrant" for the records of two of Ganias's accounting clients, and then retained by federal agents for two-and-a-half years, on the off-chance that non-responsive records might someday become useful in the government's "ongoing" investigation. BIO 3-4; *see* 2d Cir. ECF 151, Joint App. 122 (agent's testimony explaining that non-responsive records were retained because "you never know what data you may need in the future"). This sort of blanket over-seizure and indefinite retention of electronic files violates the Fourth Amendment and should require suppression of documents "not within the scope of the warrant[]." *See Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976) (where seized "papers were not within the scope of the warrants[,] . . . the trial judge was correct in suppressing" them). Yet in the court below, the *en banc* majority held that the exclusionary rule did not apply, because in 2006 agents obtained a new warrant to search Ganias's unconstitutionally seized personal records. Pet. App. 49-53.

That holding further entrenches an acknowledged, longstanding conflict in the lower courts on whether the good-faith exception to the exclusionary rule allows law-enforcement officials to "launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate." *State v. Hicks*, 146 Ariz. 533, 535 (Ariz. Ct. App. 1985); *see* Petition 12-17. Contrary to the government's claims, this case squarely implicates that split, *see infra* at 2-6, it provides a good vehicle in

which to resolve the conflict, *see infra* at 6-8, and this important question is now ripe for this Court's review, *see infra* at 8-9.

I. The acknowledged conflict is squarely presented here.

The government acknowledges that the lower courts are in conflict "over whether the good-faith exception can apply when a warrant [is] obtained based on an earlier Fourth Amendment violation," but it claims that this "disagreement is not implicated here." BIO 13. The government is incorrect.

The 2006 warrant to search Ganias's personal records *was* "obtained based on [the] earlier Fourth Amendment violation." *See id.* When, in November of 2003, federal agents seized and indefinitely retained Ganias's personal files—outside the 2003 warrant's scope and with no probable cause—the government gained indefinite, long-term access to Ganias's private papers, in violation of the Fourth Amendment. Pet. App. 116-17. The second warrant was thus directly "based on [the] earlier Fourth Amendment violation": It was the earlier, unreasonable *seizure* that gave federal agents indefinite access to these preserved records. Pet. App. 9 & n.8. Had this case arisen in other circuits, the unconstitutionally seized files would have been subject to suppression, the later warrant doing nothing "to ratify" the unconstitutional seizure after the fact. *See United States v. Scales*, 903 F.2d 765, 768 (10th Cir. 1990) ("the search of the suitcase after the search warrant was issued does not prevent" suppression based on earlier unlawful "seiz[ure] [of] the luggage"); *United States v. Burgard*, 675 F.3d 1029, 1035 (7th Cir. 2012) ("[w]hen an officer waits an

unreasonably long time to obtain a search warrant, in violation of the Fourth Amendment, he cannot seek to have evidence admitted simply by pointing to that late-obtained warrant"); Petition 14-17. In the Second Circuit, by contrast, the agents here *were* able to ratify their unconstitutional conduct by obtaining a subsequent warrant to search what had been unlawfully seized. Pet. App. 49–51. The split is squarely at issue in this case.

The government nonetheless suggests that the split actually concerns only those cases in which "the search warrant affidavit [is] tainted" by the fruit of a prior unreasonable *search*. BIO 15. This claim too is incorrect. As an initial matter, and as the Second Circuit expressly recognized in the decision below, there is no principled "justification for [a] distinction" between, on the one hand, cases where "the alleged predicate violation is a *search* that taints the warrant" application, and, on the other, cases where the "predicate violation is a *seizure*" of evidence later searched under a subsequent warrant. Pet. App. 53 n.44. In both scenarios, the key question is precisely the same: Does the subsequent warrant provide any basis for excusing law enforcement's predicate unconstitutional conduct under the good-faith exception? *E.g., Scales*, 903 F.2d at 768.

