# 12-240

In the
United States Court of Appeals
For the Second Circuit

**UNITED STATES OF AMERICA**

**v.**

**STAVROS M. GANIAS,**

***Defendant-Appellant.***

**ON REHEARING EN BANC**

## BRIEF OF DEFENDANT-APPELLANT STAVROS M. GANIAS

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## STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. A judgment of conviction and sentence entered on January 18, 2012. Special Appendix ("SA") 3–5. The defendant filed a timely notice of appeal that same day. Joint Appendix ("JA") 47. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Does the Fourth Amendment give federal agents executing a warrant for particular files on a computer the power to seize every file on that computer, and to then retain non-responsive records indefinitely, even after the files within the warrant's scope have been identified?

2. "[W]hen items outside the scope of a valid warrant are seized, the normal remedy is," or at least has been, "suppression and return of those items." *United States v. Matia*s, 836 F.2d 744, 747–48 (2d Cir. 1988). The question for this Court is:

> When the government ignores the terms of its warrant, seizes millions of electronic files outside the warrant's scope, and then retains the non-responsive files indefinitely on hope of future probable cause, can that conduct now be passed off as "'conscientious police work,'" *see* Rehearing Petition 11, subject to a new good-faith exception to the exclusionary rule?

## STATEMENT OF THE CASE

### I. The nature of the case and procedural history.

This is an appeal from defendant Stavros Ganias's conviction on charges that he willfully understated his personal income in his 2002 and 2003 tax returns. JA45–46; *see* 26 U.S.C. § 7201. In the court below, the government secured that conviction based, in substantial part, on preserved images of Mr. Ganias's personal financial records. Federal agents seized those personal records from the computers at Ganias's accounting business while executing a November 2003 warrant for files relating to two of Ganias's accounting clients. Notwithstanding the warrant's limited scope, the agents who executed it made mirror-image copies of *every* file on Ganias's computers. They then took 13 months to identify and segregate the responsive records. SA9–10, SA15–17. Once that process was complete, the agents elected to retain the millions of non-responsive files on Ganias's computers—including his personal financial documents—for another 16 months, at which point agents from the Internal Revenue Service ("IRS") targeted Ganias for evasion of his income taxes. In April of 2006, these agents sought a second warrant to search the retained images of Ganias's personal financial files. *Id.*

Prior to his trial, Ganias moved to suppress the evidence seized from his computers outside the scope of the November 2003 warrant. The District Court

(Thompson, J.) held a suppression hearing, and denied the motion. JA11. An opinion setting out the court's findings of fact and conclusions of law followed. SA6–29. The case proceeded to trial in March of 2011, at which the jury rendered verdicts of guilty on two counts of tax evasion. 16 Tr. 244–47 (Apr. 1, 2011).[1] In January of 2012, the District Court (Burns, J.[2]) sentenced Mr. Ganias to a 24-month term of incarceration. *See* SA3.[3]

On appeal to this Court, a three-judge panel reversed the denial of Ganias's suppression motion and remanded the case for further proceedings. *United States v. Ganias*, 755 F.3d 125 (2d Cir. 2014). The Court explained that the government "clearly violated Ganias's Fourth Amendment rights" when it seized his non-responsive personal files and retained them for two-and-a-half years without judicial approval, until "finally develop[ing] probable cause to search and seize them." *Id.* at 137–38. As for the remedy, the Court determined that suppression was appropriate. The indefinite retention of Ganias's private files was not the

[1] "Tr." refers to the trial transcript. The number preceding the "Tr." is the volume number. Other identifying information will be included within the parenthetical following the pin cite.

[2] Before trial, this case was reassigned from U.S. District Judge Alvin W. Thompson to U.S. District Judge Ellen Bree Burns. JA12.

[3] Mr. Ganias's voluntary surrender date has been stayed pending resolution of this appeal. JA26; *see* Gov't. Panel Br. 4 & n.2.

product of any "objectively reasonable reliance" on precedent, or on a warrant, or, for that matter, on any other authority. *Id.* at 140–41. The Court noted that "precedent at the time" of the unlawful seizure provided no "good-faith basis to believe" that federal agents could "keep the nonresponsive files indefinitely." *Id.* at 140–41. Agents' later efforts to "obtain[] the 2006 search warrant" also did nothing to "cure[]" or excuse the earlier unconstitutional seizure of "wrongfully retained files." *Id.* at 138–39 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)). All told, the Court held that the substantial "benefits of deterr[ing]" the agents' "culpable" conduct outweighed the costs of suppression. *Id.* at 140–41.[4]

Writing separately, Judge Hall agreed with the panel majority that retention of Ganias's "non-responsive documents . . . represent[ed] an unreasonable seizure," but he dissented from the Court's suppression holding. *Id.* at 141–42. Relying on the Supreme Court's decision in *Davis v. United States*, 131 S. Ct. 2419 (2011), Judge Hall saw no "need for deterrence" of the agents' conduct because they had not violated any clearly "established precedent" then in

[4] Apart from the Fourth amendment claim, the Court also rejected Mr. Ganias's claim for a new trial based on a juror's Facebook postings. *Ganias*, 755 F.3d at 131–33. The *en banc* Court has elected not to rehear that aspect of the decision. *See* Order, June 29, 2015, ECF No. 102.

existence. *Ganias*, 755 F.3d at 142; *but see Davis*, 131 S. Ct. at 2429 (adopting a good-faith exception for reliance on subsequently overruled "binding appellate precedent [that] *specifically authorizes a particular police practice*" (emphasis added)). By Judge Hall's reckoning, "there was little caselaw . . . at the time" of the agents' unlawful seizure suggesting "that the Government could not hold onto non-responsive material" indefinitely. *Id.*; *but see Marron v. United States*, 275 U.S. 192, 196 (1927) (Fourth Amendment "prevents the seizure of one thing under a warrant describing another"); *Matias*, 836 F.2d at 747-48 (remedy for seizure of items "outside the scope of a valid warrant" is "suppression and return of those items"); *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982) (retaining non-responsive files for "six months after locating the relevant documents" is "an unreasonable and therefore unconstitutional manner of executing the warrant"). As a result, Judge Hall would have affirmed the judgment.

The government petitioned for panel rehearing, limited to the exclusionary-rule issue. Pet. For Reh'g, Aug. 14, 2014, ECF No. 90. Ten months later, the Court ordered an *en banc* rehearing on both the Fourth Amendment merits and application of the exclusionary rule. Order, June 29, 2015, ECF No. 103.

## II. Factual background.

Mr. Ganias's prosecution for tax evasion in this case was the culmination of an IRS inquiry into his personal finances and tax liability. But long before the IRS opened any investigation into Ganias, it was the U.S. Army's Criminal Investigation Command that seized his personal financial records—along with everything else on his computers—while pursuing an unrelated procurement-fraud investigation against two of Ganias's accounting clients.

### A. The Army's blanket seizure of every file on Ganias's computers.

In August of 2003, Army special agents received a tip indicating that officers and employees of Industrial Property Management, Inc. ("IPM"), a contractor responsible for upkeep at a vacant Army facility in Connecticut, had committed various acts of theft and fraud. JA441-43. According to the tipster, IPM's owner, James McCarthy, had stolen "copper wire," "work benches," and other items from the facility. JA442. McCarthy and his wife were also said to have "certified that the business was woman-owned," when in truth Mrs. McCarthy played no role in the "daily operations." JA444. In addition, McCarthy was allegedly "charg[ing] the military for labor performed" on behalf of another one of his companies, American Boiler. JA443. Evidence of this misfeasance, the Army's sources stated, could be found at IPM and American Boiler's offices. In

addition, a source claimed that IPM's "payroll records, receivables, payables, and government checks" were stored at the offices of "an individual named Steve Gainis [*sic*]," who "perform[ed] accounting work for IPM and American Boiler." JA445; *see* SA8.

Based on this information, Army investigators applied for and obtained a warrant to search the Wallingford, Connecticut office of Ganias's accounting business, Taxes International. SA8; *see* JA431. The warrant, dated November 17, 2003, authorized the "[s]eizure of all books, records, documents, materials, computer hardware[,] . . . software, and computer associated data relating to the business, financial, and accounting operations of [IPM] and American Boiler." JA433; SA8–9. Two days later, Army officials executed the warrant at Ganias's office.

On the day of the warrant's execution, Army computer specialists accompanied investigators to Ganias's office and helped with the collection of electronic files. As Special Agent Michael Conner had explained in his affidavit supporting the warrant application, searching for evidence on computers sometimes requires "specially trained" personnel. JA448–49. Conner also stated that because identification of relevant data "can take weeks or months," on-site review of "electronic storage devices" for files within the scope of a warrant is

often infeasible. JA449. Anticipating this difficulty, the computer specialists who came to Ganias's office "chose to make mirror image" copies of every file on Ganias's three computers. SA9–10.[5]

By completing this "mirror imag[ing]," the Army seized vast quantities of information outside the warrant's scope. The mirror images captured not just IPM and American Boiler data, but also Ganias's own personal financial records, other personal information and files, and the sensitive financial records of dozens of Ganias's other accounting clients, including "Star Pizza," "Ziggy's Restaurant," the "Copper Skillet," and others. SA8–9, JA427–28, JA464–65; *see* 16 Tr. 122–23 (Apr. 1, 2011).

