No. _____

In The

Supreme Court of the United States

MARKICE LAVERT McCANE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Leon*, 468 U.S. 897 (1984), this Court created a good-faith exception to the exclusionary rule of the Fourth Amendment. The Court has expanded the good-faith exception over time, most recently in *Herring v. United States*, 129 S. Ct. 695 (2009). This case asks the Court to resolve a deep three-way split in the lower courts over whether the good-faith exception applies to changing interpretations of law. The question presented is this:

> "Whether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional."

PARTIES TO THE PROCEEDING

Petitioner is Markice McCane, an individual. Respondent is the United States.

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PETITION FOR CERTIORARI

Mr. Markice McCane respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 573 F.3d 1037. It is reprinted in the Appendix at Pet. App. 1.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on July 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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

This is a Fourth Amendment case about the scope of the exclusionary rule. On April 28, 2007, Oklahoma City Police Officer Aaron Ulman stopped a vehicle for a traffic violation. Officer Ulman approached the vehicle and asked the driver, later identified as the Petitioner Markice McCane, for his license and identification. McCane responded that his license was suspended. Officer Ulman ran a computer check and confirmed that McCane's license was suspended.

Officer Ulman arrested McCane for driving with a suspended license, placed him in handcuffs, and put him in the back seat of the patrol car. Ulman then searched the passenger compartment of the car incident to McCane's arrest under *New York v. Belton,* 453 U.S. 454 (1981). During the search, he found a loaded .25 caliber firearm hidden under a rag in the pocket of the driver's side door.

McCane was charged in federal court with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He filed a motion to suppress the firearm on the ground that the car was searched in violation of his Fourth Amendment rights. The district court denied the motion on the ground that the search was authorized by *Belton* as interpreted by the

Tenth Circuit in *United States v. Brothers*, 438 F.3d 1068, 1073 (10th Cir. 2006), and *United States v. Cotton*, 751 F.2d 1146, 1148-49 (10th Cir. 1985). *See* Pet. App. 38-39. A jury convicted McCane, and he was sentenced to serve 63 months in prison. He then appealed his conviction on several grounds, including that the search of the car violated his Fourth Amendment rights.

While McCane's appeal was pending before the Tenth Circuit, this Court decided *Arizona v. Gant*, 129 S. Ct. 1710 (2009). The facts of *Gant* were very similar to this case. Gant was arrested for driving on a suspended license, and he was handcuffed and then put in the back of the police squad car. Two officers searched Gant's vehicle incident to arrest, revealing a gun and cocaine in the car. Although lower courts had widely upheld this practice under *Belton*, the Court announced that such searches were no longer to be considered justified incident to arrest. *See id*. at 1719. *Gant* instead announced the rule that searches incident to arrest in the automobile context are constitutional "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id*.

In the decision below, the Tenth Circuit concluded that although the search was unconstitutional under *Gant*, McCane's conviction should be affirmed because the good-faith exception to the exclusionary rule applied. The Tenth Circuit held that the good-faith

exception applies "when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals." Pet. App. 18. The exception applied to McCane's case because Officer Ulman's search was "wholly consistent with and supported by this court's precedent prior to *Gant*." Pet. App. 9. Because Officer Ulman relied in good faith on pre-*Gant* case law, "[t]he good-faith exception to the exclusionary rule applies in this case" and the motion to suppress was properly denied. Pet. App. 18.

The Tenth Circuit reached this conclusion by first surveying the Supreme Court's quartet of good-faith cases: *United States v. Leon,* 468 U.S. 897 (1984); *Illinois v. Krull*, 480 U.S. 340 (1987); *Arizona v. Evans*, 514 U.S. 1 (1995); and *Herring v. United States*, 129 S. Ct. 695 (2009). *Leon* introduced the good-faith exception and applied it to reliance on an invalid search warrant. *Krull* expanded the exception and applied it to reliance on a constitutionally invalid statute. Both *Evans* and *Herring* extended the exception to reliance on a mistaken belief that a warrant authorized the suspect's arrest.