Moreover, and contrary to the government's claims, "the affidavit supporting the [2006] warrant" in this case clearly *did* rely on evidence "obtained in violation of the Fourth Amendment." BIO 15, citing *United States v. McClain*, 444 F.3d 556, 565 (6th Cir. 2005). The unconstitutionally seized evidence here—Ganias's personal QuickBooks financial records—was the *very*

subject of the 2006 warrant application. The affidavit supporting the 2006 warrant application thus noted that the agent was in possession of "a QuickBooks file titled Steve_ga.qbw," which, in the agent's view, was "highly likely [to] contain the" personal financial records of Mr. Ganias. 2d Cir. ECF 152, Joint App. 467. Had the government not seized those personal financial records and then retained them for more than 29 months outside the 2003 warrant's scope, the government would have had no access to a "QuickBooks file titled Steve_ga.qbw," and there would have been nothing to search pursuant to a 2006 warrant. The "search warrant affidavit" in this case *is* "tainted" by the government's predicate unconstitutional seizure, and the split is directly implicated. *See* BIO 15.

Indeed, the fact that this case involves a predicate unconstitutional *seizure*—as opposed to information learned during a predicate unconstitutional *search*—actually simplifies this Court's review. In past petitions involving predicate unconstitutional searches, the government has avoided review by pointing to complications arising from whether the evidence "used to obtain [a] [subsequent] search warrant" qualified as "the fruit" of an earlier constitutional violation. *Massi v. United States*, no. 14-740, Brief in Opposition 16–17 (April 2015). Here, by contrast, no poisonous-tree analysis is needed, because the unconstitutionally seized evidence—Ganias's personal financial records—are the very files that the government unconstitutionally seized and then, two-and-a-half years later, sought a second warrant to search. This case thus provides a simple, clean vehicle in which to resolve the split. *See, e.g., Burgard*, 675 F.3d at 1035

(where the predicate violation involves "wait[ing] an unreasonably long time to obtain a search warrant," agents "cannot seek to have evidence admitted simply by pointing to that late-obtained warrant").

Nor is there any merit to the government's contention that suppression can be avoided because the unconstitutional seizure of Ganias's personal financial records properly "prevent[ed] [him] from deleting or altering th[ose] records." BIO 16-17. The basic premise of the Fourth Amendment is that a person's "papers are his dearest property." *See Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 Eng. Rep. 807 (K.B. 1765). And among the most basic "rights and benefits of property ownership" is the right to modify or change that property. *E.g., Almeida v. Holder*, 588 F.3d 778, 788 (2d Cir. 2009); *see generally* Paul Ohm, *The Fourth Amendment Right to Delete*, 119 Harv. L. Rev. F. 10, 11 (2005) ("without the . . . ability to change, delete, or destroy, virtually nothing will be left of the rights of dominion and control"). By seizing and retaining mirror images of every file on Ganias's computers—outside the 2003 warrant's scope and without probable cause—the government denied Ganias this basic freedom to control and edit the content of his most private and sensitive records. Indeed, 13 years after the initial over-seizure, the government still remains in possession of every file on Ganias's computers, frozen in time and available to be searched as needed. Based on a narrow warrant authorizing seizure of records of two of Ganias's accounting clients, Mr. Ganias, a 74-year-old veteran, will spend the rest of his life with the government having unfettered access to the equivalent of every document, every file, and every private record in his house. *Cf. Riley v. California*, 134 S. Ct. 2473,

2491 (2014) (electronic storage devices "expose to the government far more" than even the contents of a house). The fact that the government "prevent[ed] petitioner from" editing his private financial records, *see* BIO 16, only underscores the serious constitutional harm inflicted upon Ganias.

Nothing in this Court's decision in *Segura v. United States*, 468 U.S. 796 (1984), is to the contrary. *See* BIO 17-18. In *Segura*, law enforcement officers "entered a home without a warrant and remained there for 19 hours before obtaining and executing a search warrant for the premises." BIO 17. As the Court recognized in *Segura*, "information possessed by the agents *before they entered the apartment* constituted an independent source for the discovery and seizure of the evidence." 468 U.S. at 814-15. In this case, by contrast, there was no such "independent source" justifying seizure of Ganias's personal financial records. At the time of the 2003 warrant's execution, the government had no warrant and no probable cause to support indefinite retention of Ganias's personal files. *Segura* and the independent-source doctrine thus have nothing to do with this case, which is undoubtedly why the government and the Second Circuit's decision below *never* so much as mentioned the independent-source doctrine as a basis for avoiding suppression.

II. The alleged vehicle problems raised by the government create no impediment to this Court's review.

The government also claims that this case "would be a poor vehicle in which to resolve" the split because the "predicate Fourth Amendment violation" at issue "*itself* arose from a warrant," and is therefore independently

subject to the good-faith exception. *See* BIO 18-19. There is, however, no basis for the government to claim good-faith reliance on the 2003 warrant.