Ganias was present throughout the collection, and he expressed some concern about the scope of the Army's data extraction. JA385, JA428. In response, Special Agent John Latham "assured" Ganias that the Army was only looking for files relating to "American Boiler and IPM." JA428. Everything else, Latham explained, "would be purged once they completed their search" for relevant files. *Id.*

[5] The same protocol was followed at the offices of IPM and American Boiler, where similar warrants were executed the same day.

### B. The government conducts its off-site searches for files within the scope of the warrant.

Army computer specialists then copied Ganias's data (along with data taken from other locations) "onto two sets of 19 DVDs," which were "maintained as evidence." SA11.

In February of 2004 (*2 ½ months post-seizure*), Special Agent Conner "sent one set of the 19 DVDs" to the Army Criminal Investigation Lab. SA11. The lab's task was to search through the imaged files and to identify documents within the scope of the warrant. SA11–12. The DVDs remained in the lab's queue for several months, but by "early June 2004" (*6 ½ months post-seizure*) a "[d]igital evidence examiner . . . was assigned to conduct the review." SA12, SA14.

Meanwhile, Army investigators working the case discovered evidence suggesting that a man named William DeLorenze had received regular payments from IPM, but had failed to report these payments as income. SA12–13. The Army decided to invite the IRS to "join the investigation" in May 2004. *Id.* The Army gave the IRS copies of all the imaged hard drives that it had seized, and the IRS sent its copies to its own in-house "computer investigative specialist[s]" for review and analysis. SA13.

Two sets of computer analysts—one at the Army, one at the IRS—proceeded, in parallel, to search the imaged hard drives for the IPM and American

Boiler files covered by the warrant. In late July 2004 (*8 months post-seizure*), an Army computer specialist completed his review and sent Army investigators "a CD" containing files potentially within the scope of the warrant. SA13–14. Similarly, by early October 2004 (*10 ½ months post-seizure*), an IRS computer specialist had isolated, "bookmark[ed]," and saved to a CD all files "that appeared to her to be within the scope of the warrant." SA15. It took the Army and IRS investigators working on the case a couple of additional months to obtain the TurboTax and QuickBooks software needed to review these files, but by December 2004 (*13 months post-seizure*), they had the programs they needed to examine the extracted IPM and American Boiler files. SA16.

### C. Having already identified the responsive files, the agents nonetheless elect to retain indefinitely every file on Ganias's computers.

Although it had taken 13 months, by December 2004 the government had finished identifying and segregating data potentially responsive to the November 2003 warrant. No one, at that point, was under any misconception about the warrant's scope. The Army investigators on the case knew that they "could only look at IPM or American Boiler" files. JA320–21. The lead IRS investigator, Special Agent Amy Hosney, understood that neither "Steve Ganias'" financial records nor those of his other clients were "listed on" the warrant among the "items

to be seized." JA348. The only thing left to do, then, was to put a stop to the continuing seizure and retention of files that everyone knew were beyond the scope of the November 2003 warrant. *See* JA428.

But that is not what happened. Instead, the government elected to keep all of Ganias's files indefinitely. From the government's perspective, those records had all become "evidence," *see* SA11, and the agents in this case were not in the habit of "deleting evidence off of DVDs stored in [their] evidence room." JA122–24. At some point in the future, after the investigation had closed, the government might choose to "destroy" or "release" the data. JA122–24. Until then, Ganias's files and records would remain in the government's hands, since (as one agent put it) "you never know what data you may need in the future." *See* JA122. Granted, the government had neither warrant nor probable cause to retain any of this data, but no matter, because all of the files were the "government's property" now:

> [Counsel]: And once you do [a] search within a reasonable period of time, you're to return those items that don't pertain to your lawful authority to seize[,] . . . correct?
>
> [Agent Conner]: Yes, sir.
>
> [Counsel]: And you didn't do that in this case, correct?
>
> [Agent Conner]: That's correct. *We viewed the data as the government's property. Not Mr. Ganias's property.*

JA145–46 (emphasis added).

Ganias's private files thus remained with the agents working on the case as the investigation into IPM and American Boiler proceeded. Then, on "July 28, 2005" (*21 months post-seizure*), the IRS decided to take a look at Mr. Ganias's personal income taxes, and its "investigation was expanded to include Ganias." SA17.

**D. The IRS investigates Ganias and obtains the April 2006 warrant.**

Their sights now set on Ganias, IRS agents subpoenaed his bank records, pulled his tax returns, and proceeded to analyze the data. This review revealed a discrepancy between the deposits into Ganias's business accounts and the "gross receipts" reported on his Schedule C. JA465–66.[6] In Special Agent Hosney's "estimat[ion]," Ganias had likely "underreported" his income between 1999 and 2003. JA467. In order to be sure, Hosney wanted to review Ganias's own personal financial records. *Id.* Fortunately for the government, there just happened to be a preserved image of those files, as they existed in November 2003, waiting in the "evidence room."

Hosney had previously reviewed the IPM and American Boiler data in the "mirror image" of "Ganias' QuickBooks program." JA463–64. While doing so,

[6] Schedule C is an attachment to Form 1040 used "to report income or loss from a business." IRS, 2014 Instructions for Schedule C, Profit or Loss from Business, http://www.irs.gov/instructions/i1040sc/ar01.html.

she had seen all of the "names of Ganias' QuickBooks files" listed in the program's directory. JA464. One of those files was entitled "Steve_ga.qbw." JA467. It was "highly likely," in Hosney's view, that this file contained Ganias's personal financial information. *Id.* But Hosney also knew that the records of "Steve Ganias and Taxes International were not" included in the "items to be seized" listed in the November 2003 warrant. JA336, JA347–48. That had not stopped the government from seizing the file, of course, and Hosney herself had no compunction about continuing to retain the file indefinitely. But, recognizing that neither she nor anyone else had any warrant to seize and retain Ganias's private financial information, Hosney decided to seek Ganias's consent to review the retained images of his personal QuickBooks records. *See* JA347–48.

The government thus asked "Ganias and his attorney" to come in for a "proffer session" in February 2006 (*27 months post-seizure*). SA17. There, Ganias was informed that the government still had his personal records, and it wanted his consent to search them. SA17, JA428. When the government did not hear back from Ganias on this request, Hosney elected to apply for a warrant to search the preserved images of Ganias's financial records. SA17. On April 24,

2006 (*29 months post-seizure*), the warrant issued, and Hosney proceeded to review the files. SA17.[7]

### E. The government uses Ganias's over-seized financial records to secure a tax-evasion conviction.

The overbroad seizure and indefinite retention of Ganias's QuickBooks files paid dividends for the government at trial. Those files became the centerpiece of the government's claim that Ganias willfully underpaid his income taxes (by approximately $35,000 per year) in 2002 and 2003. In the records, "payments" received from Ganias's customers had often been recorded under "owner's contributions," which is an equity or non-income account. *E.g.*, 7 Tr. 43 (March 18, 2011, morning session). As the government's QuickBooks expert explained, because "owner's contribution[s]" do not "post[]" as income, the "Profit & Loss Statement" produced by Ganias's QuickBooks program understated his actual profit. *E.g.*, 6 Tr. 148 (Mar. 17, 2001). Based on these entries, the government

[7] At no time, before or after the April 2006 warrant, did the government ever seek a warrant to search or seize Ganias's actual personal financial records, as they existed in 2006. Nor would such a warrant have yielded the same information as the search of the imaged records. Two days after the execution of the November 2003 warrant, Ganias reviewed his personal QuickBooks file and exercised one of his most basic "rights and benefits of property ownership"—his right to edit, alter, "or even destroy" his private papers. *See Almeida v. Holder*, 588 F.3d 778, 788 (2d Cir. 2009). Ganias went back through his personal financial files and corrected over 90 errors in earlier journal entries. 15 Tr. 86–87 (Mar. 31, 2011, afternoon session).

claimed that Ganias—an accountant and former IRS agent—was simply too knowledgeable to have made a good-faith error. *E.g.*, 16 Tr. 117 (Apr. 1, 2011) (closing argument) ("They were recorded as owner's contribution. . . . That's pretty significant evidence of deliberate intent to evade tax."); *id.* at 176 ("[H]e is an accountant. . . . He is a person who has used QuickBooks for a long time.").

There was, in truth, much more to the story than that. Although Ganias was a longtime accountant, he had no detailed knowledge about the finer points of QuickBooks. Further, as Ganias's own QuickBooks expert explained, while the program can be a "great tool" for someone who "know[s] how to use it," it can be "dangerous" when used by someone with a flawed understanding of its principles. 14 Tr. 13–14 (Mar. 30, 2011). Ganias had just such a flawed understanding. He had no idea that, in order for QuickBooks to automatically register a customer payment as income, there must be an "outstanding statement charge" in the system "to which the payment c[an] apply." 14 Tr. 145–46 (Mar. 30, 2011). Numerous entries that Ganias attempted to record as customer payments were, for want of a statement charge, defaulted to other accounts or mistakenly recorded by Ganias as owner's contributions. *Id.* This led to a substantial understatement of Ganias's income in the QuickBooks "profit and loss statement," and Ganias unwittingly perpetuated that error on his tax returns. *Id.* at 150. That said, and notwithstanding

this innocent explanation, the government was in the end successful in its efforts to use Ganias's over-seized and indefinitely retained financial records as key *mens rea* evidence at trial.[8]

## SUMMARY OF ARGUMENT

The seizure and two-and-a-half year retention of Ganias's personal financial records outside the November 2003 warrant's scope violated the Fourth Amendment and requires suppression.

