No. 14-_____

IN THE
Supreme Court of the United States

HENRY STEPHENS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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MAY 1, 2015

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QUESTION PRESENTED

The good-faith exception to the exclusionary rule is triggered when, among other circumstances, "police act in strict compliance" with "binding appellate precedent [that] specifically authorizes a particular police practice." *Davis v. United States*, 131 S. Ct. 2419, 2428–29 (2011). Police conducted warrantless global-positioning-system (GPS) tracking of Petitioner Henry Stephens' vehicle even though no binding precedent authorized that practice. In fact, the law was at best "unsettled," *id.* at 2435 (Sotomayor, J., concurring): the Fourth Circuit, where the surveillance occurred, had not addressed the question, and the D.C. Circuit had created a circuit split on it. A short time later, this Court held that warrantless GPS tracking violates the Fourth Amendment. *See United States v. Jones*, 132 S. Ct. 945 (2012).

The Fourth Circuit panel majority nonetheless applied the good-faith exception to uphold Mr. Stephens' conviction. As Judge Thacker explained in dissent, the majority departed from *Davis* and exacerbated a split in the lower courts as to the proper application of *Davis*. In fact, three different approaches have emerged among the lower courts on this important issue: (1) several state appellate courts and a panel of the Seventh Circuit have held that *Davis* definitively requires "binding appellate precedent [that] specifically authorizes a particular police practice," 131 S. Ct. at 2429, (2) two federal circuit courts have held that *Davis* is satisfied by binding appellate precedent authorizing the particular police practice, but have not definitively resolved whether such precedent is

essential under *Davis*, and (3) several other federal circuits, a handful of state courts, and the panel majority below have held that *Davis* can be satisfied by precedent involving a different police practice. The question presented is:

> Did the Fourth Circuit panel majority err when it applied the good-faith exception to unconstitutional warrantless GPS tracking even though no binding appellate precedent specifically authorized that practice?

PARTIES TO THE PROCEEDING

Petitioner is Henry Stephens, Defendant-Appellant below. Respondent is the United States of America, Plaintiff-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Henry Stephens respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit panel opinion (Pet. App. 3a-41a) is reported at 764 F.3d 327. The Fourth Circuit's order denying rehearing *en banc* is unreported. Pet. App. 1a-2a.

JURISDICTION

The Fourth Circuit issued an opinion on August 19, 2014. Pet. App. 3a. The Fourth Circuit's judgment became final when it denied rehearing *en banc* on December 2, 2014. *Id.* at 1a. Chief Justice Roberts granted two thirty-day extensions, up to and including May 1, 2015, to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. 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."

INTRODUCTION

There is no dispute that the evidence underlying Mr. Stephens' conviction was obtained in violation of the Fourth Amendment. As the government conceded below, its warrantless GPS tracking of Mr. Stephens' automobile violated this Court's later

decision in *United States v. Jones*, 132 S. Ct. 945 (2012). It is further undisputed that, at the time of this unconstitutional surveillance, no "binding appellate precedent specifically *authorize[d]*" police to engage in the "particular police practice" of warrantless GPS surveillance. *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011). To the contrary, as even the Fourth Circuit panel majority recognized, "neither the Supreme Court nor this Court had expressly approved or disapproved of warrantless GPS usage" at the time that the officers employed it against Mr. Stephens. *See* Pet. App. 10a.

As Judge Thacker explained in dissent, this lack of "binding appellate precedent [that] specifically *authorize[d]*" the "particular police practice," *Davis*, 131 S. Ct. at 2429; Pet. App. 32a, should have ended the case. Indeed, without such precedent, the surveillance could not qualify for the good-faith exception, the evidence against Mr. Stephens should have been suppressed, and the charges should have been dismissed for lack of evidence. *See, e.g.*, *Davis*, 131 S. Ct. at 2429.

Furthermore, even the *non*-binding appellate precedent from other circuits was at best "unsettled," *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring), because the D.C. Circuit had created a circuit split on the constitutionality of warrantless GPS tracking seven months *before* the government used it against Mr. Stephens, *see United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones*, 132 S. Ct. 945 (2012). In fact, during the period of its warrantless GPS tracking of Mr. Stephens' automobile, the government petitioned

this Court for certiorari based primarily upon the existence of a circuit split. Cert. Pet. at 12, *Jones*, 132 S. Ct. 945 (No. 10-1259) ("*Jones* Cert. Pet.").

The Fourth Circuit panel majority, however, nonetheless excused the lack of "binding appellate precedent specifically *authoriz[ing]*" warrantless GPS tracking, *Davis*, 131 S. Ct. at 2429, and applied the good-faith exception to uphold Mr. Stephens' conviction. In so doing, the majority invoked cases involving *consensual* beeper searches that even it agreed were "not exactly on point," and held that an unquantified "body of federal law" either addressing this *different* police practice or arising outside the jurisdiction satisfied *Davis*' exacting requirement. Pet. App. 14a, 22a. And to support that holding, the majority ignored the government's acknowledgement of the circuit split on warrantless GPS tracking at the time of the search of Mr. Stephens, and relegated the D.C. Circuit's opinion creating that split to a "but see" signal in a string citation. Pet. App. 13a.

The majority thus departed from the bright-line requirement of *Davis*, deepened a split in lower-court authority on the availability of the good-faith exception for pre-*Jones* warrantless GPS tracking, and interjected even more uncertainty into a fundamental, far-reaching, and recurring division on the proper construction of *Davis*. Indeed, in the four years since this Court decided *Davis*, the following three approaches have emerged in an attempt to resolve this important issue. *First*, several state courts, including at least one state court of last resort, and a panel of the Seventh Circuit have faithfully adhered to *Davis* and held that it requires "binding appellate precedent [that] specifically

authorizes [the] particular police practice" used against the defendant. *Davis*, 131 S. Ct. at 2428–29. These courts therefore have declined to apply the good-faith exception to pre-*Jones* warrantless GPS tracking in the absence of binding precedent upholding that practice. *Second*, two federal circuit courts have taken a similar approach in holding that *Davis* is *satisfied* by binding appellate precedent authorizing the particular police practice. These courts thus applied *Davis* to pre-*Jones* warrantless GPS tracking because prior binding in-jurisdiction precedent specifically authorized that practice. *Third*, several federal courts of appeals and a handful of state courts have departed from *Davis*' plain terms and held that it can be satisfied by precedent involving a *different* police practice or arising outside the jurisdiction. These courts accordingly have extended the good-faith exception to warrantless GPS tracking *despite* an absence of binding precedent specifically authorizing that practice. *See infra* Part I.B.

These important and recurring questions regarding the application of *Davis* and the good-faith exception not only are dispositive in this case, but also occupy a critical constitutional forefront at the intersection of the Fourth Amendment and law enforcement officers' rapidly growing use of emerging and judicially unsanctioned technologies. The Court should grant certiorari.

STATEMENT OF THE CASE

A. The Unconstitutional Search

In March 2011, investigators installed a GPS device on the rear bumper of Mr. Stephens' automobile without obtaining a warrant or

Mr. Stephens' consent. Pet. App. 5a. The investigators left the device on Mr. Stephens' automobile for the better part of six weeks, and specifically used it to track the automobile's movements from March 20 to April 12, 2011. Pet. App. 26a (Thacker, J., dissenting). On May 13, 2011, investigators reinstalled the GPS device onto Mr. Stephens' automobile and tracked its movements until the evening of May 16, 2011, when they decided to conduct surveillance on Mr. Stephens. Pet. App. 5a. The investigators relied upon the GPS unit to locate him at an area school and then tracked his movements until he returned to his apartment. Pet. App. 6a. As Mr. Stephens was leaving his apartment, two investigators saw Mr. Stephens reach with his right hand back around his waistband area to fix his shirt. *Id.* Both believed that Mr. Stephens was armed and getting ready to go to work at a night club. *Id.*

The officers then followed his movements on the GPS device until he arrived at the club parking lot nearly an hour later, where he was apprehended. *Id.* Officers searched Mr. Stephens' person, but recovered only a vinyl holster that was not carrying a weapon. *Id.* A K-9 detection dog alerted to the trunk of his car, where the officers recovered a bulletproof vest inside a jacket and a loaded 9mm handgun inside a pouch in the vest. *Id.*

B. The Proceedings Below

On August 16, 2011, the government filed an indictment in the United States District Court for the District of Maryland, charging Mr. Stephens with possession of the handgun and ammunition recovered from his car in violation of 18 U.S.C.

§ 922(g)(1). Pet. App. 7a. While the charges were pending, this Court held in *Jones* that warrantless GPS searches violate the Fourth Amendment. 132 S. Ct. 945. Shortly thereafter, Mr. Stephens moved to suppress the handgun and other evidence under *Jones*. Pet. App. 7a.

The government conceded that its searches were unconstitutional under *Jones* and that these unlawful searches were the source of the evidence underlying its case against Mr. Stephens. Pet. App. 16a n.8. It nonetheless asked the district court to admit the evidence under the good-faith exception to the exclusionary rule. Pet. App. 7a-8a. Rejecting Mr. Stephens' arguments that there was no binding appellate precedent authorizing either GPS search, the district court applied the good-faith exception and denied the motion to suppress. *Id.* After that ruling, Mr. Stephens entered a conditional guilty plea to possession of the handgun and ammunition. Pet. App. 8a.

On August 19, 2014, a panel majority of the Fourth Circuit affirmed Mr. Stephens' conviction. The panel majority acknowledged that "neither the Supreme Court nor this Court had expressly approved or disapproved of warrantless GPS usage" at the time that the officers employed it against Mr. Stephens. *See* Pet. App. 3a, 10a. At the time of the search, neither the Supreme Court nor the Fourth Circuit had upheld warrantless GPS searches under the Fourth Amendment, Pet. App. 10a, and the non-binding appellate precedent was unsettled. The majority did not mention that on April 15, 2011, during the period of its warrantless GPS tracking of Mr. Stephens' automobile, the government petitioned

this Court for certiorari on the basis that the lower courts were divided on the issue. *Jones* Cert. Pet. 12.

Nevertheless, the majority held that *Davis*' "binding appellate precedent" requirement was satisfied and upheld Mr. Stephens' conviction. Pet. App. 4a. The panel majority opined that *Davis* was satisfied by "th[e] body of federal law," Pet. App. 14a, and the "general legal landscape that existed before *Jones*," Pet. App. 23a. According to the majority, this "body of federal law" consisted of this Court's decisions upholding consensual beeper tracking, out-of-circuit authority on warrantless GPS tracking, and Maryland state cases. Pet. App. 13a-15a.

The majority first pointed to the decisions in *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984), where this Court "rejected a Fourth Amendment challenge to law enforcement officers' use of a beeper, which is the technological forerunner to the GPS," Pet. App. 10a. In *Knotts* and *Karo*, officers had placed beepers in containers that were loaded onto vehicles, and then "followed the container by using both visual surveillance of the vehicle and a monitor that received signals from the beeper" at close range. *Id.* As this Court explained in *Jones*, beepers and GPS are markedly different technologies. *See Jones*, 132 S. Ct. at 951–53. Moreover, the placement of the beepers in the containers in *Knotts* and *Karo* occurred "with the consent of the then-owner," *id.* at 952—a fact the panel majority in this case did not mention, *see* Pet. App. 10a-11a.

The majority next noted that "[b]ased on *Knotts*, several federal appellate courts" outside the Fourth Circuit had held that warrantless GPS tracking "did

not necessarily violate the Fourth Amendment." Pet. App. 13a. The majority viewed this "body of federal law" as "significant," Pet. App. 14a, but mentioned the D.C. Circuit's contrary holding only with a "but see" signal in a string cite, Pet. App. 13a.

Finally, the majority invoked decisions of the Court of Special Appeals of Maryland (where the surveillance of Mr. Stephens occurred) upholding warrantless GPS tracking under *Knotts*. *See* Pet. App. 14a-15a.