As this Court itself noted in *United States v. Leon*, 468 U.S. 897 (1984), the good-faith exception's application to "evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant." *Id*. at 918 n.19. Here, there was no such proper execution. As the District Court expressly recognized below, the 2003 warrant limited "the data. . . to be seized" to files concerning the operations of two of Ganias's accounting clients. Pet. App. 159. Notwithstanding that limitation, the government seized every file on Ganias's computers and then retained them for two-and-a-half years outside the 2003 warrant's scope. This continuing retention of non-responsive documents provides no basis for invoking the good-faith exception under *Leon*. *See, e.g.*, LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 1.3(f) (5th ed.) ("*Leon* cannot be invoked in the prosecution's favor on such issues as whether . . . certain items not named in the warrant were properly seized.").

Nor does the fact that the *en banc* majority "assumed without deciding that the government violated the Fourth Amendment," *see* BIO 19-20, provide any meaningful impediment to this Court's review. As noted in the petition, this Court's regular practice in good-faith cases has been to assume, but not decide, the existence of a constitutional violation in the course of its analysis. *See Herring v. United States*, 555 U.S. 135, 139 (2009) (deciding the case on the

"assumption that there was a Fourth Amendment violation"); *Illinois v. Krull*, 480 U.S. 340, 356 n.13 (1987) ("The question whether the Illinois statute in effect at the time of *McNally*'s search was, in fact, unconstitutional is not before us."). The government identifies nothing that would prevent this Court from taking precisely the same approach here.[1]

III. The question presented is ripe for this Court's review.

Finally, this longstanding lower-court conflict on whether to extend the good-faith exception to predicate Fourth Amendment violations is—as explained in the petition—deep, entrenched, and ripe for this Court's review. Petition 17-18.

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[1] The government also urges this Court not to add the Fourth Amendment merits as an additional question presented because a "suggestion in the body of the petition is not sufficient to preserve the issue." *See* BIO 21 n.4. Again, this Court need not address the Fourth Amendment merits; the exclusionary-rule issue is worthy of this Court's review in its own right. That said, the Court frequently adds questions presented on its own initiative, and it can do so here as well if it deems review appropriate. *E.g., United States v. Jones*, 564 U.S. 1036 (2011). Moreover, the Fourth Amendment merits in this case is clearly a question of great importance. And, contrary to the government's suggestion in its latest filing, the government's *en banc* brief in the Court of Appeals expressly disclaimed any argument that the "failure to file a Rule 41(g) motion amounts to [a] waiver of the right to file a motion to suppress." 2d Cir. ECF 191, Gov. Br. 42. As the panel unanimously held, there is simply "no authority for concluding that a Rule 41(g) motion is a prerequisite to a motion to suppress," and it would be wholly unfair to spring this heretofore nonexistent waiver rule upon Mr. Ganias in this case. Pet. App. 121. The Fourth Amendment merits are properly before the Court and may be added as a question presented if the Court is so inclined.

The government nonetheless suggests that the Court should stay its hand, because over time the split may resolve itself based on this Court's "recent good-faith decisions." *See* BIO 14-15, citing *Herring v. United States*, 555 U.S. 135 (2009), and *Davis v. United States*, 564 U.S. 229 (2011). The government, however, made the exact same argument two years ago, the last time this question was before the Court. *Massi v. United States*, Brief in Opposition 13-14 & n.2 ("Most of the courts whose decisions petitioner invokes have not yet had the opportunity to consider their approach in light of *Herring*."). And in the intervening period, there has not been any movement suggesting that courts will revisit prior holdings "if given an opportunity to do so with the benefit of this Court's" recent caselaw. *See* BIO 15.

If anything, the uncertainty created by this Court's decisions in *Herring* and *Davis* makes review in this case all the more necessary and appropriate. As Members of this Court have pointed out, some of the "the broad dicta in *Herring*" and *Davis* could, if extended to the limits of its logic, dramatically limit the traditional office of the exclusionary rule, in ways that would affect "many thousands [of cases] each year." *See Davis*, 564 U.S. at 259 (Breyer, J., dissenting). Only this Court can clarify the scope and effect of this broad dictum. Granting review in this case would give the Court an opportunity to provide some of that much-needed guidance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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