*First*, the Fourth Amendment barred government agents from turning what should have been a limited search for particular information about two of Ganias's accounting clients into a general and indefinite seizure of *every* document, *every* file, and *every* record stored on Ganias's computers. Among the reams of information seized by these officials outside the scope of their warrant were Ganias's own personal financial records, which (years later) the government would use in this case to prosecute and convict Ganias on two counts of tax evasion. Had the year been 1765 or 1965, courts would have quickly rejected such a blanket seizure and retention of "all the papers" in Ganias's office. *Entick v. Carrington*,

[8] *See* 16 Tr. 114, 130 (Apr. 1, 2011) ("describing the "great deal" of evidence "about Mr. Ganias recording income into a non-income account, into owner's contribution"); *id.* at 182 ("[H]e did it himself. There was nobody else entering or making entries into the QuickBooks records.").

19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765); *Stanford v. Texas*, 379 U.S. 476 (1965). Yet the court below approved the government's indefinite retention of all of Ganias's electronic documents as consistent with the Constitution.

If the promise of the Fourth Amendment is to endure in an increasingly paperless and digital era, that decision cannot stand. It may be true that, when law-enforcement officers execute a warrant for particular files on a computer, those files will sometimes be "so intermingled" with other documents "that they cannot feasibly be sorted on site." *E.g.*, *United States v. Tamura*, 694 F.2d 591, 595–96 (9th Cir. 1982). If so, the Fourth Amendment demands, at the very least, that the officers expeditiously complete their off-site search and then promptly return (or destroy) files outside the warrant's scope. *Id.* at 596–97 (six-month "delay in returning" documents outside warrant's scope was "an unreasonable and therefore unconstitutional manner of executing the warrant"). Here, the Government's blanket seizure and two-and-a-half year retention of every document on Ganias's computers clearly exceeded these minimum demands of reasonableness under the Fourth Amendment.

*Second*, the government's unconstitutional seizure of Ganias's files demands suppression of the unconstitutionally seized evidence. In order to compel respect for the Fourth Amendment, federal courts have long applied the exclusionary rule

to deter culpable police conduct. Here, the unconstitutional seizure of Ganias's personal financial records is just the sort of culpable police conduct for which suppression will yield appreciable deterrence that outweighs the loss of probative evidence.

As an initial matter, the government cannot avoid suppression based on any "reliance on binding appellate precedent." *Davis v. United States*, 131 S. Ct. 2419, 2434 (2011). Nothing in the decisions of this Court or the Supreme Court authorized the government's seizure and indefinite retention of all of Ganias's electronic papers. Instead, the government wants this Court to expand *Davis* to reach cases where the law may be unsettled or indeterminate. The Court should reject this invitation. Such a broad and open-ended good-faith exception would effectively swallow the exclusionary rule and would put the Fourth Amendment in grave peril, "grant[ing] the right" in name "but in reality withhold[ing] its . . . enjoyment." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

Nor can the government avoid suppression based on a claim of good-faith reliance on the April 2006 warrant. "[T]he issuance of th[at] warrant was itself premised on material obtained in a prior [seizure] that [this Court's] holding makes clear was illegal." *United States v. Reilly*, 76 F.3d 1271, 1280 (2d Cir. 1996). For the April 2006 to provide an escape from suppression, then, the agents who

procured it would have needed to, at the very least, give the issuing magistrate judge full and complete disclosure about the over-seizure and indefinite retention of Ganias's files. *See id.* at 1280–82. Here, the government failed to satisfy this standard. The affidavit in support of the April 2006 warrant omitted the key facts essential for any informed assessment of the seizure of Ganias's records. It never mentioned that Ganias's personal financial records were seized outside the scope of the November 2003 warrant, nor did it indicate that the government had been retaining those files for 16 months *after* the responsive files were located. *See* JA457–72. Without that information, the issuing magistrate judge could not possibly have made an informed decision about the legality of the government's earlier seizure. The April 2006 warrant does nothing to purge the taint of the prior misconduct, and it provides no grounds for avoiding suppression.

## ARGUMENT

### I. The seizure and two-and-a-half year retention of every file on Ganias's computers violated the Fourth Amendment.

#### A. Standard of review.

Whether a seizure violates the Fourth Amendment and warrants suppression is a legal issue subject to de novo review. *United States v. Voustianiouk*, 685 F.3d 206, 210 (2d Cir. 2012). The District Court's findings of fact in a suppression

order are reviewed for "clear error," considering "the evidence in the light most favorable to the government." *Id.* (internal quotation omitted)..

### B. The Fourth Amendment prohibits indiscriminate seizure and indefinite retention of electronic files outside a warrant's scope.

#### 1. The Fourth Amendment forbids general seizures.

The drafters and ratifiers of the Bill of Rights believed that a man's papers were "his dearest property." *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765).[9] And they knew, too well, the threat to liberty posed by "messengers of the King" sent to "seize . . . books and papers under the unbridled authority of a general warrant." *Stanford v. Texas*, 379 U.S. 476, 486 (1965); *see generally* William J. Stuntz, *The Substantive Origins of Criminal Procedure,* 105 Yale L.J. 393, 399–411 (1995) (discussing history of general warrants).[10] That is why the Fourth Amendment demands that all warrants recite a particular description of the items authorized to be seized. *United States v. George*, 975 F.2d

[9] As the panel opinion observed, "*Entick* was 'undoubtedly familiar to every American statesman at the time the Constitution was adopted, and [was] considered to be the true and ultimate expression of constitutional law with regard to search and seizure.'" *Ganias*, 755 F.3d at 134 n.9 (quoting *United States v. Jones*, 132 S. Ct. 945, 949 (2012)).

[10] *See also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311–12 (1978) (noting that "[t]he particular offensiveness" of general warrants "was acutely felt by the merchants and businessmen whose premises and products were inspected" under them).

72, 75 (2d Cir. 1992). It is also why officials must "confine[]" themselves, when they execute a warrant, "strictly within the bounds set" by that document. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394 n.7 (1971). In this way, the Fourth Amendment's particularity requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another." *Marron v. United States*, 275 U.S. 192, 196 (1927).

To be sure, officers searching for particular papers described in a warrant may need to take a "cursor[y]" look at many documents to "determine whether they are . . . among th[e] papers" that may be seized. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). But, having done that, the officers may seize what the warrant tells them they may seize, and nothing more. *Id.* (to the extent that seized "papers were not within the scope of the warrants[,] . . . the State was correct in returning them voluntarily and the trial judge was correct in suppressing others"); *United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988) (seizure of items "outside the scope of a valid warrant" violates Fourth Amendment).

All of this law is well-settled and beyond dispute. In the days before mass storage of electronic "papers," no government official would have dared to claim a general right to engage in "wholesale seizure for later detailed examination of records not described in a warrant." *Tamura*, 694 F.2d at 595; *see United States v.*

*Abrams*, 615 F.2d 541, 543 (1st Cir. 1980) (indiscriminate seizure of documents "in order that a detailed examination could be made later" was "exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent"). There were "comparatively rare instances," courts recognized, when documents within a warrant's scope might be "so intermingled" with other documents that the records could not "feasibly be sorted on site." *Tamura*, 694 F.2d at 595; *see also United States v. $92,422.75*, 307 F.3d 137, 152–54 (3d Cir. 2002) (Alito, J.) (discussing procedures for identifying responsive Chinese-language documents where "no officer able to speak Chinese was" present during warrant's execution). But those "rare" cases were just that—"rare." In those cases, moreover, courts recognized the gravity of the Fourth Amendment interests at stake, and they demanded that officers both immediately complete their off-site search *and promptly return* the documents outside the warrant's scope. *Tamura*, 694 F.2d. at 596–97 (six-month "delay in returning" documents outside warrant's scope, after having "locat[ed] the relevant documents," was "an unreasonable and therefore unconstitutional manner of executing the warrant"); *United States v. Santarelli*, 778 F.2d 609, 615–16 (11th Cir. 1985) ("agents acted reasonably when they removed the documents to another

location for subsequent examination, . . . . *so long as any items found not to be relevant were promptly returned*" (emphasis added)).[11]

### 2. The government's approach to computer warrants—seize first, search later.

Today, the widespread use of computers and other electronic storage devices has put pressure on these fundamental principles. Even the most "inexpensive electronic storage media" can now "store the equivalent of millions of pages of information." *United States v. Comprehensive Drug Testing, Inc.* ("*CDT*"), 621 F.3d 1162, 1175 (9th Cir. 2010) (en banc). According to the government, this makes the "on-site search of a computer" for responsive files "infeasible *in almost every case*."[12] Federal courts, for their part, have generally agreed, and have

[11] *See also CDT*, 621 F.3d at 1169 (noting that *Tamura* "disapproved the wholesale seizure of the documents and particularly the government's failure to return the materials that were not the object of the search once they had been segregated"); *United States v. Hargus*, 128 F.3d 1358, 1363 (10th Cir. 1997) (taking dim view of "the wholesale seizure of file cabinets and miscellaneous papers and property not specified in the search warrant," but denying suppression because, unlike this case, "[n]o item not specified in the warrant was admitted against Mr. Hargus at trial"); *Doane v. United States*, No. 08 Mag. 0017, 2009 U.S. Dist. LEXIS 61908, at *29 (S.D.N.Y. June 1, 2009) ("even where practical considerations permit the Government to seize items that are beyond the scope of the warrant," non-responsive items must be returned "once the fruits of the search are segregated into responsive and non-responsive groups").