The Tenth Circuit interpreted these cases to stand for the view that the exclusionary rule should apply only when it deters police misconduct. Pet. App. 15. Applying this principle, the court concluded that the good-faith exception should apply to searches authorized by then-existing precedents:

> Just as there is no misconduct on the part of a law enforcement officer who reasonably relies upon the mistake of a court employee in entering data, or the mistake of a legislature in passing a statute later determined to be unconstitutional, a police officer who undertakes a search in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision, has not engaged in misconduct. The refrain in *Leon* and the succession of Supreme Court good-faith cases is that the exclusionary rule should not be applied to objectively reasonable law enforcement activity. Relying upon the settled case law of a United States Court of Appeals certainly qualifies as objectively reasonable law enforcement behavior.

Pet. App. 15-16 (internal citations and quotations omitted).

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the deep and irreconcilable three-way split among the lower courts and this Court about whether the good-faith exception applies when a search that was considered lawful at the time it occurred is later ruled unconstitutional.

This recurring question of Fourth Amendment law is raised every time a court issues a ruling in a

defendant's favor that departs unexpectedly from earlier decisions. Criminal defendants with similar cases still in the pipeline will invoke the new ruling in support of suppression. The question is, does the new case apply in full force so that the evidence is suppressed? Or does the good-faith exception to the exclusionary rule apply so that the evidence is admitted?

A deep three-way circuit split has emerged to answer this question. The Tenth Circuit, the Fifth Circuit, and two state Supreme Courts have held that the good-faith exception applies in such settings. *See United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987); *State v. Ward*, 604 N.W.2d 517 (Wis. 2000); *State v. Herrick*, 588 N.W.2d 847 (N.D. 1999). In contrast, the Ninth Circuit has held that the good-faith exception does not apply. *See United States v. Gonzales*, ___ F.3d ___, 2009 WL 2581738 (9th Cir. 2009). Finally, the Seventh Circuit and the First Circuit have taken a third approach that applies the good-faith exception in some circumstances but not others. *See United States v. Real Property Located at 15324 County Highway E.,* 332 F.3d 1070 (7th Cir. 2003); *United States v. Brunette*, 256 F.3d 14, 19 (1st Cir. 2001). This Court should grant the petition to resolve the disagreement in the lower courts.

Certiorari is also warranted because the opinion below conflicts with the Supreme Court's own guidance. Although the Court has never directly addressed whether the good-faith exception applies to overruled precedents, it has repeatedly addressed whether new Fourth Amendment rules apply to cases on direct review. In those cases, the Court has concluded that the Fourth Amendment applies and convictions based on the fruits of unconstitutional searches must be overturned. The Tenth Circuit's contrary conclusion demands Supreme Court review.

Finally, this case provides the ideal vehicle for review. The combination of two recent Fourth Amendment decisions, *Herring v. United States* and *Arizona v. Gant,* triggered a great deal of litigation in the lower courts on the precise issue raised by this petition. The sharp division in the lower courts demonstrates that this Court will have to resolve the issue eventually. Because this is the first petition to reach the Court after *Herring* and *Gant*, and the deep split already exists, this is the ideal case to review. Sound judicial administration strongly counsels that the Court grant certiorari now rather than allow the lower courts to continue amidst widespread confusion and uncertainty.

I. A THREE-WAY CIRCUIT SPLIT EXISTS ON WHETHER THE GOOD-FAITH EXCEPTION EXTENDS TO RELIANCE ON OVERTURNED LAW: TWO CIRCUITS AND TWO STATE SUPREME COURTS CONCLUDE IT DOES; ONE CIRCUIT CONCLUDES IT DOES NOT; AND TWO CIRCUITS CONCLUDE IT DEPENDS ON WHETHER A WARRANT WAS OBTAINED.

