IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0613

STATE OF MONTANA,

Plaintiff and Appellant,

v.

COLE LARSON LEVINE,

Defendant and Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Shane A. Vannatta, Presiding

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STATEMENT OF THE ISSUES

Whether the district court incorrectly interpreted Mont. Code Ann. § 46-5-605(3)(a)—the long-arm jurisdiction statute for electronic communication search warrants—in deeming a search warrant issued to Verizon Wireless, a company registered to conduct business in Montana, invalid for lack of jurisdiction.

Alternatively, whether the district court erroneously failed to apply the "good faith" exception to the warrant requirement to prevent suppression of the historical phone data subject to the warrant.

STATEMENT OF THE CASE

On August 18, 2022, Cole Larson Levine assaulted M.H. and attempted to rape her in a downtown Missoula alley. When M.H. cried out for help, she alerted a friend who was walking on the nearby sidewalk during the assault. The friend chased Levine away. While Levine had taken M.H.'s cell phone in the preceding struggle, he dropped his own cell phone in the alley before fleeing. Police recovered Levine's phone. (*See* Doc. 2.)

On September 9, 2022, Levine was arrested. (Doc. 51, Report 2022-31491.) The State charged him with attempted sexual intercourse without consent,

attempted kidnapping, aggravated assault, and criminal destruction of or tampering with a communication device. (Doc. 4.)

On September 14, 2022, the State applied for, and was granted, a search warrant pertaining to the data physically stored on Levine's phone. (Doc. 28, Ex. 2.) The phone's data was forensically extracted. (Doc. 28, thumb drive, Exs. 3-4, Cellebrite Extraction Data and Extraction Report.)

On October 3, 2022, pursuant to the district court's finding of probable cause, the State issued a search warrant to the custodian of records at Verizon Wireless in Bedminster, New Jersey, seeking historical records—such as GPS, location tracking, and cloud data—from May 20, 2022, through August 20, 2022, for Levine's phone. (Doc. 28, Ex. 5.) This October 3, 2022 warrant is the only search warrant at issue for this appeal.[1]

Levine filed a motion to suppress and a brief in support. (Doc. 28.) In his brief, Levine did not raise any claim related to the statutory authority for the district court to issue the October 3, 2022 warrant to Verizon Wireless. Instead, Levine raised the following issues: (1) the responding officer executed a warrantless search when he called 911 to verify Levine's phone number and read the text messages visible on Levine's home screen from escorts services; (2) the

[1]*See* Appellant's App. A. at 24 ("The Court has only suppressed the evidence seized pursuant to the October 3, 2022 search warrant[.]")

State's warrant application for searching Levine's phone was unconstitutionally broad; and (3) the extraction of data from the phone and the search of the Verizon records conducted pursuant to the search warrant were based on unconstitutionally obtained information without probable cause. (Doc. 28.) The State responded, addressing all of Levine's raised claims. (Doc. 37.)

On March 14, 2023, for the first time in a reply brief, Levine proffered a new claim that "the Search Warrant attached as Exhibit 5 to the Motion is an illegal extraterritorial warrant and void *ab initio*." (Doc. 47 at 3.) The State wasn't aware that Levine had raised a new issue "for the first time in their reply brief" until defense counsel emailed the State. (Doc. 48.) Thus, on March 27, 2023, the same day the State alerted the district court of that fact, the State promptly filed a sur-reply addressing the new claim. (Docs. 48, 49.)

A couple weeks later, defense counsel filed a "Notice of Supplemental Authority." This "notice" did not alert the court of any new or intervening authority, but rather attached an opinion from two years prior—federal Judge Susan Watters' opinion in *United States v. Webb*, No. CR 19-121-BLG-SPW-1, 2021 U.S. Dist. LEXIS 1009 (D. Mont. Jan. 4, 2021)—for the first time. (Doc. 53.) The notice also contained substantial argument raising the "good faith exception" as discussed in *Webb* but arguing that Judge Watters' application of the

good faith exception "cannot be reconciled with" this Court's precedent that warrants issued without statutory authority are "void *ab initio*." (*Id*.)

On September 29, 2023, without conducting an evidentiary hearing, the district court denied suppression of the other claims raised in Levine's opening brief, but granted Levine's suppression claim raised in his reply brief, agreeing with Levine that the October 3, 2022 search warrant was "invalid for lack of jurisdiction and therefore void *ab initio*." (Doc. 71 at 21, attached as State's App. A.)