[12] Executive Office for U.S. Attorneys, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 77 (2009) ("DOJ

approved the blanket seizure and "off-site review of . . . electronic files" to identify items within a warrant's scope. *Ganias*, 755 F.3d at 135–36 (collecting cases).[13]

### 3. At a minimum, the Fourth Amendment requires prompt completion of an off-site review and return of files outside the warrant's scope.

For better or worse, then, the era of "over-seiz[ure]" and off-site review of electronic data is now upon us. *CDT*, 621 F.3d at 1177. But make no mistake: It is no small matter, under the Fourth Amendment, for a federal agent executing a warrant to indiscriminately seize every file and every paper stored on an electronic device. Computers, tablets, and smartphones now provide "a digital record of nearly every aspect of their [users'] lives—from the mundane to the intimate." *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). Indeed, these devices often contain *more* private information than would be revealed in even "the most exhaustive search of a house." *Id.* at 2491. It scarcely needs to be said that seizure

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Manual") (emphasis added), http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf.

[13] The current version of Federal Rule of Criminal Procedure 41, as amended in 2009, also "contemplate[s] off-site review of computer hard drives in certain circumstances." *Ganias*, 755 F.3d at 135; *see* Fed. R. Crim. P. 41 2009 advisory Committee's note (amended rule "acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant").

of the entire contents of a house for later off-site review would be patently unconstitutional. *See Kremen v. United States*, 353 U.S. 346, 347 (1957) (per curiam) ("The seizure of the entire contents of the house and its removal some two hundred miles away to the F.B.I. offices for the purpose of examination are beyond the sanction of any of our cases."). Permitting that sort of conduct in the execution of a computer warrant presents an equally grave danger to fundamental Fourth Amendment liberties.

The Supreme Court's landmark decision in *Stanford v. Texas*, 379 U.S. 476 (1965), illustrates just how grave this danger is. When the police came to John Stanford's house, it took five hours of "ransack[ing]" for them to gather up and haul away all of his books and papers in violation of the Fourth Amendment. *Id.* at 477–80. If Stanford had lived in the present day, the police could have just as well imaged his electronic storage devices instead of rummaging through his file cabinets and bookshelves. There they would have likely found the "files of his personal correspondence" (his e-mail), his business records (in QuickBooks, perhaps), and his "household bills and receipts" (in an Excel spreadsheet). *See id.* at 480. Stanford's copies of works by "Karl Marx," "Jean Paul Sartre," "Fidel Castro," and "Pope John XXIII" would have all been stored on his Kindle or his iPad. *Id.* at 479–80. Today, when the government seizes all of the data off of a

person's computers and electronic storage devices, it effectively seizes all the papers from that person's filing cabinet, library, diary, photo album, financial ledgers, and more. *See Riley*, 134 S. Ct. at 2489–90.

It may be that, as a pragmatic concession to the needs of law enforcement, these blanket seizures must now be tolerated, at least for the purpose of a brief off-site review. There comes a point, though, when enough is enough. Courts must enforce "limits . . . upon th[e] power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Careful review under the Fourth Amendment of "the manner in which" warrants for electronic information are "executed" is both necessary and appropriate. *See Dalia v. United States*, 441 U.S. 238, 258 (1979).

One basic limit, which the government recognizes, is that the police must "complete [their off-site] review . . . within a 'reasonable' period of time." *United States v. Metter,* 860 F. Supp. 2d 205, 215 (E.D.N.Y. 2012); *see* DOJ Manual, *supra* note 12, at 92 ("The Fourth Amendment does require that forensic analysis of a computer be conducted within a reasonable time."). Courts have regularly approved delays of weeks or a few months.[14] Even delays of several months have

[14] *United States v. Hernandez*, 183 F. Supp. 2d 468, 481 (D.P.R. 2004) (six weeks); *United States v. Grimmett*, No. 04-40005, 2004 U.S. Dist. LEXIS 26988,

been deemed "lengthy," but still within the bounds of constitutional reasonableness.[15] Beyond that, however, a 15-month delay before reviewing and sorting "imaged evidence" has been deemed a "flagrant[]" violation of the Fourth Amendment. *Metter*, 860 F. Supp. 2d at 215 (without reasonably prompt completion of off-site review, "the Fourth Amendment would lose all force and meaning in the digital era and citizens will have no recourse as to the unlawful seizure of information that falls outside the scope of a search warrant"). In addition, some magistrate judges have adopted the practice of putting express mandates in warrants regarding the time for completing off-site searches.[16]

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at *15 (D. Kan. Aug. 10, 2004) ("concluded within a few weeks of the execution of the warrant").

[15] *See United States v. Gorrell*, 360 F. Supp. 2d 48, 55 n.5 (D.D.C. 2004) ("lengthy"); *United States v. Burns*, No. 07-556, 2008 U.S. Dist. LEXIS 35312, at *27 (N.D. Ill. Apr. 29, 2008) ("certainly lengthy").

[16] *E.g.*, *In re Search Warrant*, 193 Vt. 51 (2012) (affirming use of *ex ante* restrictions); *In re Search of Info. Associated with the Facebook Account Identified by the Username Aaron.Alexis*, 21 F. Supp. 3d 1, 6 (D.D.C. 2013) ("All records and content that the government determines are NOT within the scope of the investigation . . . must either be returned to Facebook, Inc., or, if copies (physical or electronic), destroyed."); *In re Search of the Premises Known as 1406 N. 2nd Avenue*, 2006 U.S. Dist. LEXIS 99596, at *20 (W.D. Mich. March 17, 2006) ("The Government will be permitted to search the computer seized . . . and is hereby ordered to conclude that search within 90 days of the date of this opinion and order.").

The more fundamental requirement, though, is that, whenever the government does finish its review, it must at that point part ways with non-responsive information that "it ha[d] no probable cause to collect" in the first place. *E.g.*, *CDT*, 621 F.3d at 1177. Numerous decisions have recognized this basic, common-sense limit. *Id.* at 1169, 1171; *Tamura*, 694 F.2d at 596–97 (retention of "documents not described in the warrant . . . . for at least six months after locating the relevant documents" appeared to be "an unreasonable and therefore unconstitutional manner of executing the warrant"); *supra*, note 16 (citing additional cases involving off-site review of paper files). Without this minimum safeguard, the practice of over-seizing electronic records for later off-site review would lead to general and indefinite retention of all electronic papers—every file that computer users possess, "every piece of mail they have received for the past several months, every picture they have taken, [and] every book or article they have read." *Riley*, 134 S. Ct. at 2489; *see CDT*, 621 F.3d at 1176. Then, the government could simply "store such records and efficiently mine them for information years into the future." *See United States v. Jones*, 132 S. Ct. 945, 955–56 (2012) (Sotomayor, J., concurring). The Fourth Amendment has never countenanced that sort of general and indefinite seizure.

There is nothing novel or onerous about these minimum demands of reasonableness in the execution of warrants for electronic information. They simply reflect a constitutional baseline that prevents the government from completing a permanent "seizure of one thing under a warrant describing another." *Stanford*, 379 U.S. at 485–86 (quoting *Marron*, 275 U.S. at 196). Additional safeguards and protocols, such as limitations on the plain-view doctrine and "heightened" particularity requirements, may also be appropriate. *See generally United States v. Galpin*, 720 F.3d 436, 447–48 (2d Cir. 2013). But this case does not require consideration of those bolder and more controversial rules. The Court need only adopt a simple, basic standard: The Fourth Amendment does not permit officials executing a warrant for the seizure of *particular* data on a computer to seize and indefinitely retain *every file* on that computer. *Stanford*, 379 U.S. at 486–87; *CDT*, 621 F.3d at 1176–77; *see also In re App. for a Search Warrant*, No. 05-mj-3113, slip op. at 14 (M.D. Fla. Jan. 30, 2006) ("Permitting the United States to retain information that is beyond the scope of the search warrant under the hope that, someday, it may have probable cause to support another search of the mirror images for additional information would contravene the Fourth Amendment prohibition against general searches and seizures.") (copy of opinion on file at Gov't Supp. Appx. 124–39, ECF No. 44)

### C. The mass seizure and indefinite retention of Ganias's files violated his Fourth Amendment rights.

In this case, the wholesale seizure and indefinite retention of every file on Ganias's computers was unreasonable under the Fourth Amendment.

The Army's November 2003 warrant was a narrow instrument that "limit[ed]" the files "to be seized" to "data . . . relating to the business, financial and accounting operations of" two of Ganias's clients: "IPM and [American Boiler]." SA27. What was actually seized, however, were "mirror image" copies of every file on all three of Ganias's computers. It is uncontroverted that the Army investigators copied Ganias's "personal" records and his private financial documents. JA428. They also copied the sensitive financial records of all of Ganias's other clients, including dozens of "pizza places, restaurants, diners, donut shops," and individuals. JA464–65. All of these private papers—plus everything else on the computers—were imaged, stored on an external hard drive, and carried away. SA9–10. Had Ganias been reading an eBook by "Marx," "Sartre," or the "Pope," *see Stanford*, 379 U.S. at 479–80, the Army would have undoubtedly taken those too. *See* JA449 (Aff. of Agent Conner) ("seizing information from computers often requires agents to seize most or all electronic storage devices (along with related peripherals) to be searched later").