(a) Good-Faith Exception Recognized: Tenth Circuit, Fifth Circuit, and two state Supreme Courts. The Tenth Circuit adopted the good-faith exception for reliance on subsequently overturned precedents in the decision below, *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009). According to the Tenth Circuit, the good-faith exception applies "when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals" that is later recognized as "unconstitutional by a Supreme Court decision." Pet. App. 15. Because "[r]elying upon the settled case law of a United States Court of Appeals certainly qualifies as objectively reasonable law enforcement behavior," Pet. App. 16, the good-faith exception applies and the evidence is admitted.

The Fifth Circuit reached the same result in *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987) (en banc). *Jackson* overturned Fifth Circuit precedent that had allowed warrantless searches at a checkpoint under the border search exception to the Fourth Amendment. The *en banc* court in *Jackson* ruled that

the checkpoint searches were unconstitutional, but then applied the good-faith exception and affirmed the convictions in light of the officers' reasonable reliance on Fifth Circuit law. *Id*. at 866. The court reasoned that officers who relied on then-existing circuit precedent were not acting lawlessly and did not need to be deterred. As a result, "the exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to the change of that law on the date of the delivery of this opinion." *Id*. *See also United States v. Morgan*, 835 F.2d 79, 80-81 (5th Cir. 1987) (applying good-faith exception for changed interpretations of law recognized by *Jackson*).

Two state supreme courts have adopted the same approach. *See State v. Ward*, 604 N.W.2d 517 (Wis. 2000); *State v. Herrick*, 588 N.W.2d 847 (N.D. 1999). Both cases involved "no-knock" searches that had been allowed by state court precedents authorizing no-knock warrants in all felony drug investigations prior to this Court's decision in *Richards v. Wisconsin*, 520 U.S. 385 (1997). *Richards* rejected a *per se* exception to the knock-and-announce rule and instead required a case-by-case determination of need for a no-knock warrant. *Id*. at 393-94.

After *Richards* was decided, defendants tried to invoke the exclusionary rule in cases that could not satisfy the case-by-case standard. The Supreme Court of Wisconsin and the Supreme Court of North Dakota each held that the good-faith exception applied to such pre-*Richards* searches in light of state court precedents allowing no-knock searches. *See Ward*,

604 N.W.2d at 749-50; *Herrick*, 588 N.W.2d at 850-51. As the Supreme Court of Wisconsin explained in *Ward*:

> [W]e cannot say now that the subsequent change in Fourth Amendment jurisprudence has somehow transformed the character of the evidence seized at the Ward home into something so tainted that it mars judicial integrity. Nor will any remedial purpose be achieved through exclusion of the evidence when the officers and magistrate followed, rather than defied, the rule of law.

Ward, 604 N.W.2d at 750. *See also Herrick*, 588 N.W.2d at 850-51 (holding that the good-faith exception applied because the officers "operated under the belief that if drugs were present a no-knock warrant was justifiably obtainable," a belief "directly traceable to our prior rulings," so that "law enforcement officers would have no reason to doubt the validity of a no-knock warrant issued in a drug case by a magistrate or judge.").

(b) No Good-Faith Exception: Ninth Circuit. In contrast, the Ninth Circuit has flatly rejected the good-faith exception for changing law in a case with facts essentially identical to those in this petition. *See United States v. Gonzales*, ___ F.3d ___, 2009 WL 2581738 (9th Cir., Aug. 24, 2009). Like this petition, *Gonzales* involved a search that complied with circuit precedent when it occurred but was later ruled unlawful by *Arizona v. Gant,* 129 S. Ct. 1710 (2009). Gonzales was arrested and placed in the back of the

squad car in a traffic stop. A search of the car incident to arrest uncovered a pistol in the glovebox. The Ninth Circuit initially affirmed in a routine unpublished decision. *United States v. Gonzales*, 290 Fed. Appx. 51 (9th Cir. 2008). The Supreme Court then handed down *Gant*, and the Court granted, vacated, and remanded the *Gonzales* case in light of *Gant*.