Judge Thacker dissented from the panel majority's decision on the grounds that it conflicted with *Davis* for three reasons. In the first place, the warrantless GPS tracking here did not satisfy *Davis*' rigorous standard because "[a]t the time the warrantless search was conducted in this case, no binding appellate precedent existed in this circuit specifically authorizing law enforcement's actions." Pet. App. 32a (internal quotation marks omitted). Moreover, Judge Thacker explained, "the law in general regarding the warrantless use of GPS devices was not settled, but was, in fact, in a state of flux" because the D.C. Circuit had created a circuit split in *Maynard*. *Id.*

Finally, Judge Thacker concluded that "law enforcement officers did not act in an objectively reasonable manner." *Id.* (internal quotation marks omitted). As Judge Thacker pointed out, at the time of the search, the government had sought certiorari review of *Maynard*. *See* Pet. App. 39a. Furthermore, the officer "did not seek advice from any legal authority regarding the constitutionality" of the surveillance of Mr. Stephens, "even though there was no exigent circumstance preventing him from doing

so." *Id.* By not even "bother[ing] to ask" the "United States Attorney's Office" for "such guidance," the officer "acted with reckless disregard for [Petitioner's] Fourth Amendment rights and failed to act reasonably to learn what was required" to conform the investigation to constitutional mandates. Pet. App. 40.

Mr. Stephens petitioned the Fourth Circuit for rehearing en banc, which the court denied by order filed December 2, 2014. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This Court should grant for at least three reasons. *First*, the Fourth Circuit majority's decision conflicts with this Court's requirement in *Davis* that the good-faith exception applies where "binding appellate precedent specifically *authorizes* a particular police practice," *Davis*, 131 S. Ct. 2429, because it upheld that exception in the undisputed *absence* of such precedent. In so doing, the Fourth Circuit majority deepened a broad and mature split among lower courts on whether *Davis* requires binding precedent on the police practice used against the defendant or can be satisfied by precedent involving a *different* practice or arising outside the jurisdiction. In the four years since *Davis* was decided, three distinct approaches have emerged among the lower courts as they seek to determine the proper application of *Davis*. Courts throughout the country will continue to grapple with these divergent approaches to *Davis* until this Court definitively resolves the issue.

Second, the panel majority's decision not only interjects uncertainty into this critically important area of constitutional jurisprudence, but also erodes

critical Fourth Amendment protections. The *Davis* rule guarantees clarity for law enforcement officers, courts, and defendants alike by supplying a bright-line rule for application of the good-faith exception. Yet the Fourth Circuit's nebulous "body of law" approach permits invocation of that exception based upon reliance on a body of unsettled law that involved a *different* police practice and arose *outside* of the jurisdiction where the search occurred.

Third, this case presents an ideal vehicle to resolve the misapplication of *Davis* and the yawning split in lower-court authority. Indeed, that split is dispositive here, as certain courts would have reversed Mr. Stephens' conviction that the Fourth Circuit majority upheld. And resolving the split now is essential, as law-enforcement officers are rapidly beginning to employ a large and growing number of emerging technologies to conduct searches that have not been definitively sanctioned by the courts.

I. The Fourth Circuit Majority's Decision Departed From *Davis* And Exacerbated A Deep Split In The Lower Courts.

The Court should grant certiorari because the Fourth Circuit majority's amorphous "body of federal law" approach both irreconcilably conflicts with *Davis*' requirement of "binding appellate precedent specifically *authoriz[ing]* a particular police practice," *Davis*, 131 S. Ct. at 2429, and deepens a split in lower-court authority regarding the proper application of the good-faith exception.

A. The Fourth Circuit Majority's Application Of The Good-Faith Exception Conflicts With *Davis*.

Davis directed that the good-faith exception to the exclusionary rule is triggered when "[t]he police act[] in strict compliance with binding precedent" that "specifically *authorizes*" the "particular police practice" later deemed unconstitutional. 131 S. Ct. at 2428–29. As the Court explained, in such cases, the police conduct is "non-culpable," but rather epitomizes the "good faith" effort to comply with the Fourth Amendment underpinning the exception. *Id.* at 2429. Indeed, application of the exclusionary rule to those cases would serve no deterrent purpose because it would "'punish[]'" law enforcement for "'the errors of judges.'" *Id.* at 2428 (quoting *United States v. Leon*, 468 U.S. 897, 922 (1984)).

Davis' bright-line requirement of "strict compliance" with "binding appellate precedent [that] specifically authorizes a particular police practice" not only is easy for law-enforcement officers and courts to apply, but also fosters "conscientious police work" by encouraging "[r]esponsible law-enforcement officers [to] take care to learn 'what is required of them' under the Fourth Amendment." *Id.* at 2429 (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)). At the same time, this straightforward requirement limits the class of cases in which the good-faith exception applies and thereby protects against undue erosion of the exclusionary rule. *See* Pet. App. 37a (Thacker, J., dissenting). Thus, in *Davis*, this Court applied the good-faith exception to a warrantless search of an automobile incident to an arrest that "was in strict compliance with then-

binding Circuit law" specifically authorizing such searches. 131 S. Ct. at 2428.

The Fourth Circuit majority's nebulous "body of federal law" approach, Pet. App. 14a, is irreconcilable with *Davis* because it extends the good-faith exception in the undisputed *absence* of "binding appellate precedent [that] specifically *authorize[d]*" warrantless GPS tracking, 131 S. Ct. at 2429. As even the majority below recognized, "neither the Supreme Court nor this Court had expressly approved or disapproved of warrantless GPS usage" at the time the officers employed it against Mr. Stephens. *See* Pet. App. 10a. Moreover, the *non*-binding appellate precedent from other circuits was at best "unsettled," *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring), because the D.C. Circuit had created a circuit split on the constitutionality of warrantless GPS tracking seven months earlier, *see Maynard*, 615 F.3d 544. In fact, during the period of its warrantless GPS tracking of Mr. Stephens' automobile, the government petitioned this Court for certiorari for the express reason that the D.C. Circuit's opinion had "create[d] a square conflict among the courts of appeals." *Jones* Cert. Pet. 12.

The Fourth Circuit majority did not even mention the government's certiorari petition, glossed over the circuit split on warrantless GPS tracking at the time of the search, and relegated the D.C. Circuit's opinion creating that split to a "but see" signal in a string citation. Pet. App. 13a. The majority therefore sought refuge in two inapposite bodies of caselaw in an attempt to shoehorn its analysis into *Davis*' "binding appellate precedent" requirement, but that effort failed. As the dissent

aptly noted, the majority effectively replaced the requirement of binding appellate precedent with "what it calls a significant body of federal law and precedent from [Maryland appellate courts]." Pet. App. 33a (Thacker, J., dissenting).

First, the Fourth Circuit majority invoked three cases from more than two decades ago that authorize a *different* police practice. *See* Pet. App. 10a-13a (citing *Knotts*, 460 U.S. 276; *Karo*, 468 U.S. 705; *United States v. Jones*, 31 F.3d 1304 (4th Cir. 1994)). Yet even the majority recognized that those cases are "not exactly on point." Pet. App. 22a. And with good reason: they all involved the *consensual* placement of *beepers* in containers, which were loaded onto a vehicle and emitted a signal that could be tracked only by following the vehicle on a public highway at close distance. *See Knotts*, 460 U.S. at 277–79; *Karo*, 468 U.S. at 707 & n.1; *Jones*, 31 F.3d at 1311. As five members of this Court confirmed in *Jones*, beepers and GPS devices are different in the Fourth Amendment context. 132 S. Ct. at 957 (Sotomayor, J., concurring); *see also id.* at 964 (Alito, J., concurring). This Court's beeper cases therefore do not "specifically *authorize*[]" warrantless, non-consensual GPS tracking from a distance. *Davis*, 131 S. Ct. at 2429; Pet. App. 33a (Thacker, J., dissenting).

Second, the majority pointed to decisions of *other* circuits that had upheld the constitutionality of warrantless GPS tracking. Pet. App. 13a. But, of course, those decisions were not "binding appellate precedent" within the Fourth Circuit. *Davis*, 131 S. Ct. at 2429; *see also* Pet. App. 33a (Thacker, J., dissenting). And even if out-of-circuit precedent

were relevant to the *Davis* inquiry, there could have been no "objectively reasonable reliance" on the majority's cherry-picked decisions. *Davis*, 131 S. Ct. at 2428. Indeed, the out-of-circuit law was "unsettled," *id.* at 2434 (Sotomayor, J., concurring), by the D.C. Circuit's creation of a circuit split, *Jones* Cert. Pet. 12.

The Fourth Circuit majority therefore contravened *Davis* because it extended the good-faith exception to a "particular police practice" that was not "specifically *authorize[d]*" by "binding appellate precedent." *Davis*, 131 S. Ct. at 2429; Pet. App. 32a (Thacker, J., dissenting). In fact, the majority applied the exception even though the available caselaw at the time of the search was "not exactly on point," Pet. App. 22a, or "unsettled," *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring). Moreover, the officer never even "bother[ed] to ask" the "United States Attorney's Office" for "guidance" and therefore "acted with reckless disregard for [Petitioner's] Fourth Amendment rights." Pet. App. 40a; *Davis*, 131 S. Ct. at 2429. The majority's decision thus eroded crucial constitutional safeguards against investigative overreaching and upheld a conviction that rests on unconstitutionally obtained evidence. *See infra* Parts II–III; Pet. App. 37a (Thacker, J., dissenting). The Court's review is necessary to prevent this erosion of *Davis*' clear rule.

B. The Fourth Circuit Majority Exacerbated A Fundamental Split In Authority On The Proper Application of *Davis*.

The Fourth Circuit majority's decision not only contravened *Davis*, but also further deepened a split among federal and state courts on the proper

application of the good-faith exception. Three divergent approaches to applying *Davis*' "binding appellate precedent" requirement have emerged among the lower courts. *Davis*, 131 S. Ct. at 2429. *First*, several state appellate courts, including at least one state court of last resort, and a panel of the Seventh Circuit, have scrupulously adhered to *Davis* and applied the good-faith exception only where "binding appellate precedent [that] specifically *authorizes*" the "particular police practice" at issue. *Id.* *Second*, at least two federal courts of appeals have applied the good-faith exception where in-circuit precedent specifically authorized the particular police practice at issue, without deciding whether such precedent was required. *Finally*, the Fourth Circuit panel majority and other courts have departed from the plain language of *Davis* and recognized the good-faith exception based upon precedent involving a different police practice or arising outside the jurisdiction. The specific issue presented in this case—whether warrantless GPS tracking that predated *Jones* qualifies for the good-faith exception—highlights the deep split in authority on the proper application of *Davis* and provides yet another illustration of the need for this Court's review.

Courts requiring binding appellate precedent on the same police practice. A number of state courts, and a panel of the Seventh Circuit scrupulously apply *Davis* and decline to apply the good-faith exception where no binding in-jurisdiction precedent authorized the same police practice at the time of the search. *See, e.g.*, *State v. Adams*, 763 S.E.2d 341, 348 (S.C. 2014); *State v. Mitchell*, 323 P.3d 69, 79 (Ariz. Ct. App. 2014); *State v. Hohn*, 321 P.3d 799

(Kan. Ct. App. 2014); *People v. LeFlore*, 996 N.E.2d 678 (Ill. App. Ct. 2013); *see also United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013) (per curiam) (Flaum, Kanne, Wood, JJ.) (explaining in dicta that were it necessary in that case, the court would adhere strictly to *Davis* and "apply[] the traditional remedy of exclusion" where "the government seeks to introduce evidence that is the 'fruit' of an unconstitutional search"). In other words, these courts have expressly held that *Davis* requires reliance upon binding appellate precedent specifically authorizing the particular police practice at issue. *See Adams*, 763 S.E.2d at 348; *Mitchell*, 323 P.3d at 79; *Hohn*, 321 P.3d at *6; *LeFlore*, 996 N.E.2d 678.