The government says that, in a digital world, this mass and indiscriminate seizure of Ganias's private information was necessary, just as it will be necessary "in almost every" other case. DOJ Manual, *supra* note 12, at 77; JA194. Maybe that is right, although the government has never explained how, in this case, it took any more than a few minutes to find the clearly labeled accounting records within the scope of the warrant. *See* JA464 (Aff. of Agent Hosney) ("American Boiler's QuickBooks file is denoted 'american.qbw'; IPM's QuickBooks file is identified as 'industri.qbw'."). But even assuming the initial blanket seizure was necessary, the Fourth Amendment at least demanded that the government promptly complete its offsite review and then relinquish custody of the reams of papers and records outside the scope of its warrant. *See Andresen*, 427 U.S. at 482 n.11; *Tamura*, 694 F.2d at 596–97.

The government did neither of these things here. Instead, it spent just under 11 months having two separate federal computer laboratories identify and segregate files within the scope of the warrant. SA14 (Army segregation completed "July 23, 2004"); SA15 (IRS segregation of files "that appeared [to the lab analyst] to be within the scope of the warrant" completed "beginning of October 2004"). The agents then spent another two months procuring the commercially available software they needed to review the files. SA15–16.

At this point, the IRS and Army agents working on this case had stepped to the edge—if they had not already gone over it—of "blatant" disregard for Ganias's Fourth Amendment rights. *See Metter*, 860 F. Supp. 2d at 215 (15-month delay before reviewing 65 "computer hard drives" and "a snapshot of all" the defendant's email activity held to be blatantly unconstitutional). Over a year out from the seizure of all of Ganias's electronic papers, the agents were well aware that the only "items to be seized" listed on the warrant were the files of IPM and American Boiler, JA347–48, and those files had (at long last) been identified and segregated, *see* SA16. Yet no one was doing anything to return the vast quantities of records outside the warrant's scope. *Contra Andresen*, 427 U.S. at 482 n.11 (where officers seized "papers . . . not within the scope of the warrants[,] . . . the State was correct in returning them voluntarily and the trial judge was correct in suppressing others").

This was quite enough to demonstrate the agents' "disregard" for both the scope of their warrant and Ganias's constitutional rights. *See Metter*, 860 F. Supp. 2d at 215. But the behavior of these agents got much worse from there. Because at this stage—about 13 months post-seizure—the government's conduct shifted from a dilatory failure to promptly complete an off-site search, *see Metter*, 860 F. Supp. 2d at 215, to a naked grab for indefinite access to all non-responsive files

*after* the responsive records had been identified, *see Tamura*, 694 F.2d at 596. The government's agents had searched Ganias's computers and identified responsive American Boiler and IPM records, *see* SA16, but the files within the scope of their warrant were not enough. Like the King's messengers, these agents wanted to keep "all the papers . . . without exception." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1064, 95 Eng. Rep. 807 (K. B. 1765). As far as the agents were concerned, all of the imaged files were the "*government's property*" now. JA146–47 (Agent Conner) (emphasis added). Thus, all of the files—Ganias's own personal and financial documents, plus the sensitive records of "Star Pizza," "Ziggy's Restaurant," the "Copper Skillet," and all of Ganias's other clients—were staying right where they were, in the "evidence room," to be "protect[ed]" for "future" use. JA117, 122–24; *see* 16 Tr. 122–23 (Apr. 1, 2011).

The government undoubtedly "hope[d] that, someday, it [might] have probable cause to support another search of the mirror images for additional information." *In re App. for a Search Warrant*, slip. op. at 14; *see* JA122 (Agent Conner: "[Y]ou never know what data you may need in the future."). From the government's point of view, it would be nice and convenient for law enforcement to be able to seize and retain papers on hope of future probable cause, and to maintain a vast digital "evidence room" filled with over-seized private records,

frozen in time and available to be searched as needed. *See* SA24 (opinion below approving mass and indefinite retention of documents outside warrant's scope in light of "justifiabl[e] concern[s] about preservation of evidence"). But the Fourth Amendment does not reserve to the government any power to retain private papers—which it had neither warrant nor probable cause to collect in the first place—on the hope that it might have grounds to search them in the future.

The government nonetheless says that, even after it had finished segregating the responsive documents, the agents' continued indefinite retention of non-responsive records was reasonable under the Fourth Amendment. *Contra Tamura*, 694 F.2d at 596–97 (retention of "documents not described in the warrant" for "six months after locating the relevant documents" unconstitutional). The implications of that claim are staggering.

Here, the Army indiscriminately over-seized every filed on Ganias's computers (millions of files) while executing a warrant for evidence of military procurement fraud by two of Ganias's clients (a handful of files). *See* JA430–34. The government then retained Ganias's private records without warrant or probable cause for 29 months—16 of which took place *after* the government had already identified the records within the legitimate reach of its warrant—until the IRS obtained a second warrant to search the retained images for evidence of tax

evasion by Ganias. JA457–59. If that was a reasonable manner of executing the November 2003 warrant, then why stop there? Perhaps the Commerce Department wants to "mine [the hard drives] for information." *See Jones*, 132 S. Ct. at 955–56 (Sotomayor, J., concurring). Maybe in a couple of years the Labor Department or Immigration & Customs Enforcement will want to look at "Star Pizza's" documents. The many agencies of the government could likely think of innumerable uses for the millions of pages of documents taken off of Ganias's computers. Better yet, the government could combine Ganias's files with the over-seized computer records from "almost every" other case, *see* DOJ Manual, *supra* note 12, at 77, and upload all of them to one big "evidence room," filled with "thousands" of people's indefinitely retained documents. *See* Paul Ohm, *The Fourth Amendment Right to Delete*, 119 Harv. L. Rev. F. 10 (2005).[17]

This frightening power would likely go a long way towards satisfying the government's desires for maximum "preservation of evidence." SA24. But as long as the Fourth Amendment stands, federal agents still need a warrant and

[17] *Cf. In re App. for a Search Warrant*, slip op. at 14–15 (disapproving the "cavalier attitude" reflected in the "United States' representation in [its] motion . . . that 'for the last several years it has been the practice of [certain United States Attorneys' Offices] to copy the hard drives of computers taken during searches and to keep these images throughout the investigation or prosecution of the case.'" (second alteration in the original)).

probable cause before they may take private papers, convert them into "government property," and consign them indefinitely to the evidence room. The mass seizure and indefinite retention of files outside the November 2003 warrant's scope "clearly violated Ganias's Fourth Amendment rights." *Ganias*, 755 F.3d at 137–38.

### D. The asserted justifications for the government's over-seizure and indefinite retention do nothing to render the seizure constitutional.

Neither the government's arguments in defense of its general and indefinite seizure nor the District Court's analysis below provides any grounds for upholding the constitutionality of the seizure in this case.

#### 1. The seizure of mirror-image copies of Ganias's files, rather than the physical hardware, is beside the point.

The District Court's decision below rested in part on its conclusion that the government's seizure of mirror-image copies was "less intrusive" than "holding the computers themselves." SA24. That distinction, however, is one "without a difference." *Metter*, 860 F. Supp. 2d at 215 (rejecting governments' claim that return of "the original electronic documents and equipment" and retention of "only the imaged electronic documents" had any effect on the Fourth Amendment analysis); *see generally* Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700 (2010).

As the panel recognized, a Fourth Amendment seizure occurs whenever the government meaningfully interferes with an "individual's possessory interests in . . . property." *Soldal v. Cook Cnty.*, 506 U.S. 56, 63 (1992) (internal quotation omitted); *accord Ganias*, 755 F.3d at 133. The government's indefinite retention of mirror-image copies of every file on Ganias's personal computers clearly satisfies this standard. *Id.* at 137. Among the most basic "strands in an owner's bundle of property rights" are the "power to exclude," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), and the right to edit, alter, or "even destroy" one's property. *Almeida v. Holder*, 588 F.3d 778, 788 (2d Cir. 2009); *see generally* Ohm, *supra*, at 14 ("without the . . . ability to change, delete, or destroy, virtually nothing will be left of the rights of dominion and control"). By seizing and retaining mirror-image copies of every file on Ganias's computers, the government denied Ganias these basic rights to control access to his most private and sensitive records, and to edit or modify those records as he deemed appropriate. *See* Kerr, *supra*, at 710–11 ("[O]btaining the copy [of a person's electronic data] serves the traditional function regulated by the seizure power: it freezes whatever information is copied, preserving it for future access by government investigators."). That is a "meaningful interference with Ganias's

possessory rights," and it is no less "a seizure within the meaning of the Fourth Amendment" than the taking of a physical hard drive. *Ganias*, 755 F.3d at 137.

Even if the distinction were a significant one, however, it would not justify the government's conduct in this case. In the court below, the government relied heavily on the fact that Ganias lost "but one day of use of his computers." *E.g.*, JA400 (government's argument below). Perhaps so, but that is hardly the point. The government seized every file from Ganias's computers and decided that all of those private records had become "government[] property," *see* JA146, to be retained indefinitely in the evidence room. If giving up the hardware for a few months is what Ganias had to do to get the government's hands off the vast quantities of records outside the scope of its warrant, Ganias would have taken that trade. Loss of hardware for a period would have been much "less intrusive," *see* SA24, than blanket retention of all of Ganias's private papers for 11 years, 8 months, 10 days (and counting).