The substantive effect of the district court's suppression order was to exclude accurate historical data—including GPS location data detailing Levine's cell phone's movements through downtown Missoula. (*See* Doc. 28, Ex. 5; Doc. 41 at 4-5.) The court's suppression order also excluded data in possession of Verizon Wireless pertaining to: (1) customer/subscriber information; (2) device purchase information; (3) email addresses associated with the account; (4) cell detail records; (5) cell site information; (6) cell site locations; (7) location information including current location, distance to the tower, timing, and triangulation information; (8) text messages; and (9) cloud data. (Doc. 28, Ex. 5, available at Appellant's App. B.)

Pursuant to Mont. Code Ann. § 46-20-103(1)(e), the State of Montana timely appealed the district court's opinion and order invalidating the October 3,

2022 search warrant to Verizon Wireless and suppressing the evidence collected pursuant to that warrant. (10/18/23 Notice of Appeal.)

STATEMENT OF THE FACTS

I. The offense

On August 14, 2022, Defendant Levine, previously from New Mexico, moved to Missoula to begin law school at the University of Montana. Levine moved into a house with several first-year law school classmates he had met online. (Doc. 25, Ex. 4 at 1.) His mother Elana Levine secured a room at the Comfort Inn in downtown Missoula from August 14 through August 19, with a plan to help him settle in before law school. (Doc. 2 at 3.) At this time, Levine was 23 years old. Levine is 5'8", 160 pounds, and Caucasian, with short brown or black hair, and minimal facial hair.[2]

On August 17, 2022, Levine and his roommate D.S. were watching television at around 9 or 10 p.m. (Doc. 25, Ex. 4 at 1.) Levine invited D.S. to go out to the bars. D.S. declined because law school orientation was scheduled to start early the next morning. Levine left the house, and D.S. did not see him the

[2](Doc. 25, Ex. 2 at 2 supplemental police report describing Levine's identifying characteristics; *see* Doc. 47, Ex. 2, N.M. police descriptive information; *see also* Doc. 51, Report 2022-31941 at 29, surveillance photo of Levine's full profile at Comfort Inn Hotel lobby on August 18, 2022.)

rest of that night. (*Id.)* Levine was wearing a white t-shirt, dark pants, and white tennis shoes. (*See* Doc. 28, flash drive: Ex. 4 at 147, IMG_2036 and Ex. 4 at 149, IMG_2042, "selfies" recovered from the night of August 17, 2022.)

That night—sometime around 2 a.m. on August 18, 2022—M.H. was bar hopping in downtown Missoula, celebrating a friend's birthday. (Doc. 2 at 5; Doc. 51, Report 2022-31941 at 24-25.) She walked alone to Al and Vic's bar to meet her boyfriend. (Doc. 2 at 5.) En route, at an alley intersection near the Garlington Lohn and Robinson building at 350 Ryman Street, M.H. was approached by two males. (*Id.)* One male was someone M.H. might have seen earlier that night, possibly at the Golden Rose or Badlander Bar. (*Id.)* M.H. noted that the male was a Caucasian male in his twenties to thirties. She estimated he was 5'9" to 5'10", with an average or thin but fit athletic build, short dark hair, no facial hair, and wearing a light-colored t-shirt. (*Id.)* The second male was Caucasian, 6' or 6'1" tall, with short dirty blond hair, and a broader build. (*Id.*)[3]

The shorter male—later identified from recovery of his cell phone as Cole Levine—abruptly began to engage M.H. in conversation that "caught her off guard[.]" (*Id.*) Next, Levine forced himself onto M.H. and tried to kiss her, while

[3]The record does not indicate that the blond male actively participated in the offense. It also does not indicate whether he witnessed the assault or fled after Levine encountered M.H. Police efforts to identify him were inconclusive. (*See, e.g.*, Doc. 51, Report 2022-31491 at 47.)

M.H. tried to pull away. (*Id*.) M.H. asked Levine what he was doing and informed him that she had a boyfriend. (*Id*.) Levine told M.H. she was "naughty" and she would "like it." (*Id*.)

Levine dragged M.H. from the sidewalk into the alley, physically holding her wrists and neck and directing her where to go. (*Id*. at 5-6.) M.H. protested, explaining that she was not interested in Levine and did not want to go with him. (*Id*. at 6.) Levine responded that M.H. was "nasty" and "liked it rough." (*Id*.) M.H. slapped Levine in the face. (*Id*.) This did not deter Levine but rather "seemed to excite him." (*Id*.) M.H. again tried to pull away, but Levine pushed her against the wall of the building. (*Id*.) Despite her protestations, Levine continually tried to persuade M.H. to go with him. (*Id*.) When she declined, Levine "became rougher with her." (*Id*.)