These courts therefore have concluded that the good-faith exception does not apply to pre-*Jones* warrantless GPS tracking where "there were no reported decisions from [that jurisdiction] addressing whether the use of a GPS device without a warrant violated the fourth amendment." *LeFlore*, 996 N.E.2d at 691; *Adams*, 763 S.E.2d at 347 ("Prior to *Jones*, no South Carolina appellate decision addressed the constitutionality of the warrantless installation and monitoring of a GPS device."); *Hohn*, 321 P.3d at *6; *see also Martin*, 712 F.3d at 1082 ("We reject the government's invitation to allow police officers to rely on a diffuse notion of the weight of authority around the country, especially where that amorphous opinion turns out to be incorrect in the Supreme Court's eyes.").

These courts thus emphatically reject the suggestion that the good-faith exception announced in *Davis* could apply to pre-*Jones* warrantless GPS

searches based on authority authorizing consensual beeper searches, such as *Knotts* and *Karo*. *See, e.g.*, *Adams*, 763 S.E.2d at 347; *LeFlore*, 996 N.E.2d at 692. As the Illinois Court of Appeals has explained, its faithful adherence to *Davis* reflects the constitutional values embodied in the Fourth Amendment and fosters effective and constitutional police work. As that court pointed out, "[w]hen a law enforcement official conducts a search based on a nonbinding judicial decision, that official is guessing at what the law might be, rather than relying on what a binding legal authority tells him it is." *LeFlore*, 996 N.E.2d at 692 (internal quotation marks omitted). And without a decision on the particular police practice, the officers can "only speculate[]" as to the constitutionality of the search. *Id.* This is especially so where, as here, the warrantless search involved "using a GPS device that provided constant and contemporaneous information on a vehicle"—something that beeper monitoring could not accomplish. *Id.* at 692-93.

The Kansas Court of Appeals also endorsed this reasoning, explaining that although "[t]he officers may have erroneously thought they could rely on what they believed to be analogous cases to authorize their actions, . . . the good-faith exception protects only reasonable reliance on *governing law*." *Hohn*, 321 P.3d at *6.

***Courts holding that binding appellate precedent on the same police practice satisfies* Davis.** Two federal circuit courts have taken a similar approach in holding that *Davis* is *satisfied* by binding appellate precedent authorizing the particular police practice. *See United States v. Pineda-Moreno*, 688

F.3d 1087, 1090 (9th Cir. 2012); *United States v. Barraza-Maldonado*, 732 F.3d 865, 868 (8th Cir. 2013). Notably, when faced with this issue, these courts first turned to in-circuit precedent on the specific police practice rather than to the underlying principles of this Court's decisions on different police practices, as was done by the Fourth Circuit here. In other words, these courts applied *Davis* to pre-*Jones* warrantless GPS tracking because prior binding in-jurisdiction precedent specifically authorized that practice. Although slightly different from the approach taken by the state courts discussed above, this standard nevertheless confirms the importance of the specific police practice to the *Davis* analysis.

The Ninth Circuit was the first court to take this approach. In *Pineda-Moreno*, the court applied *Davis* to pre-*Jones* warrantless GPS tracking because prior Ninth Circuit precedent held that a GPS search "was neither a search nor a seizure under the Fourth Amendment" and that "the government does not violate the Fourth Amendment when it uses an electronic tracking device to monitor the movements of a car along public roads." *Pineda-Moreno*, 688 F.3d at 1090.

The Eighth Circuit followed the Ninth Circuit's approach in *Barraza-Maldonado*, a case in which the court considered whether to apply the good-faith exception to a warrantless GPS search that began in Phoenix. 732 F.3d at 868. Because the installation occurred in the Ninth Circuit, the court relied upon the binding Ninth Circuit precedent at the time of the installation, which held that attaching a GPS "device on a car did not constitute a Fourth Amendment search." *Id.* The Eighth Circuit also

noted that its own precedent was "consistent with the Ninth Circuit precedent on which the agents relied" and, thus, underscored the applicability of the good-faith exception. *Id.* at 869.

Courts departing from* Davis *to rely upon precedent involving a different police practice. A number of federal circuits and a handful of state courts have followed the same approach as the Fourth Circuit majority here, and held that *Davis*' exacting requirement is satisfied either by precedent authorizing a *different* police practice that is "not exactly on point," or by a "body of federal law" from outside the jurisdiction that authorizes the particular practice. Pet. App. 14a, 22a; *United States v. Hohn*, No. 14-3030, Order (10th Cir. Apr. 1, 2015); *United States v. Katzin*, 769 F.3d 163, 177 (3d Cir. 2014) (en banc); *United States v. Fisher*, 745 F.3d 200 (6th Cir. 2014); *United States v. Brown*, 744 F.3d 474 (7th Cir. 2014); *United States v. Ransfer*, 749 F.3d 914, 918 (11th Cir. 2014); *United States v. Spark*s, 711 F.3d 58, 60 (1st Cir. 2013); *United States v. Andres*, 703 F.3d 828 (5th Cir. 2013); *United States v. Aguiar*, 737 F.3d 251, 262 (2d Cir. 2013); *State v. Oberst*, 847 N.W.2d 892 (Wis. Ct. App. 2014); *State v. Johnson*, 22 N.E.3d 1061, 1071-72 (Ohio 2014); *Kelly v. State*, 82 A.3d 205 (Md. 2013); *Hill v. Commonwealth*, No. 1541-12-3, 2013 WL 5801742 (Va. Ct. App. Oct. 29, 2013). These courts therefore do not require "binding appellate precedent" that "specifically *authorizes*" *the* "particular police practice" at issue. *Davis*, 131 S. Ct. at 2429.

These courts thus have applied the good-faith exception to warrantless GPS tracking based on a broad interpretation of *Knotts, Karo*, and other

consensual beeper cases. For example, the First Circuit described the holding in *Knotts* as an "apparent bright-line rule that the Fourth Amendment is unconcerned with police surveillance of public automotive movements." *Sparks*, 711 F.3d at 67. Under this sweeping rule, the First Circuit determined that the guidelines on beeper use outlined in *Knotts* are equally applicable to GPS devices and thus provide sufficient binding appellate precedent to trigger the good-faith exception for warrantless GPS searches. *Id.* at 66.

The Fifth, Sixth, and Eleventh Circuits articulated similar reasoning and held that "[d]espite any possible technological differences between a 1981 beeper and the GPS device used in this case, the functionality is sufficiently similar that the agents' reliance on [in-circuit precedent] to install a GPS device on the truck . . . was objectively reasonable." *Andres*, 703 F.3d at 835; *see also Ransfer*, 749 F.3d at 923; *Fisher*, 745 F.3d at 204. The Second, Third, Seventh, and Tenth Circuits likewise applied the good-faith exception based upon a conclusion that "the beeper technology used in *Knotts* [was] sufficiently similar to the GPS technology deployed by the government here." *Aguiar*, 737 F.3d at 261-62; *see also Hohn,* No. 14-3030 at 7–8; *Brown*, 744 F.3d at 477; *Katzin*, 769 F.3d at 173. These courts, then, would allow officers to determine that a search is constitutional based solely on their own unchecked application of underlying legal principles to novel circumstances.

Thus, in sum, federal and state courts are split on the proper construction of *Davis*' requirement of "binding appellate precedent [that] specifically

authorizes a particular police practice," 131 S. Ct. at 2429, as highlighted by the divergent approaches taken in applying the good-faith exception to pre-*Jones* warrantless GPS tracking. As a result, defendants in jurisdictions that have applied the good-faith exception under these circumstances remain subject to prosecution based upon illegally obtained evidence, whereas defendants in the states that reject the good-faith exception do not. The Court's review is warranted to bring uniformity to this important and recurring question of federal law.

II. The Fourth Circuit Majority's Holding Erodes *Davis* And Its Crucial Constitutional Safeguard On An Important And Recurring Question.

This case presents important and recurring questions regarding the application of the good-faith exception, which merit the Court's review and are taking on increased significance in light of police officers' rapidly expanding use of emerging technologies.

A. The Majority's Holding Interjects Increased Uncertainty With Respect To Two Important And Recurring Questions

The majority's holding implicates an important and recurring question regarding the proper construction of *Davis*' "binding appellate precedent" requirement, a far-reaching and fundamental issue. In the four years since *Davis* was decided, 248 federal cases and 141 state cases have cited *Davis*' "binding appellate precedent" standard—or, in other words, approximately two cases every week. As it relates to the circumstances here, the lower courts have grappled with whether the good-faith exception is available for pre-*Jones* warrantless GPS tracking.

In the three years since *Jones* was decided, 134 federal cases and 57 state cases have addressed this question.

Federal and state courts have thus ruled—and will continue to rule until this Court resolves the split—inconsistently on whether the good-faith exception applies to pre-*Jones* warrantless GPS tracking cases. The Fourth Circuit majority's approach interjects greater uncertainty and lack of clarity into this critically important area of constitutional jurisprudence and, thus, will invariably contribute to even more fragmenting in lower-court decisions. Indeed, the Fourth Circuit majority has endorsed a standard for the good-faith exception that erodes critical Fourth Amendment protections and conflicts with the plain language of this Court's holding in *Davis*. The Fourth Circuit majority's approach would permit officers to rely on a body of law that was unsettled, involved a different police practice, and arose outside the jurisdiction where the search was conducted. This unjustified expansion would muddy application of the good-faith exception that this Court articulated in *Davis* and prove unworkable in practice, where clear rules are indispensible to preserving constitutional norms and guiding police practice.

The bright-line rule announced in *Davis* achieves numerous benefits that the Fourth Circuit panel majority's amorphous standard cannot. Among others, the *Davis* rule facilitates good investigative practice, deters Fourth Amendment violations, and is administrable by law enforcement and the courts. As a general matter, clear rules provide enormous benefits to police, prosecutors, citizens, and the

courts alike—especially in the Fourth Amendment context. *See, e.g.*, *Thornton v. United States*, 541 U.S. 615, 620-24 (2004) (reasoning that rules requiring ad hoc determinations by police are impracticable); *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) ("[A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations . . . lest every discretionary judgment . . . be converted into an occasion for constitutional review.").

Davis' requirement of "objectively reasonable reliance on binding appellate precedent," 131 S. Ct. at 2434, relieves police and courts of the difficult, standardless line-drawing problem inherent in an approach, such as the panel majority's here, that requires only a good-faith guess at what unsettled law will later become. For that reason, *Davis* specifically contemplates that "well-trained officers will and should use" any "binding appellate precedent specifically *authoriz[ing]* a particular police practice." *Id.* at 2429. To the contrary, nothing in *Davis* supports the notion that officers can or should engage in the extrapolation of legal principles to support a warrantless search using novel surveillance technology.

The Fourth Circuit's nebulous "body of federal law" approach gives away all of these benefits—and accepts uncertainty in return. Notably, the Fourth Circuit panel majority never articulated a standard for what would constitute a "body of federal law" sufficient to support the exception. *See* Pet. App. 14a. For example, the court did not explain whether a significant minority, or even a bare majority, position in the circuits would suffice, or whether its approach

turns on which circuits support or condemn the practice or how many have addressed the issue. *See id.*; *Martin*, 712 F.3d at 1082; *see also* Pet. App. 36a (Thacker, J., dissenting) ("*Davis* sets a higher bar than a simple survey of an amorphous 'vast majority of decisions.'"). The risks associated with this "body of federal law" approach are on full display in the Fourth Circuit panel majority's decision. For one thing, the "body of federal law" at the time of the warrantless GPS search of Mr. Stephens' automobile was "unsettled," *Davis*, 131 S. Ct. at 2434 (Sotomayor, J., dissenting), and did not speak in one voice, *see, e.g.*, *Maynard*, 615 F.3d at 568; Pet App. 13a.