On remand, the Ninth Circuit ruled that the good-faith exception did not apply and therefore reversed the conviction. *See United States v. Gonzales*, ___ F.3d ___, 2009 WL 2581738 (9th Cir. 2009). In an opinion by Judge Betty Fletcher, the Ninth Circuit reasoned that applying the good-faith exception would "violate the integrity of judicial review by turning the court into, in effect, a legislative body announcing new rules but not applying them, rather than acting in our proper role as an adjudicative body deciding cases." *Id.* at *2. Further, the good-faith exception could not apply because its application would conflict with the Supreme Court's retroactivity decisions:

> [T]his case should be controlled by long-standing precedent governing the applicability of a new rule announced by the Supreme Court while a case is on direct review. The Court has held that "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *United States v. Johnson,* 457 U.S. 537, 562 (1982); *see Griffith v. Kentucky,* 479 U.S. 314, 328

> (1987) (finding that even decisions constituting a "clear break" with past precedent have retroactive application). This precedent requires us to apply *Gant* to the current case without the overlay of an application of the good-faith exception. To hold that *Gant* may not be fully applied here, as the Government urges, would conflict with the Court's retroactivity precedents.

Id. at *2. Because the facts of the case were very similar to those of *Gant*, *Gant* applied and the motion to suppress was granted. *See id.* at *1 ("We hold that *Gant* requires that Appellant Ricardo Gonzalez's motion to suppress be granted and, therefore, Gonzalez's conviction be reversed.").

(c) No Good-Faith Exception Unless A Warrant Was Obtained: Seventh Circuit and First Circuit. Two circuits have taken a third approach that hinges on whether the police later obtained a warrant. If the police seek admission of evidence that was obtained directly from a warrantless search deemed unconstitutional by subsequent case developments, the good-faith exception does not apply. On the other hand, the good-faith exception *does* apply if investigators use evidence from the unlawful warrantless search to create probable cause for a search warrant.

The Seventh Circuit adopted this mixed approach in *United States v. Real Property Located at 15324 County Highway E.,* 332 F.3d 1070 (7th Cir. 2003). The police had scanned the suspect's home with a thermal imaging device without a warrant to

determine if he was growing marijuana inside. The scan established probable cause for a warrant to search the home, and the police used that cause to obtain a warrant. A search pursuant to the warrant led to the discovery of narcotics and then forfeiture proceedings. Based on Seventh Circuit precedent holding that use of a thermal imaging device was not a search, the Seventh Circuit initially affirmed the forfeiture against a Fourth Amendment challenge. *See United States v. 15324 County Highway E.,* 219 F.3d 602 (7th Cir. 2000).

Soon after the Seventh Circuit's decision, the Supreme Court held that use of a thermal imaging device was a search in *Kyllo v. United States*, 533 U.S. 27 (2001). Following *Kyllo*, the Supreme Court granted, vacated, and remanded the Seventh Circuit's decision. *Acker v. United States*, 533 U.S. 913 (2001). The Seventh Circuit held on remand that the good-faith exception applies only if the police obtain a warrant following the warrantless search later deemed unconstitutional. *15324 County Highway E.,* 332 F.3d at 1075-76. Under this rule, no good-faith exception applies if the government seeks admission of evidence obtained as a fruit of a warrantless search later deemed unlawful:

> We decline to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon subsequently overruled case law . . . absent magistrate approval by way of a search warrant.

Id. at 1076. On the other hand, if the police conduct a warrantless search that is later ruled unconstitutional, and they then use the fruits of that search to obtain a warrant, the good-faith exception applies to the fruits of the warrant search:

> [W]e hold that evidence seized by law enforcement agents acting in objectively reasonable reliance upon a validly issued search warrant that, through no misconduct on the part of the agents, rests on a constitutionally flawed probable cause finding owing to a subsequent change in controlling judicial precedent, is not subject to the exclusionary rule.