**2. The magistrate judge's omission of an express deadline for return or destruction of non-responsive files does not insulate the government's execution of the November 2003 warrant from judicial review.**

In its opposition brief before the original panel, the government also claimed that, unless the issuing magistrate judge includes an express deadline for return of non-responsive files, this Court "cannot impose a time limit on" the execution of a

computer warrant "after the fact." Gov. Panel Br. 30–31 ("Ganias cannot impose a time limit on the government after the fact, when the magistrate judge did not do so while approving the warrant."). This has it exactly backwards.

The "manner in which a warrant is executed" has always been "subject to later judicial review as to its reasonableness." *Dalia v. United States*, 441 U.S. 238, 258 (1979); *see, e.g., United States v. Ramirez*, 523 U.S. 65, 71 (1998). By its very nature, Fourth Amendment analysis turns heavily on the particular "factual circumstances" in a given case, and an informed assessment must take place "after [the] circumstances unfold, not before." *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc). The decision of a magistrate judge to include (or not to include) an *ex ante* restriction in a warrant is thus no substitute for later judicial review. This Court must reach its own decision on whether indefinite retention of files outside a warrant's scope satisfies the Fourth Amendment. *See United States v. Christie*, 717 F.3d 1156, 1167 (10th Cir. 2013).

Indeed, the need for this Court's review is particularly urgent in light of the extremely narrow role that magistrate judges play in this area. To be sure, a number of magistrate judges have in recent years begun including express directives in computer warrants regarding the time for completing off-site searches and for returning files not covered by warrants. *See supra*, note 16 (citing cases).

This nascent trend, however, is both controversial and uneven. Some magistrate judges have hesitated to impose these restrictions for fear of "hamstringing a valid criminal investigation by binding the government to a strict search protocol *ex ante*." *In re Search of Black iPhone 4*, 27 F. Supp. 3d 74, 79 (D.D.C. 2014). Given this variation in practice, it would make little sense for Article III courts to abdicate their traditional office of reviewing the "manner in which a warrant is executed." *See Dalia*, 441 U.S. at 258.

In fact, the government's own internal guidance to its prosecutors directly contradicts its current litigating position before this Court. The government has long instructed its "prosecutors" to "oppose" attempts by magistrate judges to set *ex ante* "time limits on law enforcement's examination of seized evidence." DOJ Manual, *supra* note 12, at 93–94. The government's position has been that the magistrate judge should simply issue the warrant and then "permit the parties to litigate the constitutional issues afterwards." DOJ Manual, *supra* note 12, at 94. That is exactly what Ganias is seeking to do here. The time to litigate the "constitutional issues" raised by the government's indefinite retention of computer records is now.

### 3. The government's desire to "maintain . . . evidentiary integrity" does not justify retention of data outside a warrant's scope.

Before the panel, the government also claimed that blanket retention of non-responsive files was necessary in order to authenticate responsive documents using the "hash value[s]" in the "mirror image." *See* Gov't Panel Br. 34–35. This too does nothing to justify indefinite retention of files beyond a warrant's scope. A "hash value" is simply a "numerical identifier" assigned to an electronic file. *See generally* Salgado, *Fourth Amendment Search and the Power of the Hash*, 119 Harv. L. Rev. F. 38, 38–40 (2005). It may well be, as the government pointed out to the panel, that returning or deleting non-responsive files—which the government never had any warrant to seize in the first place—could alter some "hash value[s]" in the data. Gov't Panel Br. 34. That, however, is no basis for throwing out the Fourth Amendment.

As courts have recognized, "*one method* of authenticating electronic evidence under Rule 901(b)(4) is the use of 'hash values' or 'hash marks' when making documents." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546–47 (D. Md. 2007) (emphasis added); *see* Gov. Panel Br. 34. In no way is this the only method, however. Under Rule 901, "[t]he bar for authentication of evidence is not particularly high." *United States v. Vayner*, 769 F.3d 125, 131 (2d Cir. 2014). For

example, instead of retaining millions of private papers beyond a warrant's scope, the government could offer "the testimony of a witness with knowledge that a matter is what it is claimed to be." *Id.*; *accord Lorraine*, 241 F.R.D. at 545 ("Courts considering the admissibility of electronic evidence frequently have acknowledged that it may be authenticated by a witness with personal knowledge").

Indeed, that is how the government has long gone about authenticating paper records seized from filing cabinets or other containers. *See Tamura*, 694 F.2d at 597 ("The Government did not need the master volumes to authenticate the documents introduced at trial," because "[t]he testimony of the agents who removed the documents from their master volumes would have sufficed."). Here too, the government could offer the testimony of, among other people, the analyst who imaged the hard drives, the person who downloaded them onto DVDs, and the IRS computer specialist who prepared a CD of files "that appeared to her to be within the scope of the warrant." SA15. That testimony, or something like it, would readily establish a chain of custody, and would satisfy any authentication concern the government might have. Most important of all, it would have the added benefit of preserving 225 years of constitutional history rejecting general and indefinite seizures of private papers outside a warrant's scope.

Indeed, not even the government actually buys the argument it is selling to this Court. When FBI computer personnel search imaged computer files, they have no trouble engaging in a "culling process" that "eliminate[s] files . . . unlikely to contain material within the warrants' scope." *United States v. Khanani*, 502 F.3d 1281, 1290–91 (11th Cir. 2007) ("The culling process winnowed down the files seized from approximately three million to approximately 270,000."); *see In re Search of Apple iPhone*, 31 F. Supp. 3d 159, 163–64 (D.D.C. 2014) (from the affidavit of Special Agent David Goldkopf: "'Any information discovered on the Device . . .which falls outside the scope of this warrant will be returned, or, if copied, destroyed . . . .'"). The government's current litigating position on "evidentiary integrity" is contradicted by the actual practice of its special agents.

In addition, a number of courts have also required return or deletion of imaged electronic files not covered by warrants. *E.g., United States v. Metter*, 860 F. Supp. 2d at 215; *see also CDT*, 621 F.3d at 1180 (Kozinski, J., concurring) ("The government must destroy or, if the recipient may lawfully possess it, return non-responsive data."). In several of these decisions, courts have considered, and specifically rejected, claims that the government needed to retain "data outside the scope of the warrant for identification, authentication or chain-of-custody purposes." *United States v. Collins*, No. 11-cr-00471, 2012 U.S. Dist. LEXIS

35980, *23–*24 (N.D. Cal. Mar. 16, 2012); *In re App. for a Search Warrant*, slip op. at 13 (rejecting claim that "the United States must retain the mirror images in order to authenticate data seized therefrom.").

In short, "evidentiary integrity" provides no basis for indefinite retention of files outside the scope of the November 2003 warrant. Moreover, even if the Court "assumed it were necessary to maintain a complete copy of the hard drive solely to authenticate evidence responsive to the original warrant, that does not provide a basis for using the mirror image" for investigative purposes unconnected to authentication. *Ganias*, 755 F.3d at 139.

**4. Rule 41(g) does not estop a criminal defendant from vindicating his Fourth Amendment rights through a motion to suppress.**

Finally, the District Court was also wrong in suggesting that Ganias's omission of a pre-indictment motion "for return of property under [Federal Rule of Criminal Procedure] 41(g)" bars a post-indictment suppression motion. SA23–24.

As Judge Chin's panel opinion correctly noted, neither the District Court nor the government has identified any "authority for concluding that a Rule 41(g) motion is a prerequisite to a motion to suppress." *Ganias*, 755 F.3d at 139. In the absence of such authority, it would be grossly unfair to spring a new waiver rule on

Mr. Ganias, which he could not have reasonably anticipated prior to the District Court's decision.

In any event, the panel also correctly concluded that "a Rule 41(g) motion would have served" little purpose in this case. *Id.* Had Mr. Ganias sought return of his over-seized records, the government would have made the exact same argument it makes now—that it may retain "non-responsive files in its possession" until kingdom come, because they cannot "feasibly [be] returned or purged." *Id.* There is, then, no basis for concluding that Ganias forfeited his Fourth Amendment rights under a heretofore unannounced waiver rule.

## II. The unconstitutional seizure of Ganias's electronic files warrants suppression.

In addition to being unconstitutional, the seizure and indefinite retention of Ganias's personal financial records also warrants application of the exclusionary rule.

### A. The exclusionary rule is and remains essential to deterrence of Fourth Amendment violations.

For more than 100 years, federal courts have applied the exclusionary rule as a means of "safeguard[ing] Fourth Amendment rights." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Suppression "is not a personal constitutional right." *Stone v. Powell*, 428 U.S. 465, 486 (1976). But it has proven itself to be "the only

effectively available way" "to compel respect for the constitutional guaranty." *Elkins v. United States*, 364 U.S. 206, 217 (1960). Without it, the Fourth Amendment would "grant the right" in name, "but in reality [would] withhold its . . . enjoyment." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). The sacred liberties the amendment protects would soon be "of no value," and might just "as well be stricken from the Constitution." *Weeks v. United States*, 232 U.S. 383, 393 (1914).