Moreover, the Fourth Circuit's approach would lead to further inconsistent application of the good-faith exception across the judiciary. Courts invariably will differ on the quantum, quality, and source of case law required to form an adequate "body of federal law" to trigger the good-faith exception. That approach thus could spawn additional splits in authority on whether a given combination of federal precedent suffices to support the exception. That outcome not only would complicate the judicial function in applying the exception, but also would create incoherence for officers in the field attempting to conform their actions to constitutional requirements.

In short, the systemic risk posed by leaving these questions to retrospective adjudication of good faith unguided by *Davis*' specific touchstone of binding in-circuit, on-point appellate precedent would create enormous uncertainty and incoherence for police, defendants, and the courts as to when the good-faith

exception is triggered. Instead of providing officers clear guidance as to how to conform their actions to constitutional norms before conducting searches, as *Davis* accomplishes, the Fourth Circuit panel majority's approach would leave to courts to sort out—without a workable standard—whether a sufficient "body of federal law" supported the police action after the fact.

Finally, the Fourth Circuit's approach will vest too much discretion in police. Under the Fourth Circuit's regime, police will be forced to make ad hoc, case-by-case determinations as to whether a sufficient "body of federal law" supports a particular practice—precisely what Fourth Amendment jurisprudence seeks to avoid. *See, e.g.*, *Thornton*, 541 U.S. at 620–24; *Atwater*, 532 U.S. at 347. Indeed, "[w]hen a law enforcement official conducts a search based on a nonbinding judicial decision, that official is guessing at what the law might be, rather than relying on what a binding legal authority tells him it is." *LeFlore*, 996 N.E.2d at 692 (internal quotation marks omitted). Here, for example, the investigators did not even consult with counsel on the legality of warrantless GPS searches, even though no binding precedent had authorized that practice at the time of the search. Pet. App. 27a (Thacker, J., dissenting). Instead, they determined that such warrantless searches would satisfy the Fourth Amendment based upon their own incorrect assumptions—the very approach that *Davis* sought to eliminate.

Officers may also err on the side of overreaching to engage in practices with some precedential support, on the hope that a court later will hold that such precedent constitutes a "body" of authorizing

law. The task of policing this investigative overreaching will fall to the lower courts, which will be forced to perform it with the blunt instrument of the nebulous "body of federal law" approach rather than the scalpel of the exacting *Davis* standard.

All told, the Fourth Circuit majority panel's novel "body of federal law" approach exceeds the bounds of this Court's decision in *Davis* and makes for an unworkable standard in practice. Where, as here, all agree that there was no binding appellate precedent authorizing the particular police practice, "[t]he Government must err on the side of the Constitution and obtain a warrant." Pet. App. 41a (Thacker, J., dissenting).

B. Confirmation of *Davis* Is Necessary In Light Of Law Enforcement's Expanding Use Of Emerging Technology

Cases involving warrantless GPS tracking represent only the latest round in an ongoing and expanding struggle to apply *Davis*' straightforward generic requirement to myriad forms of police conduct. Future rounds are inevitable, as law-enforcement efforts expand to make use of new and rapidly emerging technologies whose compliance with the Fourth Amendment has not yet been definitively resolved by this Court.

Indeed, the mischief of the Fourth Circuit panel majority's approach is not limited to warrantless GPS tracking, but implicates every area in which the lower courts are working to conform Fourth Amendment law to officers' growing use of technological investigative tools, such as searches of cell phones incident to arrest that occurred before the Supreme Court resolved the circuit split on that

issue in *Riley v. California*, 134 S. Ct. 2473 (2014). Given the divergent approaches among the lower courts, *supra* Part I.B, officers remain uncertain whether and to what extent they can rely upon judicial decisions to guide their use of emerging technological investigative tools. This uncertainty is most prevalent in jurisdictions such as the Fourth Circuit, where officers can apply legal principles of appellate precedent to new and distinct technologies if the "body of federal law" could be understood to authorize it. Pet. App. 14a. Such an amorphous standard will only lead to further confusion and, as a result, inconsistent and haphazard searches.

The uncertainty inherent in this standard enables—and, in fact, encourages—officers to apply their interpretation of underlying legal principles to searches using new technology, without any prior court authorization. This approach will undoubtedly prove problematic, however, because existing legal principles do not always apply in the same manner to new technology. For example, as five members of this Court held in *Jones*, beepers and GPS devices are different in the Fourth Amendment context. 132 S. Ct. at 955 (Sotomayor, J., concurring); *see also id.* at 964 (Alito, J., concurring).

Moreover, this Court's review of this important issue is timely because officers are rapidly beginning to use technology that is distinct from and surpasses the capabilities of even GPS tracking devices. In Wisconsin, for instance, officers use stingrays to track individuals who they investigate. *State v. Tate*, 849 N.W. 2d 798 (Wis. 2014). A stingray is a directional antenna that officers can mount on a vehicle to track particular electronic devices. *Id.* at

803–04. As an officer in *Tate* explained, the stingray is effective because it operates as a pseudo cell tower that "will respond only to that electronic serial number of which we're looking for and it will give us an arrow, if you will, pointing to the direction and with the strength tell us how close we are to that particular electronic." *Id.*

Likewise, officers in many states now use GPS vehicle pursuit darts, thermal imaging devices, gun-scanning technology, information-gathering robotics, and unmanned aerial vehicles to track individuals and conduct searches of property. *See, e.g.*, *Florida Police Trial James Bond-Style Vehicle Tracking Darts*, BBC News, Aug. 30, 2014; American Civil Liberties Union, *Protecting Privacy From Aerial Surveillance*, December 2011; *NYPD Testing Scanners To Detect Hidden Guns; Technology Could Curtail Use of Stop-and-Frisks*, Huffington Post (Jan. 24, 2013, 5:44 p.m.).

Until this Court clarifies the proper application and scope of *Davis*, officers will continue to rely upon precedent authorizing warrantless searches for one technology as a basis to perform warrantless searches using other, novel technologies. But as *Jones* made clear, the Fourth Amendment does not apply in the same manner to all technology. Indeed, this Court has not allowed officers to analogize from one technology to another, and a ruling on the constitutionality of one technology does not thereby render another technology constitutional. Just as this Court's beeper cases did not resolve the constitutionality of warrantless GPS searches, the rule announced in *Jones* does not necessarily apply to stringrays or drones. Each specific police practice

must therefore be evaluated on its own rather than by analogy to other technologies.

In "this era of fast-moving technological advancements and our ever-shrinking zone of privacy," Pet. App. 40a (Thacker, J., dissenting), clarity from this Court on when officers must seek a warrant and when they can invoke the good-faith exception is essential to preserving the core constitutional protections embodied in the Fourth Amendment.

III. This Case Presents An Ideal Vehicle To Resolve The Important And Recurring Questions Presented.

This case not only squarely implicates, but in fact is controlled by, the lower-court split in authority on the applicability of the good-faith exception to pre-*Jones* GPS warrantless searches and the correct interpretation of *Davis*. The government has conceded that the GPS search of Mr. Stephens' vehicle was unconstitutional and that this search yielded the evidence necessary to Mr. Stephens' conviction. Moreover, because Mr. Stephens has fully preserved this challenge for review, *see* Pet. App. 7a-8a, the Court will not be faced with any preliminary issues, such as waiver. Thus, the *only* question is whether the good-faith exception recognized in *Davis* is applicable here.

As explained above, *see supra* Part I.B, various lower courts would resolve that question differently. Indeed, had Mr. Stephens been prosecuted by state officials in South Carolina, Arizona, Kansas, or Illinois, the charges against him would have been dismissed. *See id.* Yet because he was prosecuted in federal court in the Fourth Circuit, he now faces 70

months in prison and three years supervised release. *See id.* Thus, the outcome of Mr. Stephens' case turned not on the merits of his constitutional claim, but instead on the forum where law enforcement agents chose to prosecute him. This danger of conflicting outcomes is especially problematic where, as here, the investigators are part of a joint federal-state task force and could seek to file charges in *either* federal *or* state court in their own unreviewable discretion. *See* Pet. App. 5a.

This possibility of conflicting outcomes based on where law enforcement agents decide to pursue prosecution is all too real—as demonstrated by two cases involving the *exact same search* have been resolved *differently* in state and federal courts in Kansas. There, Amanda and Steven Hohn, a married couple, were arrested based on evidence obtained from a warrantless GPS search on Mr. Hohn's cars. *Hohn*, 321 P.3d at *1. Amanda was charged with possession of drugs in Kansas state court, *see id.* at *2, while Steven was indicted for conspiracy to distribute methamphetamine in federal court, *see United States v. Hohn*, Nos. 12-20003-03-CM, 12-20003-10-CM, 2013 WL 6796428, at *1 (D. Kan. Dec. 20, 2013).

Each moved to suppress the evidence obtained from the illegal search, but only Amanda's motion succeeded. The Kansas Court of Appeals held that the good-faith exception was inapplicable in Amanda's case because no binding appellate precedent within Kansas authorized warrantless GPS searches. *See Hohn*, 321 P.3d at *8. By contrast, the federal district court reached the opposite result in Steven's case, *Hohn*, 2013 WL

6796428, at *8, and the Tenth Circuit affirmed, holding that the good-faith exception *did* apply *despite* the absence of controlling appellate precedent authorizing that particular police practice, *Hohn*, No. 14-3030 at 7–8. That courts operating across the street from each other could reach these opposing outcomes under *Davis* only underscores the need for this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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MAY 1, 2015

APPENDIX

APPENDIX A

FILED: December 2, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4625
(1:11-cr-00447-JKB-1)

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

HENRY STEPHENS,

Defendant – Appellant,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Potential Amici Curiae.

O R D E R

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Traxler, Judge Wilkinson, Judge Niemeyer, Judge King, Judge Gregory, Judge Shedd,

Judge Duncan, Judge Agee, Judge Keenan, Judge Diaz, and Judge Floyd voted to deny rehearing en banc. Judge Motz, Judge Wynn, and Judge Thacker voted to grant rehearing en banc. Judge Harris did not participate in the vote.

Entered at the direction of Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4625

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

HENRY STEPHENS,

Defendant – Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James K. Bredar, District Judge. (1:11-cr-00447-JKB-1)

Argued: October 30, 2013 Decided: August 19, 2014

Before SHEDD and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge Shedd wrote the majority opinion, in which Senior Judge Hamilton joined. Judge Thacker wrote a dissenting opinion.

ARGUED: Christopher Ford Cowan, LAW OFFICE OF CHRIS F. COWAN, Columbus, Ohio, for Appellant. Albert David Copperthite, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Rod J. Rosenstein, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

SHEDD, Circuit Judge:

Convicted of illegal firearm possession, Henry Stephens contends that the district court erroneously denied his pretrial motion to suppress evidence. Caselaw decided after Stephens was indicted tends to establish that the search at issue is unreasonable under the Fourth Amendment, but we are not now concerned with the legality of the search. Rather, we must decide the separate issue of whether the district court correctly declined to apply the exclusionary rule because the search was conducted in "good faith." Our consideration of this issue requires us to answer "the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Herring v. United States*, 555 U.S. 135, 145 (2009) (citation and internal punctuation omitted). Because we find that the search was "conducted in objectively reasonable reliance on binding appellate precedent," *Davis v. United States*, 131 S.Ct. 2419, 2423-24 (2011), the answer to this question is "yes." Therefore, the exclusionary rule does not apply, and we affirm Stephens' conviction.

I

The underlying facts are not disputed. In 2011, federal and state law enforcement officers in the

Baltimore area were investigating Stephens for possible drug and firearms crimes. The investigation began as a result of information provided by a registered confidential informant, and it was spearheaded by Officer Paul Geare, who was a 13-year veteran of the Baltimore Police Department. Officer Geare was also deputized as an ATF agent and assigned to a "High Intensity Drug Trafficking Area" ("HIDTA") task force unit, which was "a hybrid unit of federal agents as well as city police officers" operating pursuant to Baltimore City and HIDTA guidelines. J.A. 405. The HIDTA joint task force is "organized to conduct investigations into drug and gun violations of *both* federal and state law, and its investigations indeed [lead] to both federal and state prosecutions, determined on the basis of the facts uncovered." *United States v. Claridy*, 601 F.3d 276, 283 (4th Cir.), *cert. denied*, 131 S.Ct. 259 (2010) (emphasis in original).