Id. at 1076. Because the officers had only used the thermal imaging device to establish probable cause, and they had obtained a warrant to search the home, the good-faith exception applied and the order denying the motion to suppress was affirmed. *Id.*

The Seventh Circuit justified this mixed approach on the ground that if a magistrate judge evaluates the conduct and approves the warrant, there can be no misconduct by the officers that would justify suppression: "any error that is said to have occurred must be attributed to the magistrate, and not law enforcement agents, for the former was in a relatively better position to divine the as-yet unannounced unconstitutionality of the thermal imaging scan." *Id*. at 1075. On the other hand, allowing the good-faith exception absent an intervening warrant

"would have undesirable, unintended consequences" by forcing police officers to take on that task. *Id.* at 1076.

The First Circuit has suggested a similar approach, although its cases have not made the point as clearly and directly as the Seventh Circuit. When the government has obtained a warrant, the First Circuit has applied the good-faith exception by factoring in the state of case law at the time the search occurred. *See, e.g., United States v. Brunette*, 256 F.3d 14, 19 (1st Cir. 2001) (holding that "the uncertain state of the law at the time made reliance on the warrant objectively reasonable" even though the warrant was held unlawful in precedents handed down after the search occurred); *United States v. Syphers*, 426 F.3d 461, 468 (1st Cir. 2005) (analyzing good faith for fruits of a warrant based on "then-prevailing caselaw" at the time the search was executed). On the other hand, the First Circuit has rejected the application of the good-faith exception when the government has not obtained a warrant. *See United States v. Curzi*, 867 F.2d 36, 44 (1st Cir. 1989) (noting that the First Circuit "has not recognized a good-faith exception in respect to warrantless searches," and rejecting an extension of *Leon* and *Krull* to warrantless searches not authorized by statute).

The division in the lower courts is deep, irreconcilable, and outcome-determinative. If no good-faith exception exists for reliance on overturned precedents, the evidence will be excluded: The Fourth Amendment has been violated and the exclusionary rule applies. On the other hand, if a good-faith

exception does exist, the evidence normally will be admitted: A police officer in the field cannot be expected to predict the future of Fourth Amendment law, so reliance on existing cases will be in good faith. The division in the lower circuits is therefore not only a conceptual difference in approach. It is the difference between denying a motion to suppress and granting it.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S OWN PRECEDENTS, INCLUDING *ARIZONA V. GANT* ITSELF.

This court should also grant certiorari because the decision below conflicts with the precedents of this Court. Although this Court has never directly decided whether the good-faith exception applies to searches that are later ruled unconstitutional, the Court has repeatedly addressed whether good-faith reliance on overruled Fourth Amendment caselaw provides a basis to affirm criminal convictions obtained in violation of the Fourth Amendment. The Court has repeatedly concluded it does not. The contrast between the decision below and the extensive guidance of this Court demands Supreme Court review.

Good-faith reliance on overruled Fourth Amendment caselaw traditionally has been addressed by the Court's retroactivity caselaw. In *United States v. Johnson*, 457 U.S. 537 (1982), the Court held that

new Fourth Amendment decisions apply to other cases on direct appeal. Johnson was arrested at his home without a warrant prior to this Court's ruling in *Payton v. New York*, 445 U.S. 573 (1980), that declared such warrantless home arrests unconstitutional. The question in *Johnson* was "whether the rule announced in *Payton* applies to an arrest that took place before *Payton* was decided." *Johnson*, 457 U.S. at 539. After reviewing the history of retroactivity law, especially in the Fourth Amendment setting, the Court ruled that Johnson and all others with cases on direct review should receive the benefit of *Payton*. *Id*. at 562.