It is therefore crucial for courts to order suppression in cases where the deterrence benefits of exclusion outweigh the costs. *Herring v. United States*, 555 U.S. 135, 141–42 (2009). Under a line of cases that originated with *United States v. Leon*, 468 U.S. 897 (1984), this "cost-benefit analysis" has been calibrated to focus on the culpability of the law-enforcement conduct at issue. *Davis*, 131 S. Ct. at 2427. When officers act in "good-faith reliance" on binding law in effect at the time of the violation, there is typically no culpable police conduct to deter. *United States v. Aguiar*, 737 F.3d 251, 259 (2d Cir. 2013). Thus, suppression does not apply to an illegal seizure carried out in objectively reasonable reliance on a warrant, *see Leon*, 468 U.S. at 908, or on a statute, *see Illinois v. Krull*, 480 U.S. 340, 349–50 (1987), or on then-binding appellate precedent "authoriz[ing] a particular police practice," *see Davis*, 131 S. Ct. at 2429. In every case, "[t]he burden is on the government to demonstrate the objective reasonableness of the

officers' good faith reliance." *United States v. Voustianiouk*, 685 F.3d 206, 215 (2d Cir. 2012) (internal quotation omitted).

Outside of these recognized good-faith exceptions, suppression should be imposed whenever police conduct is culpable enough to foster appreciable deterrence that outweighs the cost of foregoing probative evidence. *Herring*, 555 U.S. at 144; *see United States v. Berschansky*, 788 F.3d 102 (2d Cir. 2015).

### B. Seizure and indefinite retention of Mr. Ganias's files outside the November 2003 warrant's scope demands suppression.

Here, the unconstitutional seizure of Ganias's personal financial records is just the sort of culpable police conduct that needs deterring. The government's belated efforts to fit the case within an established good-faith exception to the exclusionary rule, *see* Rehearing Petition 7–11, should be rejected.

#### 1. The agents' unconstitutional seizure cannot be excused by reliance on then-existing precedent.

As an initial matter, the government attempts to meet its burden of "demonstrat[ing] the objective reasonableness" of the agents' conduct, *see Voustianiouk*, 685 F.3d at 215, by relying on "*Davis*'s 'binding appellate precedent' rule." Rehearing Petition 10. According to the government, this rule should prevent suppression because "image copying of computers was still in its infancy" at the time of the unconstitutional seizure "and this Court had not

announced any specific rules." *Id.* at 10; *see also Ganias*, 755 F.3d at 142 (Hall, J., concurring in part and dissenting in part). The argument fails for two independent reasons.

**a. Under *Davis*, binding precedent must *authorize* the police practice at issue.**

The government misapprehends the meaning of "*Davis*'s 'binding appellate precedent' rule." Rehearing Petition 10. The rule requires a precedent that is in fact *binding*—the agents who engage in the illegal conduct must act in "objectively reasonable reliance on binding appellate precedent," *see Davis*, 131 S. Ct. at 2434, meaning a "precedent of this Circuit" or "the Supreme Court" that *authorizes* the challenged conduct. *See Aguiar*, 737 F.3d at 262. The *Davis* exception "is not a license for law enforcement to forge ahead with new investigative methods in the face of uncertainty as to their constitutionality." *United States v. Sparks*, 711 F.3d 58, 67–68 (1st Cir. 2013); *see Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring in the judgment) ("This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.").

Nor should this Court accept any invitation by the government to expand *Davis*'s scope. The Court has already held that *Davis*'s good-faith exception is limited to binding precedent. *See Aguiar*, 737 F.3d at 262 (decisions of "sister

circuits . . . do not control our analysis under *Davis*" but may inform interpretation of binding Supreme Court precedent). Moreover, to adopt a new good-faith rule based on the *absence* of governing law, *see* Rehearing Petition 10, would signal a sharp break from the Supreme Court's previous decisions in its "*Leon* line of cases." *See Davis*, 131 S. Ct. at 2427. In those cases, "[n]eutral authorization for law enforcement's actions has been the hallmark of the good faith exception[.]" *See United States v. Katzin*, 769 F.3d 163, 188 (3d Cir. 2014) (en banc) (Greenaway, J., dissenting). In *Leon* itself, the police conducted a search in "objectively reasonable reliance" on a warrant later held invalid. *Leon,* 468 U.S. at 922. That holding was later extended to reliance on subsequently invalidated statutes, *see Krull*, 480 U.S. at 349–50, warrant records in government databases, *see Herring*, 555 U.S. at 145; *Arizona v. Evans*, 514 U.S. 1, 14–15 (1995), and binding judicial precedent, *see Davis*, 131 S. Ct. at 2423–24. The common denominator in these decisions is that officers relied on independent determinations and conduct by other actors. The government would now have this Court expand the good-faith exception to cover an officer's own *individual* judgment call on an unsettled Fourth Amendment issue. *See* Rehearing Petition 10. That, however, is not the sort of reasonable reliance that the *Leon* line of cases has sought to foster.

Perhaps even more important, a new good-faith exception based on the existence of *unsettled* law could well swallow the exclusionary rule entirely. Fourth Amendment law is not an area where bright lines predominate. The distinctions are many, and courts must frequently "slosh [their] way through the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007). A great many questions, then, can fairly be described as unsettled or debatable. To adopt a new "good faith" exception that applies whenever the law is unsettled would drastically reduce the scope and efficacy of the exclusionary rule. In all but rare cases, there would be "but one alternative to the rule of exclusion. That is no sanction at all." *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

An uncertainty-based good-faith exception would also create pernicious incentives for "officer[s] engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). In close or debatable cases, "law enforcement officials would have little incentive to err on the side of constitutional behavior." *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring in the judgment) (quoting *United States v. Johnson*, 457 U.S. 537, 561 (1982)). "Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law

in the area remained unsettled," no sanction would apply. *Id.* The Court should decline to adopt this unwarranted expansion of *Davis*, and it should reject the government's claim of good-faith reliance on the *absence* of precedent.

**b. Even under an expanded good-faith exception, suppression would remain appropriate.**

Even if this Court were inclined to expand on *Davis*, any such expansion would be of no help to the government here. For example, the most aggressive extension of *Davis* to date—the *en banc* Third Circuit's decision in *United States v. Katzin*—holds that "a panoply of non-binding authority establishing a 'constitutional norm'" may warrant application of a good-faith exception, even in the absence of a "precedential opinion in the Third Circuit." *Katzin*, 769 F.3d at 185–86. That decision prompted two vigorous dissents joined by a total of five judges. *Id.* at 187–97. However, even if the majority opinion in *Katzin* became the law of this circuit—indeed, even if this Court went further and adopted the government's view that the *absence* of law establishes good faith, *see* Rehearing Petition 10—suppression would still be in order here.

In this case, the government's seizure and indefinite retention was not just unauthorized by binding precedent; it actually "violated precedent at the time of the search." *Ganias*, 755 F.3d at 140. As discussed above, the November 2003 warrant expressly "limit[ed] the . . . data authorized to be seized to" files that

related to the "operations" of IPM and American Boiler. SA27. The agents who executed this warrant fully understood its limited scope. *See* JA348 (acknowledging that Ganias's personal financial records were not within the scope of the warrant). Yet, notwithstanding their knowledge and understanding of the warrant's terms, the agents elected to indefinitely retain *all* of the files from Ganias's computers—including his non-responsive personal financial records—*after* they had sorted and identified the responsive files. The agents' behavior in this case is thus a classic example of conduct that the Fourth Amendment is supposed to render "impossible": the seizure and indefinite retention of "one thing under a warrant describing another." *Stanford*, 379 U.S. at 476 (internal quotation omitted).

By the time of the seizure here, the Supreme Court had long recognized that this sort of over-seizure warrants suppression of non-responsive records. *Andresen*, 427 U.S. at 482 n.11 (as to seized "papers [that] were not within the scope of the warrants[,] . . . the State was correct in returning them voluntarily and the trial judge was correct in suppressing others"). This Court's own cases had also stated—over and over again—that "when items outside the scope of a valid warrant are seized, the normal remedy is suppression and return of those items." *United States v. Matia*s, 836 F.2d 744, 747–48 (2d Cir. 1988); *see George*, 975

F.2d at 79 ("only those items seized beyond the warrant's scope must be suppressed"); *United States v. Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978) ("the remedy with respect to any items exceeding the scope of the warrant" is "suppression of those items").[18] In addition, out-of-circuit appellate precedent dealing specifically with off-site review of intermingled files held that retaining non-responsive records for "six months after locating the relevant documents" is "an unreasonable and therefore unconstitutional manner of executing [a] warrant." *Tamura*, 694 F.2d at 597; *cf. Santarelli*, 778 F.2d at 615–16.

All of this law was on the books at the time of the agents' seizure and indefinite retention of Ganias's files. No case had ever suggested (nor has any since) that the invention of the personal computer overturned the Fourth Amendment and gave federal agents license to ignore the terms of warrants while indefinitely retaining files outside their scope. For the government to now pass

[18] This same line of cases also provides for a more "drastic remedy" of "wholesale suppression"—extending to both records within and outside the scope of the warrant—when the officers executing the warrant "effect a widespread seizure of items . . . not within the [warrant's] scope," and "flagrantly disregard the terms of [the] warrant." *United States v. Liu*, 239 F.3d 138, 140 (2d Cir. 2000) (citation omitted). In this case, the flagrancy of the government's blanket and indefinite retention fully supports this more extensive remedy. But given that Mr. Ganias's personal financial records were clearly outside the November 2003 warrant's scope, the Court can simply reverse on that basis, and need not even address whether wholesale suppression would also be appropriate.

this conduct off as "'conscientious police work,'" *see* Rehearing Petition 11, is insulting to conscientious police officers.