On May 13, 2011, Officer Geare – acting without a warrant – installed a battery-powered Global-Positioning-System device ("GPS") under the rear bumper of Stephens' vehicle, which was parked in a public lot in Parkville, Maryland.[1] Officer Geare had information that Stephens was a convicted felon, that he would be working security at a nightclub known as "Club Unite" on the evening of May 16, and that he usually carried a firearm when he worked there. With this knowledge, Officer Geare – in conjunction

[1] In March 2011, Officer Geare installed the GPS on Stephens' vehicle without a warrant, and it remained on the vehicle for several weeks. Officer Geare testified that the GPS probably had been removed because the battery was getting low.

with other officers – implemented a plan to detain Stephens and search him on May 16 at Club Unite.

During the evening of May 16, Officer Geare used the GPS to locate Stephens' vehicle at an area school. Officer Geare and another city police officer (Sergeant Johnson) then observed and followed Stephens as he drove the vehicle to his residence. Before Stephens left the residence to drive to Club Unite, Officer Geare and Sergeant Johnson saw Stephens, who was standing outside his vehicle, reach around to the back of his waistband. They interpreted this movement as being a check for a weapon. Based on this and other information they had previously obtained, the officers "had at least reasonable suspicion, if not probable cause, that [Stephens] was armed and was on his way to work at Club Unite." J.A. 520.

When Stephens drove away from his residence, Officer Geare alerted other officers who had been briefed on the plan to go to Club Unite. Using visual observation and a portable laptop computer to monitor the GPS, Officer Geare and Sergeant Johnson followed Stephens' vehicle as he drove on public roads to Club Unite. Upon Stephens' arrival at Club Unite, the officers who had been alerted approached him and conducted a patdown, which revealed an empty holster in the middle of his back. Within a matter of minutes, a Baltimore city police officer arrived and conducted a canine inspection of the vehicle exterior. After the canine alerted, the officers searched the vehicle and found (among other things) a loaded pistol. The officers then arrested Stephens and charged him with one or more state-law crimes. Stephens remained in state custody for

approximately three months, until a federal grand jury indicted him for illegal firearm possession by a convicted felon. *See* 18 U.S.C. § 922(g)(1). After the federal indictment, the state charges were dismissed. *See Presentence Report*, No. JKB-11-0447, at 1 (D. Md.).[2]

While this case was pending below, the Supreme Court held in *United States v. Jones*, 132 S.Ct. 945, 949 (2012), that the government's "installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the meaning of the Fourth Amendment. Because the officers in *Jones* did not have a valid warrant authorizing the GPS usage, the search – *i.e.*, GPS usage – violated the Fourth Amendment. The Court did not, however, rule that all warrantless GPS searches violate the Fourth Amendment; instead, the Court expressly declined to decide whether reasonable suspicion or probable cause may justify warrantless GPS attachment to vehicles, and that remains an open question. *Id*. at 954.

Based on *Jones*, Stephens moved to suppress the firearm and other evidence seized on May 16. Following a hearing, the district court denied the motion. The court concluded that in light of *Jones*, Officer Geare's warrantless use of the GPS on Stephens' vehicle was an unconstitutional search that led to the seizure of the challenged evidence. However, the court held that the exclusionary rule

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[2] The record does not specify the state charges for which Stephens was arrested. We note, however, that possession of a firearm by a convicted felon is a crime under § 5-133 of the Maryland Public Safety Article.

does not apply because Officer Geare used the GPS in good faith. Thereafter, Stephens entered a conditional guilty plea, reserving the right to appeal the suppression order. *See* Fed. R. Crim. P. 11(a)(2).

II

In May 2011, at the time of Stephens' arrest and before *Jones* was decided, it was not uncommon for law enforcement officers in Maryland to attach tracking devices to vehicles without a warrant. *See* J.A. 364. Indeed, caselaw in our circuit shows that officers in Maryland had been doing so since at least 1976. *See United States v. Woodward*, 546 F.2d 576 (4th Cir. 1976) (declining to address the defendant's argument that the warrantless attachment of a "beeper" to his truck was an illegal search under the Fourth Amendment). Before Officer Geare attached the GPS to Stephens' vehicle, he had attached a GPS to other vehicles in public areas without a warrant, and it was his understanding that a warrant was needed only when (unlike here) the GPS was wired into the vehicle's battery system. *See* J.A. 364-65. Consistent with Officer Geare's understanding, the district judge – who had been a United States Magistrate Judge in Maryland for 12 years before being elevated to the district court bench – observed that had Officer Geare applied for a federal warrant to attach a GPS to Stephens' vehicle, it was "quite likely" that "the magistrate judge would have said . . . you don't need a warrant for that." J.A. 454. As we explain below, Officer Geare's and the district judge's understanding of the state of the law as it existed in 2011 is understandable.

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The "threshold question" in every Fourth Amendment case is whether a search or seizure occurred, and "not every observation made by a law enforcement officer – even if consciously intended to disclose evidence of criminal activity – constitutes a search within the meaning of the Fourth Amendment." *United States v. Taylor*, 90 F.3d 903, 908 (4th Cir. 1996). Rather, a search occurs for constitutional purposes only "when an expectation of privacy that society is prepared to consider reasonable is infringed," *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), and "[o]fficial conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment," *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (citation and internal punctuation omitted). Under this principle, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

It was well-established by 2011 that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). In accord with this principle, we recognized in *United States v. George*, 971 F.2d 1113, 1119 (4th Cir. 1992), that "there can be no reasonable expectation of privacy in a vehicle's exterior." Moreover, we observed in *United States v. Gastiaburo*, 16 F.3d 582, 586 (4th Cir. 1994), that "it may be reasonable and therefore constitutional to search a movable vehicle without a

warrant, even though it would be unreasonable and unconstitutional to conduct a similar search of a home, store, or other fixed piece of property." Further, we noted in *United States v. Bellina*, 665 F.2d 1335, 1340 (4th Cir. 1981), that "this rule of diminished expectation of privacy is particularly appropriate when the automobile is located in the street or in a public area."

Although neither the Supreme Court nor this Court had expressly approved or disapproved of warrantless GPS usage in 2011, the Supreme Court had rejected a Fourth Amendment challenge to law enforcement officers' use of a beeper, which is the technological forerunner to the GPS. In *United States v. Knotts*, 460 U.S. 276 (1983), officers had placed a beeper in a container that was later filled with chloroform, which they suspected was being used to make illegal drugs. After the chloroform was purchased, one suspect (Petschen) placed the container in his vehicle, and the officers followed the container by using both visual surveillance of the vehicle and a monitor that received signals from the beeper. The officers eventually obtained a search warrant for Knotts' cabin and premises, which is where the container was delivered, and they discovered a drug-making laboratory. Following his arrest, Knotts unsuccessfully moved to suppress evidence on Fourth Amendment grounds because of the beeper use, and he was convicted on a drug conspiracy charge.

The Court upheld the denial of the suppression motion, holding that the use of the beeper was not a search under the Fourth Amendment. *Id.* at 285. Noting the diminished expectation of privacy in

automobiles, the Court explained that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id*. at 281. Thus, "[w]hen Petschen travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination. . . ." *Id*. at 281 82. Importantly, the Court specifically rejected Knotts' argument concerning the beeper:

> Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Id. at 282. Although the Court left open the possibility that a different rule may apply in a future case for "dragnet-type law enforcement practices," it observed that to the extent that Knotts' argument was "simply that scientific devices such as the beeper enabled the police to be more effective in detecting

crime, it simply has no constitutional foundation." *Id.* at 284.[3]

Knotts involved the use of a beeper, but it "was widely and reasonably understood to stand for the proposition that the Fourth Amendment simply was not implicated by electronic surveillance of public automotive movements." *United States v. Sparks*, 711 F.3d 58, 67 (1st Cir. 2013); *see also United States v. Aguiar*, 737 F.3d 251, 261 (2d Cir. 2013) ("*Knotts* stood for the proposition that the warrantless use of a tracking device to monitor the movements of a vehicle on public roads did not violate the Fourth Amendment."). Although we had not been presented with the issue directly, we interpreted *Knotts*, in conjunction with the subsequent case of *United States v. Karo*, 468 U.S. 705 (1984),[4] as standing for

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[3] We upheld the constitutionality of technology-enhanced extended surveillance of public areas in *United States v. Vankesteren*, 553 F.3d 286 (4th Cir.), *cert. denied*, 556 U.S. 1269 (2009), where the defendant sought to exclude evidence obtained by the government's use of a hidden, motion-activated video camera recording his open field. We noted that the "idea of a video camera constantly recording activities on one's property is undoubtedly unsettling to some," but government agents could have personally monitored the area over a continuous period without violating the Fourth Amendment, and the fact that they "chose to use a more resource-efficient surveillance method [did] not change our Fourth Amendment analysis." *Id.* at 291.

[4] In *Karo*, government agents installed a beeper inside a container and used the beeper to track the movement of the container to various locations, including a number of private residences. The Court agreed that using the beeper to monitor the movement of the container within private residences violated the Fourth Amendment. The Court distinguished *Knotts* because the beeper was used in that case only to locate the container as it traveled on public roads.

the proposition that "monitoring of a beeper falls within the ambit of the Fourth Amendment when it reveals a critical fact about the interior of premises that could not have been obtained through visual surveillance." *United States v. Jones*, 31 F.3d 1304, 1310 (4th Cir. 1994) (citation and internal punctuation omitted).

Moreover, *Knotts* was considered to be the "foundational Supreme Court precedent for GPS-related cases." *United States v. Cuevas-Perez*, 640 F.3d 272, 273 (7th Cir. 2011). Based on *Knotts*, several federal appellate courts held before 2011 that the warrantless use of a GPS to track the location of a vehicle did not necessarily violate the Fourth Amendment. *See*, *e.g.*, *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215-17 (9th Cir. 2010) (GPS installation and use is not a search);[5] *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010) (GPS installation and use requires only reasonable suspicion); *United States v. Garcia*, 474 F.3d 994, 997-98 (7th Cir. 2007) (GPS installation and use is not a search); *but see United States v. Maynard*, 615 F.3d 544, 555-60 (D.C. Cir. 2010) (prolonged GPS surveillance is a search).[6] Two months after Stephens was arrested, the Fifth Circuit relied on *Knotts* and its own prior precedent relating to beeper

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[5] Both *Pineda-Moreno* and *Cuevas-Perez* were later vacated and remanded for further consideration in light of the Supreme Court's 2012 *Jones* decision. *See* 132 S.Ct. 1533-34 (2012).

[6] In August 2010, the United States Department of Justice issued an internal email opining that *Maynard* was "fundamentally wrong and incompatible with established Fourth Amendment principles." *See United States v. Wilford*, 2013 WL 6211741, at *39 (D. Md. 2013) (quoting the email).

usage to hold that the warrantless placement and usage of a GPS on a vehicle was not a search under the Fourth Amendment. *See United States v. Hernandez*, 647 F.3d 216, 220-21 (5th Cir. 2011). Thus, a significant body of federal law existed nationally in 2011 to support the view that warrantless attachment of a GPS to a vehicle was not a search within the meaning of the Fourth Amendment or was permissible when officers possessed reasonable suspicion that criminal activity was afoot.[7]

Consistent with this body of federal law, the Court of Special Appeals of Maryland had expressly found in 2008 that warrantless GPS usage was permissible under the Fourth Amendment. In *Stone v. State*, 941 A.2d 1238 (Md. App. 2008), Maryland law enforcement officers who were investigating Stone for burglary attached a GPS to his truck, and they later used information from the GPS to locate and arrest him. During a pretrial suppression hearing, Stone's counsel sought to cross-examine one of the officers concerning the GPS in order to establish that the GPS usage violated his Fourth Amendment rights. The trial court disallowed the cross-examination, and Stone appealed.