The Court later adopted the approach of *Johnson* as a categorical rule: When the Supreme Court adopts a new rule of criminal procedure, including a new rule of Fourth Amendment law, that rule always applies in full force to all cases on direct review. *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). *See also Powell v. Nevada*, 511 U.S. 79, 84 (1994). In contrast, if a new Fourth Amendment decision is handed down *after* the defendant's conviction is final, the balance of interests implicated by the exclusionary rule dictate that the defendant cannot take advantage of the new Fourth Amendment rule in a habeas corpus action. *Stone v. Powell*, 428 U.S. 465, 493-95 (1976); *Teague v. Lane*, 489 U.S. 288 (1989).

The decision below is plainly in conflict with these Supreme Court precedents. Both retroactivity and the proposed good-faith exception focus on the same question: whether reasonable reliance on the

law at the time the search or seizure occurred excuses application of the Fourth Amendment exclusionary rule. This Court's retroactivity cases answer the question "no" for all cases not yet final when the new decision is handed down. The decision below simply relabels the question "good faith" and changes that answer to "yes." The conflict is clear.

The Court's rejection of reasonable reliance on overruled caselaw as a limitation to the exclusionary rule extends beyond the retroactivity setting. For example, in the famous case of *Katz v. United States,* 389 U.S. 347 (1967), agents investigating unlawful betting placed a monitoring device on a public telephone booth without a warrant to listen in on the suspect's calls. The monitoring was lawful under the then-existing precedents of *Olmstead v. United States,* 277 U.S. 438 (1928), and *Goldman v. United States,* 316 U.S. 129 (1942). In *Katz*, however, the Supreme Court overruled *Olmstead* and *Goldman* and held that such monitoring violated the Fourth Amendment. *See Katz*, 389 U.S. at 353.

Katz next addressed the government's argument that the fruits of surveillance should be admitted because the officers had reasonably relied on then-existing Fourth Amendment precedents. This Court rejected the argument and reversed Katz's conviction: "The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we

cannot do." *Id*. at 356. Reliance on then-existing case-law did not avoid suppression of the evidence because there was no such recognized exception to the warrant requirement. *Id*.

The rejection of good-faith reliance on overruled decisions is so deeply embedded in the Supreme Court's decisions that it was explicitly discussed in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), the very case that overruled the precedents Officer Ulman relied on to search the Petitioner's car. In his *Gant* dissent, Justice Alito, joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer, warned that "the Court's decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law." *Gant*, 129 S. Ct. at 1726 (Alito, J., dissenting). Justice Alito recognized the significant practical consequences of *Gant*:

> Many searches – almost certainly including more than a few that figure in cases now on appeal – were conducted in scrupulous reliance on [*Belton*]. It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the *Belton* rule.

Id. at 1728 (Alito, J., dissenting). Nonetheless, the evidence in such cases would be suppressed. *Id.* at 1726 (Alito, J., dissenting).

The majority opinion in *Gant* did not deny Justice Alito's assessment of the decision's impact. Instead, the Court noted that the impact of *Gant* would be limited in the civil context because "the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding." *Id.* at 1722 n.11. The Court also suggested that the cost of suppression was simply the cost of complying with the Constitution: "The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Id*. at 1723.

The exchange between the *Gant* majority and dissent, in which all nine Justices participated, plainly reflects the understanding that the good-faith exception to the exclusionary rule would not apply to reliance on pre-*Gant* caselaw. Notably, the doctrine of qualified immunity in the civil context and *Leon's* good-faith reliance test in the criminal context use an identical legal standard. *See Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004). If the members of this Court thought that the good-faith exception might apply, presumably one of the Justices would have said so.

The Court's disposition in *Gant* emphasizes the point. The Court did not remand for further proceedings such as an application of the good-faith exception. Instead, the Court affirmed the Arizona Supreme Court's order suppressing the evidence.

Gant, 129 S. Ct. at 1724. The Tenth Circuit's ruling below that the good-faith exception applies to reliance on pre-*Gant* caselaw therefore conflicts with *Gant* itself. The conflict demands Supreme Court review.