Given the high culpability of the agents' conduct, the "deterrent value of exclusion is strong" in this case, and it "outweigh[s] the resulting" loss of evidence. *See Davis*, 131 S. Ct. at 2427. The government, however, claims that the "costs of suppression" are actually unusually high here, because the "government has invested several years" in a lengthy investigation and prosecution. Rehearing Petition 14. True enough, the investigation was lengthy. But what the government neglects to mention is *why* it went on so long—because the government elected to retain non-responsive "data on Ganias's computers" for two-and-half years "on the off-chance the information would become relevant to a subsequent criminal investigation." *Ganias*, 755 F.3d at 137. Deterring the government from engaging in that sort of long-term, extra-warrant seizure is a *benefit* of suppression, not a cost. The Court should hold that suppression is needed here.

**2. The April 2006 warrant does nothing to cure the government's unconstitutional seizure.**

By the time the government obtained its second warrant—29 months post-seizure and 16 months after identification of the IPM and American Boiler documents—the violation of Ganias's Fourth Amendment rights was long since

complete. *See Andresen*, 427 U.S. at 482 n.11; *Tamura*, 694 F.2d at 596–97 (retention of over-seized records "six months after locating the relevant documents" unconstitutional). Nonetheless, in an argument raised for the first time in its request for panel rehearing, the government now claims that reliance on the April 2006 warrant should prevent suppression of evidence unconstitutionally seized and retained years earlier. *See* Rehearing Petition 8–10. The Court should reject this claim as well.[19]

**a. To claim good faith, the government had to, at a minimum, make a full and complete disclosure of the details of its unconstitutional seizure to the issuing magistrate judge.**

The entire premise of *Leon*'s good-faith exception is that "the exclusionary rule is designed to deter police misconduct," not "to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916. Nothing about that holding suggests that the police, *after* they engage in misconduct, can then "launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate." *See*

[19] This Court does not consider arguments raised for the first time in a petition for rehearing. *Anderson v. Branen*, 27 F.3d 29, 30 (2d Cir. 1994). The issue is nonetheless discussed here, however, because the Court's order on rehearing states that "[b]riefing is not restricted to the issues and arguments presented to the original panel." Order, June 29, 2015, ECF No. 102.

*generally United States v. Reilly*, 76 F.3d 1271, 1282 (2d Cir. 1996), quoting *State v. Hicks*, 707 P.2d 331, 333 (Ariz. Ct. App. 1985).

Recognizing as much, a number of state Supreme Courts and federal Courts of Appeals have held that "a subsequent warrant" cannot "validate[] an earlier illegal" search or seizure under the good-faith exception. *E.g., Hicks*, 707 P.2d at 333.[20] As these courts point out, the "magistrate's role when presented with evidence to support a search warrant is to weigh [it] to determine whether it gives rise to probable cause." *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987). The magistrate is "simply not in a position," in an *ex parte* proceeding, to home in on or "evaluate the legality" of a predicate search or seizure. *Id.* The issuance of the warrant is thus not an "endorse[ment] [of] past activity"; it is an "authoriz[ation] [of] future activity." *Dewitt*, 910 P.2d at 15 (quoting Bradley, *The 'Good Faith Exception' Cases: Reasonable Exercises in Futility*, 60 Ind. L.J. 287, 302 (1985)). Where an earlier violation has occurred, the problem "is police misconduct, the target of the exclusionary rule as recognized in *Leon*." *United*

[20] *See also United States v. McGough*, 412 F.3d 1232, 1239–40 (11th Cir. 2005); *United States v. Scales*, 903 F.2d 765, 767–68 (10th Cir. 1990); *United States v. Wanless*, 882 F.2d 1459, 1466–67 (9th Cir. 1989); *State v. De Witt*, 910 P.2d 9, 15 (Ariz. 1996); *People v. Machupa*, 872 P.2d 114, 123–24 (Cal. 1994); *State v. Johnson*, 716 P.2d 1288, 1301 (Idaho 1986); *State v. Carter*, 630 N.E.2d 355, 364 (Ohio 1994).

*States v. O'Neal*, 17 F.3d 239, 243 n.6 (8th Cir. 1994). The rationale for the good-faith exception simply does not apply in this situation.

This Court, however, has in the past taken a different approach. In a tersely worded opinion handed down just a few months after *Leon,* the Court initially applied the good-faith exception to a warrant obtained based on a predicate "canine sniff" later held unlawful. *United States v. Thomas*, 757 F.2d 1359, 1368 (2d Cir. 1985). More than a decade later, in *United States v. Reilly*, this Court observed that in the intervening years other "courts ha[d] criticized *Thomas*." 76 F.3d at 1282–83. The Court noted that it was "neither the time nor the place to reconsider" that decision. *Id.* at 1283. Instead, the *Reilly* Court distinguished *Thomas* and refined the scope of its holding.

As *Reilly* explained,"[g]ood faith is not a magic lamp for police officers to rub whenever they find themselves in trouble." *Id.* at 1280. If, however, a subsequent warrant can ever appropriately purge the taint of an earlier violation, the agent must, at the very least, "provide all potentially adverse information" regarding the earlier illegality "to the issuing judge." *Id.* Absent that sort of full disclosure, "the data presented to the issuing judge" is insufficient to launder the

misconduct, and "good faith [is] precluded" by the failure to provide all "the details of [the] dubious pre-warrant conduct." *Id.* at 1281–82.[21]

In *Reilly*, for example, officers had engaged in an earlier unconstitutional search of the curtilage surrounding the defendant's cottage, but in a later warrant application the officers did "not provide [the] issuing judge" with necessary details about the parcel or a "full account of what they did." *Id.* at 1280. The lack of complete disclosure meant that the issuing judge "could not possibly [have] decide[d] whether their conduct" had been unconstitutional, so the "officers [were] themselves ultimately responsible" for the illegal conduct. *Id.* at 1280–81. That made "*Leon* inapplicable," and it made suppression appropriate. *Id.*

**b. The government failed to fully disclose the details of its earlier unconstitutional seizure.**

Precisely the same is true in this case. If the government wanted to use the April 2006 warrant to "launder [its] prior unconstitutional" seizure and retention of Ganias's records, then at the very least the government had to "provide all

[21] A few courts have reached conclusions similar to that of *Thomas*, and they too generally require that the warrant application "fully disclose to a neutral and detached magistrate the circumstances surrounding" the predicate search or seizure, such that there is nothing else the officer "could have or should have done . . . to be sure his search would be legal." *United States v. McClain*, 444 F.3d 556, 559 (6th Cir. 2005), *as modified on rehearing by*, 444 F.3d 537 (6th Cir. 2006); *see also United States v. Massi*, 761 F.3d 512 (5th Cir. 2014).

potentially adverse information" about that earlier seizure to the magistrate judge, along with a "full account of what" the agents had done. *Id.* 1280–82. This the government failed to do.

In particular, Agent Hosney's affidavit in support of the April 2006 warrant omitted the key facts needed for *any* informed assessment of the earlier seizure's legality. The affidavit failed to mention that Ganias's personal financial records were not among the items authorized to be seized under the November 2003 warrant. *See* JA457–72. It also neglected to mention that the government had been retaining the non-responsive records for a full 16 months *after* the files within the November 2003 warrant's scope had been identified. *Id.*

Agent Hosney was, of course, fully aware of these facts. As she testified at the suppression hearing, she knew the "items to be seized" listed on the November 2003 warrant were the files of IPM and American Boiler, JA347–48, not Mr. Ganias's private financial records. For whatever reason, however, she did not volunteer this information in the April 2006 warrant application. JA457–72.

Instead, the affidavit informed the magistrate judge in general terms that "federal law enforcement officers executed a search warrant on November 19, 2003" at Ganias's accounting office. JA463. Also noted was that "[a]mong the records seized . . . were the images of three computers located at Ganias' office."

*Id.* The affidavit then stated that, "[p]ursuant to the 2003 search warrant, only the files for American Boiler and IPM *could be viewed*," *see* JA464 (emphasis added), thereby implying that the warrant may have included some sort of use restriction. The magistrate judge was never told that the only items subject to *seizure* under the terms of the November 2003 warrant were the files of American Boiler and IPM. *See* JA433. No copy of the November 2003 warrant or description of its terms was included in the application. Nor was the magistrate judge informed that, after identifying the files actually covered by the warrant, the government had decided to keep "all the [electronic] papers . . . without exception." *See Entick v. Carrington*, 19 How. St. Tr. 1029, 1064, 95 Eng. Rep. 807 (K. B. 1765).

Without this crucial information, the magistrate judge could not possibly have made any informed judgment about the propriety of the government's conduct. After all, it was the terms of the November 2003 warrant that had set the scope of the government's legitimate seizing authority. *See Andresen*, 427 U.S. at 482 n.11. The continued retention of files outside that legitimate seizing authority, after having already identified the responsive records, is what made the government's conduct "unreasonable and therefore unconstitutional." *Tamura*, 694 F.2d at 597.

By failing to "provide all potentially adverse information" and a "full account" of its overbroad seizure, the government left the magistrate judge unable to evaluate the legality of its prior conduct. *See Reilly*, 76 F.3d at 1280–82. As a result, the April 2006 warrant provides no basis for applying a good-faith exception, and it provides no grounds for avoiding suppression of Ganias's over-seized and indefinitely retained personal financial records.

## CONCLUSION

The Court should reverse the order denying Ganias's motion to suppress, vacate his conviction, and remand the case for further proceedings.

Respectfully submitted,

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/s/ John W. Cerreta
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I HEREBY CERTIFY that on this date a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e–mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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