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[7] Courts also applied *Knotts* in cases involving similar surveillance methods. For example, in *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004), agents monitored cell phone site data to track the defendant's movements along a public highway. The court held that the defendant "had no legitimate expectation of privacy in his movements along public highways," and therefore the agents did not conduct a search within the meaning of the Fourth Amendment. *Id*. at 951.

Relying primarily on *Knotts*, the Court of Special Appeals affirmed the trial court, concluding that it "did not abuse its discretion in cutting short the appellant's cross-examination about . . . the GPS tracking device because it was unlikely that cross-examination on those points would have produced any relevant evidence." *Id.* at 1249. The court noted that the GPS was "simply the next generation of tracking science and technology from the radio transmitter 'beeper' in *Knotts*, to which the *Knotts* Fourth Amendment analysis directly applies," and it stated that "the use of the GPS device could not be a Fourth Amendment violation, and hence further inquiry about it [on cross-examination] would not have led to relevant information." *Id.* at 1250. Explaining this decision, the court observed:

> [Stone] did not have a reasonable expectation of privacy in his location in the public, and, more specifically, in a vehicle riding on public roads, and therefore evidence about the use of the GPS device . . . merely to locate him in public, which just as well could have been done by human visualization – though less efficiently – was not relevant to [his] Fourth Amendment-based suppression motion.

Id. at 1250-51.

Recently, in *Kelly v. State*, 82 A.3d 205, (Md. 2013), the Maryland Court of Appeals resolved any doubt about the state of the law that existed in Maryland in 2011. The court held that "before *Jones*, binding appellate precedent in Maryland, namely *Knotts*, authorized the GPS tracking of a vehicle on public roads." *Id.* at 216. The court explained that before *Jones*, it would have applied *Knotts* like the Court of

Special Appeals had done in *Stone*, "to resolve the question of the constitutionality of GPS tracking of a vehicle on public roads." *Id.* For this reason, the court held that "just as the Court of Special Appeals applied *Knotts*, pre-*Jones*, when considering the relevance of testimony on the subject of GPS tracking of a vehicle on public streets in *Stone*, so too could police officers reasonably rely on *Knotts*, pre-*Jones*, in affixing a GPS tracking device to the vehicle of a person under their investigation for the purpose of conducting surveillance." *Id.*

III

For purposes of this appeal, we accept the district court's ruling that Officer Geare's use of the GPS to locate and follow Stephens in May 2011 was an unreasonable search under the Fourth Amendment that led directly to the seizure of the evidence from Stephens' vehicle and his arrest. Starting from this premise, we must decide the separate question of whether the exclusionary rule renders the evidence inadmissible.[8] Because the facts are not disputed, this question involves a pure legal conclusion, and we review the district court's ruling de novo. *See United States v. DeQuasie*, 373 F.3d 509, 520 (4th Cir. 2004).

A.

The Supreme Court created the exclusionary rule "to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10

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[8] We decline to address the government's argument that Officer Geare's use of the GPS was permissible under the reasonable suspicion standard because the government conceded below the illegality of the search under *Jones*. *See* J.A. 448-50.

(1995). The exclusionary rule "generally prohibits the introduction at criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights," *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 359 (1998), but the "sole purpose" of the rule "is to deter future Fourth Amendment violations," *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011), and its application "properly has been restricted to those situations in which its remedial purpose is effectively advanced," *Illinois v. Krull*, 480 U.S. 340, 347 (1987). As the Court has recently made clear, the exclusionary rule is not a "strict liability regime," *Davis*, 131 S.Ct. at 2429, and exclusion of evidence has "always been [the] last resort, not [the] first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

"Exclusion exacts a heavy toll on both the judicial system and society at large," because it "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence," and "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Davis*, 131 S.Ct. at 2427. In order for the exclusionary rule "to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.* "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system." *Id.* at 2428 (citation and internal punctuation omitted). Therefore, the exclusionary rule is applicable "[w]hen the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, [and] the deterrent value of exclusion is strong and tends to outweigh the

resulting costs." *Id.* at 2427 (citations and internal punctuation omitted).

However, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 2427-28 (citations and internal punctuation). The "pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers," and the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Herring*, 555 U.S. at 145 (internal punctuation omitted).[9]

Conducting the good-faith inquiry, the Supreme Court has found the exclusionary rule to be inapplicable in a variety of circumstances involving

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[9] The good-faith inquiry is often referred to as the good-faith "exception" to the exclusionary rule. However, given the manner in which the Supreme Court has limited the application of the exclusionary rule, some commentators have questioned the accuracy of labeling the exclusionary rule as the "rule" and the good-faith inquiry as the "exception." *See*, *e.g.*, Michael D. Cicchini, An Economics Perspective on the Exclusionary Rule and Deterrence, 75 Mo. L. Rev. 459, 462 (2010) (observing that *Herring* "makes the exclusionary rule a misnomer; in fact, when exclusion is treated as a last resort, it would be far more accurate to label it the exclusionary exception rather than the rule"); Matthew A. Josephson, *To Exclude or Not To Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 Creighton L. Rev. 175, 177 (2009) ("The *Herring* decision could transform the exclusionary rule by making the exclusion of evidence the exception rather than the rule when police violate the Fourth Amendment.").

Fourth Amendment violations. *See*, *e.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (where police conducted a search in reasonable reliance on a warrant that was later held invalid); *Krull* (where police conducted a search in reasonable reliance on subsequently invalidated state statutes); *Evans* (where police reasonably relied on erroneous information in a database maintained by judicial employees); *Herring* (where police reasonably relied on erroneous information in a database maintained by police employees). Our precedent makes it clear that application of the good-faith inquiry is not limited to the specific circumstances addressed by the Supreme Court. For example, in *United States v. Davis*, 690 F.3d 226, 251-57 (4th Cir. 2012), *cert. denied*, 134 S.Ct. 52 (2013), we held that the exclusionary rule did not apply where officers engaged in an unconstitutional search by extracting and testing the defendant's DNA sample during a murder investigation without a warrant. We explained that the Supreme Court's "recent decisions applying the exception have broadened its application, and lead us to conclude that the Fourth Amendment violations here should not result in application of the exclusionary rule." *Id.* at 251.[10]

B.

As we have noted, "the good-faith inquiry is confined to the objectively ascertainable question

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[10] In *Davis*, the majority stated that it was faithfully following Supreme Court precedent by applying "the rationale supporting the Court's application of the good-faith [inquiry]," and it rejected the dissenting judge's argument that it was creating a "new, freestanding exception" to the exclusionary rule. 690 F.3d at 256 n.34.

whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Herring*, 555 U.S. at 145 (citation and internal punctuation omitted). In *Davis*, the Supreme Court answered this question in one specific circumstance, holding that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 131 S.Ct. at 2423-24. As the Court explained: "An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances. The deterrent effect of exclusion in such case can only be to discourage the officer from doing his duty." *Id.* at 2429 (citations and internal punctuation omitted). Thus, if "binding appellate precedent" allowing warrantless GPS usage existed in May 2011, and if it was objectively reasonable for a reasonably well-trained officer to rely on that precedent, then *Davis* controls, and the exclusionary rule is inapplicable.

Despite the ample body of federal law existing in 2011 that supported warrantless GPS usage similar to what happened in this case, Stephens contends that none of those cases was binding precedent in the Fourth Circuit and, for that reason, the exclusionary rule must apply. In essence, Stephens relies on a negative implication: in his view, the *Davis* Court's application of the good-faith inquiry in the specific circumstance where an officer has reasonably relied on binding appellate precedent precludes application of the good-faith inquiry in the slightly different context where an officer reasonably relied on nonbinding precedent, no matter how extensive and well-developed that precedent may be.

We have serious doubts about Stephens' narrow view of the good-faith inquiry. Nothing in *Davis* itself supports such an interpretation. Instead, *Davis* merely establishes the inapplicability of the exclusionary rule in one specific circumstance. *Davis* does not, however, alter the general good-faith inquiry which, we reiterate, requires consideration of whether a reasonably well-trained officer would have known that a search was illegal in light of all of the circumstances. *See generally Leon*, 468 U.S. at 918 (noting that "suppression of evidence . . . should be ordered only on a case-by-case basis"). Moreover, as noted, we have not previously limited the good-faith inquiry only to the precise factual circumstances addressed by the Supreme Court.[11]

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[11] A simple hypothetical highlights the weakness of Stephens' position. Returning to the days before the Supreme Court decided *Jones*, we assume that every other federal appellate court in the country had found warrantless GPS usage to be constitutional in published opinions, and we had done so in an unpublished opinion. Under Stephens' position, evidence obtained by an officer in this circuit as a result of warrantless GPS usage would have to be suppressed because neither the out-of-circuit opinions nor our unpublished opinion are binding appellate precedent. To accept that view, a court would necessarily have to hold that even with this universal, but non-binding, precedent that was directly on point, a reasonably well-trained officer would have known that the search was illegal in light of all of the circumstances.

We also note that Stephens' view appears to run counter to the manner in which the Supreme Court has examined objective reasonableness in the analogous context of qualified immunity. *See*, *e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009) ("The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on 'consent-once-removed' entries . . . . Police officers are entitled to rely on existing lower court cases without facing personal liability for

Stephens' narrow interpretation of *Davis* presents an interesting issue, but one that is ultimately unnecessary for us to decide. As we explain below, under the facts of this case the rule announced in *Davis* directly controls: Officer Geare's use of the GPS was objectively reasonable because of the binding appellate precedent of *Knotts*.

C.

In May 2011, before *Jones*, neither the Supreme Court nor this Court had expressly approved or disapproved of warrantless GPS usage. However, in 1983, the Supreme Court held in *Knotts* that the use of a beeper to track a vehicle was not a search under the Fourth Amendment. In doing so, the Court explained that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," 460 U.S. at 281, and noted that the beeper simply conveyed to the public what was evident from visual surveillance.

Knotts is not exactly on point with the facts of this case, but it is the legal principle of *Knotts*, rather than the precise factual circumstances, that matters. *See South Dakota v. Opperman*, 428 U.S. 364, 375 (1976) (noting that "in all Fourth Amendment cases, we are obliged to look to all the facts and circumstances of this case in light of the principles set forth in . . . prior decisions"); *United States v. LaBinia*, 614 F.2d 1207, 1210 (9th Cir. 1980) (noting

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their actions."); *Wilson v. Layne*, 526 U.S. 603, 617-18 (1999) ("Given such an undeveloped state of the law, the officers in this case cannot have been expected to predict the future course of constitutional law." (citation and internal punctuation omitted)).

that "it is a general rule that unless the Supreme Court expressly limits its opinion to the facts before it, it is the principle which controls and not the specific facts upon which the principle was decided" (citation and internal punctuation omitted)). In this regard, we reiterate that in conjunction with the general legal landscape that existed before *Jones*, "*Knotts* was widely and reasonably understood to stand for the proposition that the Fourth Amendment simply was not implicated by electronic surveillance of public automotive movements," *Sparks*, 711 F.3d at 67, and it was the "foundational Supreme Court precedent for GPS-related cases," *Cuevas-Perez*, 640 F.3d at 273.

After *Jones*, we know that such an interpretation of *Knotts* is incorrect. Without the benefit of hindsight, however, and with no contrary guidance from the Supreme Court or this Court, we believe that a reasonably well-trained officer in this Circuit could have relied on *Knotts* as permitting the type of warrantless GPS usage in this case. *See Aguiar*, 737 F.3d at 262 (in declining to apply the exclusionary rule, the court stated that "sufficient Supreme Court precedent existed at the time the GPS device was placed for the officers here to reasonably conclude a warrant was not necessary in these circumstances").