III. THIS IS A RECURRING ISSUE OF NATIONAL IMPORTANCE THAT HAS PERCOLATED FOR OVER TWO DECADES, AND THIS CASE PRESENTS THE IDEAL VEHICLE FOR SUPREME COURT REVIEW.

This case squarely presents a recurring issue of national importance on which the lower courts are divided. The split is undeniable, as is the direct tension between the decision below and this Court's own caselaw. Further percolation would be unhelpful. Over the last twenty years, five circuits and two state Supreme Courts have addressed the question raised by this petition. Those lower court decisions have produced a deep three-way split, and the opinions fully explore each of the possible approaches the Court might adopt. The time has come to decide this issue.

Certiorari is particularly appropriate in this case because the combination of *Herring v. United States* and *Arizona v. Gant* has triggered a flood of litigation in the lower courts on the precise issue raised by this petition. *Herring* made the good-faith exception front-page news, quite literally. *See* Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. Times, Jan. 30, 2009, at A1 (discussing the possible future

impact of *Herring*); Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 Green Bag 2d 413, 416 (2009) (describing *Herring* as "one of the most important criminal cases of the year," and arguing that it "effected the biggest change in the exclusionary rule since *Mapp v. Ohio* applied the rule to the states in 1961").

In the months after *Herring*, prosecutors have been unusually eager to make creative arguments that could expand the good-faith exception. *Arizona v. Gant*, handed down on April 21, 2009, has provided the perfect opportunity for such arguments. Because the search technique invalidated in *Gant* was so widely used, litigation considering whether the good-faith exception applies to reliance on pre-*Gant* caselaw is now pending in dozens of state and federal courts around the country. As explained above, two circuits have already ruled on the question, producing the clear split between the decision below (ruling that the good-faith exception applies) and the Ninth Circuit in *Gonzales* (rejecting the exception).

But these two decisions are just the beginning. Many federal district courts and state intermediate courts have reached the issue in recent weeks, with many more on the way. The decisions that have been handed down already are just as divided as the federal courts of appeals. *See, e.g., United States v. Buford*, 623 F. Supp.2d 923, 926-27 (M.D. Tenn. 2009) (rejecting the good-faith exception for *Belton* searches invalidated by *Gant*); *People v. Arnold*, ___ N.E.2d ___, 2009 WL 2661136, at *13 (Ill. App. 2 Dist., Aug.

26, 2009) (same); *United States v. Lopez*, 2009 WL 2840490 (E.D. Ky., Sept. 1 2009) (accepting the good-faith exception for *Belton* searches invalidated by *Gant*); *United States v. Owens*, 2009 WL 2584570 (N.D. Fla., Aug. 20, 2009) (same); *United States v. Allison*, ___ F. Supp.2d ___, 2009 WL 2218693 (S.D. Iowa, July 24, 2009) (same); *United States v. Grote,* 2009 WL 2068023 (E.D. Wash., July 15, 2009) (same). *See also United States v. Deitz*, 577 F.3d 672, 688 (6th Cir. 2009) (holding that reliance on pre-*Gant* caselaw allowing *Belton* searches is not plain error).

In light of the extensive litigation in the lower courts, the principle of sound judicial administration calls for the Court to review this issue now rather than to wait for a future case. This petition involves the first federal circuit court decision on whether the good-faith exception applies to searches incident to arrest permitted before *Arizona v. Gant*. If the Court waits for a future case, dozens of lower courts will continue to spend valuable time and effort briefing and deciding the exact same issue the Court must decide. Lower courts that reach a conclusion contrary to that of the Court's ultimate decision will be forced to go back and start from scratch. Defendants in circuits that recognize a good-faith exception will see their convictions become final. In contrast, granting review in this case will allow lower courts around the country to put their cases on hold and await this Court's much-needed guidance.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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