Next, Levine pushed M.H. into a seated position and began telling M.H. what he intended to do with his penis. (*Id*.) He removed his erect penis from his clothing. (*Id*.) Then he put his penis back into his clothing and lifted M.H. into a standing position, moving her further into the alley and explaining she needed to go with him so they could have "rough" and "dominant" sex. (*Id*.) M.H. again said no. (*Id*.) Levine put M.H. on the ground on her back while he squeezed her neck with his hands. (*Id*.) Levine said "C'mon, lets go." (*Id*.) Again, M.H. said no. (*Id*.)

Levine tightened his grip on M.H.'s throat and she began having difficulty breathing and seeing "spots" in her vision. (*Id*.) Levine reached into the slit on the side of M.H.'s skirt and touched the outside of her vagina over her underwear. (*Id*. at 7.) He tried to pull her underwear to the side but he did not penetrate her vagina. (*Id*.) He touched her vagina with his right hand while his left hand held on to her throat. (*Id*.) He held M.H.'s throat for around ten seconds, compressing her airway and causing her to panic because she could not breathe or scream. (*Id*.) He maintained his hold on M.H.'s throat. (*Id*.) M.H. was fearful she would be seriously hurt or lose consciousness. (*Id*. at 6-7.) Thus, M.H. decided to pretend to go along with Levine, in order to stop the strangulation and have a chance to escape. (*Id*. at 7.)

With a more compliant M.H., Levine allowed M.H. back up onto her feet. She promptly ran eastbound in the alley, while attempting to call 911 for help. (*Id*.) Levine chased her down the alley and tripped her from behind, causing her to fall on her left knee. (*Id*.) He grabbed M.H.'s cell phone. (*Id*.) In the process of grabbing her cell phone, Levine's own cell phone fell to the ground. (*Id*.) M.H. began panicking and said, "Please don't do this" and "Let me go" and "Give me my phone back" and "I don't want to do this." (*Id*.)

Fortunately, while struggling with Levine, M.H. saw two of her male friends, K.B. and J.F., walking on the sidewalk. (*Id*. at 7, 2.) M.H. screamed,

"Please help me!" (*Id*. at 2, 7.) K.B. looked into the alley and saw a male, later identified as Levine, "having his arm around" M.H. and trying to "grab her." (*Id*. at 2.) K.B. yelled at Levine, breaking his attention. (*Id*.) Levine pushed M.H. onto the ground and fled with M.H's phone. (*Id*.) Levine left his own phone in the alley where he attacked M.H. (*Id*.)

K.B. ran after Levine south toward Higgins Avenue. (*Id*.) He could not keep up, and Levine escaped toward the Higgins bridge. (Doc. 25, Ex. 2, police supplemental report.) K.B. would later continue to look for M.H.'s attacker but his efforts would be unsuccessful.[4]

At 2:12 a.m., Missoula Police officers responded to the scene and spoke with M.H., K.B., and J.F. (Doc. 2 at 2.) K.B. had gotten "a good look" at Levine and described him as "5'8" to 5'9" tall, with a stocky build, possibly between his 20's to early 30's, wearing a white t-shirt, baseball cap, black jeans and white sneakers." (*Id*. at 2-3.) J.F. described the assailant similarly and concurred with K.B.'s description of the event. (*Id*. at 3.)

[4]After K.B. lost track of Levine, he later saw another person at 2:47 a.m., who appeared to match the description of the suspect, at the Roam Student Living Center. (*See* Doc. 51, Report 2022-31941 at 51.) Upon the initial contact and subsequent investigation, police determined the person was J.C., who provided an alibi for around the time of the offense—corroborated by multiple witnesses and surveillance video—that he was in his own bedroom at the time of the offense. (*Id*.)

K.B. provided the phone to Officer Harris. (*Id*. at 3.) Officer Harris pressed the emergency button on the phone to call 911. Dispatch informed Officer Harris the phone number was 915-471-4506. Cross-referencing the cell number, police identified the phone as belonging to Cole Levine from New Mexico. (*Id*. at 3; Doc. 25, Ex. 2 at 2.)

Visible on the phone's startup screen were text messages received at approximately 2:20 a.m. The first message was from (432) 245-0092 and said, "Do you need my services and where are you located?" The second message was from (320) 559-6059 and said, "How're you doing and where are you located?" Police determined that the two texts were from escort services. (Doc. 2 at 3.) The (432) number was related to us.escortsaffair.com and associated advertisements were posted on August 17, 2022, by escort "TS Mara." (Doc. 25, Ex. 3.) The (320) number was from the website "skipthegames.com, posted by escort "Amber" in Missoula. (*Id*.) Authorities would later determine that Levine had called both escorts earlier that night before he received their responsive texts.[5]

The next morning, Levine's roommate D.S. noticed that Levine's bedroom door was closed and Levine had failed to attend law school orientation. (Doc. 25,

[5]Cell phone logs confirmed Levine called the (432) number on August 17, 2022, at 11:25 p.m., which was answered. Levine also called (320) number a few minutes later, which was not answered. (*See* Doc. 28, thumb drive, Ex. 4, cell log records; Doc. 40 at 8.)