Our decision extends to all law enforcement officers within this Circuit as a matter of federal law, but it is bolstered in this case by the Maryland Court of Appeals' holding in *Kelly* that *Knotts* was binding appellate precedent in Maryland under *Davis* and, therefore, Maryland police officers could "reasonably rely on *Knotts*, pre-*Jones*, in affixing a GPS tracking device to the vehicle of a person under their investigation for the purpose of conducting

surveillance." *Kelly*, 82 A.3d at 216.[12] To be sure, Officer Geare worked on the HIDTA task force and was deputized as a federal agent, but he was also a Baltimore City police officer. In this dual role, Officer Geare was investigating both federal and state crimes, and his investigation led to Stephens' arrest for violating Maryland law. Under these circumstances, we would make a mockery of the good-faith inquiry if we were to ignore the clear pre-*Jones* state of the law in Maryland – as pronounced by Maryland's highest court – and hold that a Maryland officer's use of the GPS was objectively unreasonable. The fact that Stephens was later charged federally does not alter our determination.[13]

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[12] "[S]tate law is irrelevant for determining in the first instance whether fruits of a search are admissible in federal court under the Fourth Amendment, [but] state law is relevant when the analysis proceeds to the question of admitting unconstitutionally seized evidence under [the] good faith exception to the exclusionary rule." *United States v. Maholy*, 1 F.3d 718, 722 (8th Cir. 1993).

[13] Stephens contends that the HIDTA investigation was federal and that Maryland law is irrelevant. However, the facts do not establish that the investigation was exclusively federal, and our precedent regarding joint federal-state investigations undercuts Stephens' argument. As we have explained, when "federal and state agencies cooperate and form a joint law-enforcement effort, investigating violations of both federal and state law, . . . [s]uch an investigation is conducted on behalf of both sovereigns, and its object is to reveal evidence of crime – be it federal crime or state crime." *Claridy*, 601 F.3d at 282. Moreover, "in the initial stages of a criminal investigation, it may be anything but clear whether the conduct being investigated violates state law, federal law, or both," *United States v. Self*, 132 F.3d 1039, 1043 (4th Cir. 1997), and "the decision with respect to the court in which charges are to be brought is often made by the Office of the United States Attorney and the state prosecutor, not the

IV

Based on the foregoing, we find no basis to set aside the order denying Stephens' suppression motion. Accordingly, we affirm the conviction.

AFFIRMED

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investigating officer," *Claridy*, 601 F.3d at 282. Thus, the "possibility, even likelihood, of the federal government also bringing charges for the same underlying facts as the original state arrest does not suddenly cause state officers to stop performing their duties," *United States v. Taylor*, 240 F.3d 425, 428 (4th Cir. 2001), and the fact that "federal officers were present, assisting in the arrest of the defendant by the state officers and that they cooperated with the state officers in the investigation that led up to the arrests has never been held in any case to render the state arrest *federal*," *United States v. Iaquinta*, 674 F.2d 260, 268 (4th Cir. 1982) (emphasis in original).

THACKER, Circuit Judge, dissenting:

"When law enforcement officers rely on precedent to resolve legal questions as to which '[r]easonable minds . . . may differ,' the exclusionary rule is well-tailored to hold them accountable for their mistakes." *United States v. Davis*, 598 F.3d 1259, 1267 (11th Cir. 2010), *aff'd*, 131 S. Ct. 2419 (2011) (quoting *United States v. Leon*, 468 U.S. 897, 914 (1984)). Clearly then, the exclusionary rule is well-tailored to hold accountable the law enforcement officers in this case who relied on non-binding, non-precedential authority regarding emerging technology – without first bothering to seek legal guidance – in order to conduct a warrantless search which spanned a period of nearly two months.

Therefore, with all due respect to my colleagues in the majority, I dissent.

I.

In this case, federal and state law enforcement officers conducted surveillance to track the whereabouts of Appellant's vehicle via the installation of a global positioning system ("GPS") device. The officers used a battery operated GPS device affixed to the undercarriage of Appellant's vehicle to track his movements 24 hours a day, resulting in a catalog of data detailing the vehicle's location for nearly two months from March 20 to April 12, 2011, and again from May 13 to May 16, 2011.

They did so without obtaining a search warrant, despite the fact that no urgent or exigent circumstance existed. Indeed, in the words of one of the officers, "the investigation was taking too long,"

and officers "were spending too much time dragging it out." J.A. 374.[1]

They did so without consulting the United States Attorney's Office regarding the legality of such a search, despite the fact that there was no binding appellate precedent authorizing their actions, and there was clear indication that the law in this regard was not settled, but rather, in a state of flux.

Eight months later, the Supreme Court ruled such conduct to be in violation of the Fourth Amendment. On January 23, 2012, the Supreme Court ruled that the Government's installation of a GPS device on the undercarriage of a target's vehicle while it was parked in a public parking lot, "and its use of that device to monitor the vehicle's movements, constitute[d] a search" under the Fourth Amendment. *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (internal quotation marks omitted). In light of the *Jones* decision, the district court invited Appellant to file a motion for reconsideration of his motion to suppress, which the district court had initially denied. Ultimately, the district court ruled that, per *Jones*, the use of the GPS tracking device in this case was illegal, but the officers acted in good faith, and the purpose of the exclusionary rule would not be advanced if the evidence were to be suppressed.[2]

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[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

[2] The Government conceded below the illegality of the search. J.A. 450-51 ("THE COURT: And the use of the GPS was illegal. [GOVERNMENT COUNSEL]: And, yes, that is correct. That's what the Supreme Court has said."). Curiously, the Government now attempts to reverse course before us and argue that a warrant was not needed for the search because the officers had

II.

It is a fundamental tenet of the Fourth Amendment that warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). The text of the Fourth Amendment provides protection from unreasonable searches and seizures of "persons, houses, papers, and effects." U.S. Cont. amend. IV. As the Supreme Court recognized, "[t]he text of the Fourth Amendment reflects its close connection to property." *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

Although the Fourth Amendment protects the right to be free from unreasonable searches and seizures, it "is silent about how this right is to be enforced. To supplement the bare text, [the Supreme] Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. United States*, 131 S. Ct. 2419, 2423 (2011). The Court has repeatedly held that the exclusionary rule's sole purpose "is to deter future Fourth Amendment violations." *Id.* at 2426. Exclusion of evidence collected by unconstitutional means is "not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Id.* (internal quotation marks omitted). Rather, it is designed to safeguard the continued vitality of the Fourth Amendment.

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a reasonable suspicion Appellant was engaged in illegal activity. Appellee's Br. 23 ("Installation and use of a slap-on GPS tracking device is such a limited intrusion that it should be justified based upon reasonable suspicion.").

The deterrent function of the exclusionary rule necessarily requires us to consider the "culpability of the law enforcement conduct at issue. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis*, 131 S. Ct. at 2427 (internal quotation marks and citations omitted). Therefore, "[t]o 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." *Herring v. United States*, 555 U.S. 135, 144 (2009).

Based on this rationale, the Supreme Court created a "good faith" exception to the exclusionary rule, which applies when law enforcement officers "act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Davis*, 131 S. Ct. at 2427 (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)). The Court has applied the good faith exception to evidence obtained by law enforcement officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate, but where the warrant was ultimately found to be unsupported by probable cause. *See Leon*, 468 U.S. at 909. The Court also applied this exception when officers acted in objective reliance upon a state statute ultimately found to violate the Fourth Amendment. *See Illinois v. Krull*, 480 U.S. 340 (1987). And in *Davis*, the Court further articulated this exception applies "when the police conduct a search in objectively reasonable reliance on binding appellate precedent." 131 S.Ct. at 2427. None of these factual scenarios are present here.

In *Davis*, the Court ruled this exception applies, "when the police conduct a search in objectively reasonable reliance on *binding* appellate precedent." *Davis*, 131 S. Ct. at 2434 (emphasis supplied). In further explaining this holding, the Court stated, "when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." *Id*. at 2429 (emphasis in original). Thus, *Davis* carves out a very specific and narrow articulation of circumstances in which the good faith exception to the exclusionary rule applies: when officers conduct a search in objectively reasonable reliance on *binding appellate precedent specifically authorizing* their conduct. *See id*. *Davis* did not, however, answer "the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled." *Id*. at 2435 (Sotomayor, J., concurring).

When presented with the question below as to whether the good faith exception applied in the circumstance presented by this case, the district court denied Appellant's motion to suppress determining that "the purposes of the [e]xclusionary [r]ule would just not be achieved in any way whatsoever if suppression was ordered." J.A. 479. The district court determined that the conduct of the law enforcement officers was in good faith and "passes muster." *Id*. In so concluding, the district court relied on *United States v. Michael*, 645 F.2d 252, 257 (5th Cir. 1981) (en banc), and *Krull*, 480 U.S. 340, as proof that the law surrounding the nonconsensual, warrantless installation of an electronic tracking device was settled before *Jones*, 132 S. Ct. 945.

In *Michael*, the Fifth Circuit held that the nonconsensual, warrantless installation of a beeper on the defendant's van did not violate the Fourth Amendment even if it was a search. 645 F.2d at 256. In *Krull*, officers conducted a warrantless search of an automobile wrecking yard pursuant to a state statute authorizing warrantless administrative searches of those licensed to sell motor vehicles or automotive parts. 480 U.S. at 343. The Supreme Court held that the exclusionary rule did not apply to the evidence obtained by the search because the officers acted in objectively reasonable reliance upon the state statute, even though that statute was subsequently found to violate the Fourth Amendment. *Id*. at 342. In relying on these two cases, the district court determined that beepers and GPS devices were one and the same for purposes of Fourth Amendment analysis.[3] Therefore, the district court concluded that the law was settled and that investigators acted in good faith relying on this settled law "when the beeper was placed on the bumper." J.A. 479. There are three reasons, recognized in *Davis*, that this analysis is flawed: (1) at the time the warrantless search was conducted in this case, no "binding appellate precedent" existed in this circuit

[3] Specifically, when discussing the use of a GPS device versus a beeper, the district court stated that GPS monitoring "isn't a new technology. This is old technology. It's 20, 30, 40 years that police officers have been using beepers, transponders, whatever you want to call them, and following them around. And it's not a subject that the [c]ourts haven't previously addressed." J.A. 470. As discussed more fully below, beepers and GPS devices are not one and the same. Moreover, *Krull*, 480 U.S. 340, did not involve the use of a beeper at all, let alone a GPS device.

"specifically authoriz[ing]" law enforcement's actions, 131 S. Ct. 2429, 2434; (2) the law in general regarding the warrantless use of GPS devices was not settled, but was, in fact, in a state of flux; and (3) law enforcement officers did not act in an "objectively reasonable" manner, *id*. at 2429 (quoting *Leon*, 468 U.S. at 919).

A.

At the time the warrantless search was conducted in this case, no "binding appellate precedent" existed in this circuit "specifically authoriz[ing]" law enforcement's actions, *Davis*, 131 S. Ct. 2429, 2434. The words "binding appellate precedent" should be given their plain meaning. *Id*. at 2434. Binding appellate precedent in this circuit means the published opinions of this court and the United States Supreme Court. *See*, *e.g.*, *McBurney v. Young*, 667 F.3d 454, 465 (4th Cir. 2012) ("Appellants' reliance on [a Third Circuit opinion] is misplaced for at least two reasons. First, as out-of-circuit authority, it is not binding on this Court."); *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) ("[U]npublished opinions are not even regarded as binding precedent in our circuit . . . ." (citing Local Rule 36(c))). Simply put, opinions of other circuit courts of appeal in general and of the Fifth Circuit Court of Appeals in particular – such as *Michael*, 645 F.2d 252, upon which the district court relied – are not binding precedent in the Fourth Circuit.

Indeed, it is uncontroverted that at the time the warrantless search in this case was conducted, the two appellate courts that bind the District Court of Maryland – this court and the Supreme Court – had no precedent specifically authorizing the warrantless

use of a GPS device to track a suspect's vehicle or even authorizing the warrantless, nonconsensual installation of a beeper tracking device on a suspect's vehicle.[4] The majority attempts to fill the void left by this absence of binding precedent by describing instead what it calls a "significant body of federal law" and precedent from the Court of Special Appeals of Maryland and the Maryland Court of Appeals supporting the warrantless attachment of a GPS to a vehicle. *Ante* at 13. But the majority fails to cite any binding appellate precedent specifically authorizing the conduct as required by *Davis*. The majority focuses instead on *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984). However, reliance on these cases here is misplaced. As discussed below, in both cases, *Knotts* and *Karo*, the beeper was placed in a container with the consent of the then-owner, *not* attached to the undercarriage of the suspect's vehicle without knowledge or consent of the vehicle's owner. Clearly, these cases do not "specifically authorize[ ]" the nonconsensual, warrantless installation of a GPS

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[4] Even if such a case existed relative to beeper tracking devices, I am doubtful installation of a beeper would also "specifically authorize[ ]" installation of a GPS device. *Davis*, 313 S. Ct. at 2429. The two are of an entirely different character. A beeper tracking device requires law enforcement to at least be in proximity to the device to receive the transmitted signal, whereas a GPS device downloads location data at specific time intervals with no proximity needed. *See*, *e.g.*, *Jones*, 132 S. Ct. at 963-64 (Sotomayor, J., concurring) (discussing the differences between surveillance using a GPS device and a beeper). In other words, with the use of a GPS device, law enforcement may simply download the data from afar at their leisure, as they did in this case.

device on a suspect's vehicle. *Davis*, 131 S. Ct. at 2429.

The majority also quotes our decision in *United States v. Jones*, 31 F.3d 1304 (4th Cir. 1994), for the proposition that we interpreted *Knotts* and *Karo* to exclude the use of a beeper tracking device from "the ambit of the Fourth Amendment" unless "it reveals a critical fact about the interior of premises that could not have been obtained through visual surveillance." *Ante* at 11-12 (quoting *Jones*, 31 F.3d at 1310 (internal quotation marks omitted)). However, reliance on this case is also misplaced. In *Jones*, we were asked to determine "whether the postal inspectors' use of an electronic tracking device to monitor the contents of *Jones*' van constituted a search forbidden by the Fourth Amendment." *Id*. at 1309. Relying on *Knotts* and *Karo*, we concluded it was not a search because, as in the Supreme Court cases, the beeper tracking device

> was not planted in the van; it was concealed in a mail pouch which belonged to the [G]overnment and in which *Jones* had no expectation of privacy whatsoever. The mail pouch with the beeper found its way into *Jones*' van only because *Jones* stole the pouch and hid it in the van himself.

Id. at 1310. We made sure to illustrate that the facts in *Jones* did not "raise[ ] the disturbing specter of [G]overnment agents hiding electronic devices in all sorts of personal property and then following private citizens who own such property as they go about their business," as does the case before us now. *Id*. at 1311. There was no such danger in *Jones*, because "the [G]overnment ha[d] placed the electronic device in its

own property," and "[o]nly purloiners of such property need fear adverse consequences." *Id*.

Indeed, the Supreme Court's discussion in *Jones*, 132 S. Ct. 945, of its own beeper cases forecloses the possibility that these cases support the warrantless GPS search in the case at hand. In *Jones*, the Court identified a critical distinction between its precedent regarding the use of beepers and the case before the Court, which, as here, involved the nonconsensual, warrantless installation of a GPS device on the suspect's vehicle. *Id*. at 951-52. The Supreme Court observed that in its prior beeper cases, the beepers in question had initially been placed in containers with the consent of the then-owner, and the containers later came into the defendant's possession. *See id*. (discussing *Knotts*, 460 U.S. 276, and *Karo*, 468 U.S. 705); *see also United States v. Brown*, 744 F.3d 474, 478 (7th Cir. 2014) (deciding the good faith exception applied to the warrantless installation of a GPS device on a vehicle "[b]ecause the GPS unit that played a role in the gathering of evidence against Brown was installed with the consent of the Jeep's owner, *Knotts* and *Karo* are 'binding appellate precedent'"). Thus, the Supreme Court described the defendant in *Jones* as being "on much different footing" than the *Knotts* and *Karo* defendants because he actually possessed the vehicle at the time the Government installed the GPS tracker, and he had not consented to its installation. 132 S. Ct. at 952. That is precisely the case here.

B.

The Government also argues that the law regarding GPS searches was generally settled before the Supreme Court issued its opinion, and therefore,

the main purpose of the exclusionary rule – to deter future Fourth Amendment violations – would not be met. According to the Government, "[p]rior to the installation of the GPS tracking devices in this case, the vast majority of decisions had upheld the use of GPS tracking devices without a warrant." Appellee's Br. 29.

First and foremost, *Davis* sets a higher bar than a simple survey of an amorphous "vast majority of decisions." Appellee's Br. 29. Rather, objectively reasonable reliance on binding appellate precedent specifically authorizing the conduct at issue is the gauge. Beyond this basic premise, the Supreme Court's decision in *Jones* further undermines the Government's argument. The officers in *Jones* – standing on the same pre-*Jones* legal footing on which the officers in this case stood – felt compelled to obtain a search warrant in order to attach a GPS device to the target's vehicle. *See* 132 S. Ct. at 948. In 2005, the officers in *Jones*, participating in a joint FBI and Metropolitan Police Department Task Force, applied for and received a warrant from the United States District Court for the District of Columbia authorizing the installation of a GPS device on a suspect's vehicle in the District of Columbia within ten days of the warrant's issue. *Id.* However, they installed the GPS device outside the restrictions found in the warrant inasmuch as they installed the GPS device on the 11th day and in Maryland, rather than in the District of Columbia. *Id.* The fact that pre-*Jones* other officers – located right next door to the officers in this case no less – would feel the need to secure a warrant before installing and using a GPS device on a suspect's vehicle certainly casts further doubt on the Government's argument that an officer

similarly positioned to the officers here would have reasonably thought the warrantless search in this case was permissive under binding appellate precedent.

To be sure, the Government correctly asserts the main purpose of the exclusionary rule is to deter future Fourth Amendment violations, not to remedy past ones. But, it does not then follow that the district court correctly found there was no police misconduct in this case to be deterred because they acted in conformity with legal norms that were, at the time, "widely accepted." Appellee's Br. 12. Mere conformity with widely accepted legal norms is not the standard, nor should it be. Reliance on past practice in general in order to invade the province of the Fourth Amendment without a firm legal basis is not conscientious police work and is, at minimum, reckless.

Because no such binding authority existed in this circuit at the time of the execution of the warrantless search in this case, I conclude that the good faith exception as articulated in *Davis* is unsuitable here.[5]

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[5] *See also*, *United States v. Martin*, 712 F.3d 1080 (7th Cir. 2013) (per curiam). Although the Seventh Circuit decided the case on other grounds, it stated that the district court's reliance on *Davis* was "an unwarranted expansion of the Supreme Court's decision" because "[a]s Justice Sotomayor pointed out in her opinion concurring in the judgment, *Davis* 'd[id] not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.'" *Martin*, 712 F.3d at 1082 (quoting *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring)). The court emphasized that the good faith exception as pronounced in *Davis* applies "only to 'a search [conducted] in objectively reasonable reliance on *binding appellate precedent*.'" *Id*. (quoting *Davis*, 131 S. Ct. at 2434) (emphasis in original).

Thus, I next turn to whether the good faith exception can apply at all to the factual circumstances of this case – in other words, whether law enforcement acted in an objectively reasonable manner. Critical to this analysis is the fact that, contrary to the Government's assertion, the law in this area was not generally accepted or "widely accepted," but, rather, was in a state of flux; so much so that the Supreme Court had accepted the issue for consideration.

C.

Law enforcement officers in this case did not act in an "objectively reasonable" manner, *Davis* at 2429 (quoting *Leon*, 468 U.S. at 919). The good faith exception at its core requires officers to "act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Davis*, 131 S. Ct. at 2427 (quoting *Leon*, 468 U.S. at 909). The Supreme Court has recognized, "[r]esponsible law-enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to these rules." *Id.* at 2429 (internal quotation marks omitted). I conclude that, here, the officers could not have had an objectively reasonable belief that their conduct was lawful for several reasons.

First, at the time the warrantless search was conducted in this case, the District of Columbia Circuit, neighboring the District of Maryland where the warrantless search here occurred, had determined that a warrantless GPS search violated the Fourth Amendment. *See United States v. Maynard*, 615 F.3d 544, 549 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones*, 132 S. Ct. 945 (2012). In fact, at the time the warrantless search

was conducted in this case, *Maynard* had been accepted for argument before the Supreme Court, further undercutting the Government's position here that the issue was generally settled. Additionally, the *Maynard* case illustrates that as early as 2005, similarly situated officers were obtaining warrants for GPS searches such as the one performed in this case. Nonetheless, officers in this case did not "take care to learn" what was required of them by Fourth Amendment precedent under these circumstances. *Davis*, 131 S. Ct. at 2429.

Quite the contrary. Detective Geare testified that he did not seek advice from any legal authority regarding the constitutionality of such a search, even though there was no exigent circumstance preventing him from doing so. Appellant's counsel questioned Detective Geare,

> Q At any point did you call the U.S. Attorney's Office and say, hey, I'm thinking about putting a GPS device on a vehicle without a warrant, should I get one, you never did that, did you?
>
> A No, not to my recollection.
>
> Q The U.S. Attorney they were available to you, correct?
>
> A Sure.
>
> . . .
>
> Q The person you would talk to if you had legal questions was the U.S. Attorney, correct?
>
> A Correct.
>
> Q And you didn't call them in reference to this issue?

A Correct.

J.A. 422. Instead, Detective Geare testified that in utilizing the GPS device in this case, he relied simply on his own past conduct using GPS devices in prior cases that had resulted in convictions. Detective Geare testified that it was his "understanding" that a warrant was not required when attaching a GPS device on a target's vehicle, and his "belief" that as long as the vehicle was in a public area attaching a GPS device "was fine." J.A. 365. He certainly did not receive such guidance from the United States Attorney's Office because, per his own testimony, he did not bother to ask.

Because law enforcement officers acted with reckless disregard for Appellant's Fourth Amendment rights and failed to act reasonably to "learn what was required of them" under the Fourth Amendment before conducting a warrantless search via the use of a GPS tracking device to monitor Appellant's every movement in his vehicle for a period spanning nearly two months, I cannot conclude that they acted with an objectively reasonable good faith belief that the warrantless GPS search was lawful. *Davis*, 131 S. Ct. at 2429.

III.

In light of this era of fast-moving technological advancements and our ever-shrinking zone of privacy, *see Riley v. California*, 134 S. Ct. 2473 (2014) (holding officers must obtain a warrant before searching a cell phone seized incident to an arrest),[6] law enforcement

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[6] In *Riley*, the Supreme Court recognized that cell phones, a relatively new technology "inconceivable just a few decades ago," "are now such a pervasive and insistent part of daily life that

officers should be deterred from undertaking warrantless searches in situations where, as here, there was no binding appellate precedent authorizing the action, there was no exigent circumstance, and the state of the law was unsettled. The Government must err on the side of the Constitution and obtain a warrant especially as "the disturbing specter of [G]overnment agents hiding electronic devices in all sorts of personal property and then following private citizens who own such property as they go about their business" becomes ever more possible. *United States v. Jones*, 31 F.3d 1304, 1311 (4th Cir. 1994). In the words of the Seventh Circuit, I "reject the [G]overnment's invitation to allow police officers to rely on a diffuse notion of the weight of authority around the country, especially where that amorphous opinion turns out to be incorrect in the Supreme Court's eyes." *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013) (per curiam).

I would reverse the judgment of the district court.

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the proverbial visitor from Mars might conclude they were an important feature of human anatomy." 134 S. Ct. at 2484. The Court further stated, "[t]he fact that technology now allows an individual to carry [private] information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id*. at 2495. The Court recognized that its decision "will have an impact on the ability of law enforcement to combat crime;" however, it also emphasized that "[p]rivacy comes at a cost." *Id*. at 2493.