Ex. 4 at 1.) D.S. caught up with Levine later that night. (*Id*.) Levine "stated that a female tried to steal his cell phone" the prior night, but he claimed the incident occurred at a bar. (*Id*.) Levine said he had tried to "wrestle it" back from her while he was "on top of her" trying to retrieve the phone, that it "looked really bad[,]" and that "the police have his cell phone." (*Id*.)

In a later conversation, Levine told D.S. that he was "interest[ed] in going to a country that does not have an extradition treaty with the United States." (*Id*.) On September 7, 2022, D.S. also overheard Levine talking with his father on the phone. (*Id*.) D.S. heard Levine say, "Did mom tell you about my plan?" (*Id*.) On September 8, 2022, D.S. overheard Levine on the phone inquiring "about getting an expedited passport." (*Id*.)

II. The investigation

After quickly identifying Levine through his dropped cell phone, police learned that Levine's mother Elana was registered at the Comfort Inn. (Doc. 2 at 4.) At around noon on August 18, Levine, dressed in a full suit, entered the lobby and requested to see his mom. (*Id*.; *see also* Doc. 51, Report 2022-31941 at 29, surveillance photo.) At 12:40 p.m., officers saw Elana enter the hotel. (*Id*.) She confirmed she was in Missoula to move Levine into law school. (*Id*.) After confirming that Levine was not at the hotel, Detective Baker told Elana that he

wanted to speak with Levine about a cell phone he had lost. (*Id*.) Elana was aware of the lost cell phone. She explained that Levine had stated "he lost it while out with some friends and that they had purchased him a new phone earlier in the day." (*Id*.)

On August 25, 2022, M.H. provided Detective Baker a detailed account of the offense. (*See* Doc. 40 at 3.) Meanwhile, Officer Hoffman confirmed Levine's personal identifying characteristics, which matched the witness descriptions. (Doc. 25, Ex. 2 at 2.)

On September 9, 2022, Detective Baker received an anonymous tip that Levine was considering fleeing the country. (Doc. 41 at 2.) He thereafter met with Levine's roommate, D.S., who provided more information. (*Id*.) Next, he contacted federal authorities, requesting Levine be flagged to monitor any attempts to obtain a passport and leave the United States. (Doc. 51, Report 2022-31491 at 46.)

On September 15, 2022, Detective Baker found surveillance footage from the Missoula Housing Authority at 149 West Broadway, depicting "a male wearing a white shirt" who was "running westbound in the alley" near a parking structure. (Doc. 51, Report 2022-31941 at 44-45, *see also* associated photos.) The footage, occurring at 2:20 a.m., depicted a male wearing "a light colored shirt, darker pants and white shoes[.]" (*Id*. at 44-45, 57.) From Levine's cell phone, authorities also

recovered some selfies taken by Levine the night of the offense, showing that he had been wearing a white t-shirt, dark pants, and white tennis shoes. (*See* flash drive: Ex. 4 at 147, IMG_2036; Ex. 4 at 149, IMG_2042.)

Pursuant to the search warrants pertaining to Levine's phone and data, police recovered evidence suggesting Levine's "involvement in the crime and certainly his presence at the scene around the time of the crime." (Doc. 41 at 4-5.)

III. Pretrial proceedings

In the omnibus memorandum, Levine affirmed that he would be relying on the defense of "mistaken identity," which was approved by the court. (Doc. 14; Doc. 15 at 4.)

IV. Levine's flights to California and Canada

Apart from Levine's flight from the scene of his assault, and as alluded to by his roommate D.S., Levine did indeed attempt to execute a plan to flee prosecution. First, while the parties initially agreed that Levine could reside at his parent's home in New Mexico pretrial (Doc. 11), Levine was thereafter arrested for battery against his father, and subsequently fled to California. (Doc. 19; *See also* Doc. 27 at 4; Doc. 31 at 51; Doc. 27 at 4; Doc. 35, Ex A.) He was arrested and transported back to Montana. (Doc. 30; Doc. 31 at 6.)

On October 19, 2023, after Levine had his bond and release conditions reduced and he posted bond, Levine fled to Idaho, where his GPS stopped working. (Doc. 73, Ex. 1; Docs. 54-55; Doc. 57.) Thereafter, Levine fled to British Columbia, Canada, where he was arrested the next day. (Doc. 80; Doc. 81 at 3.)

V. Analyses of Mont. Code Ann. § 46-5-605(3)(a)

A. *Webb* decision

In 2021, the federal district court in *Webb* analyzed the long-arm jurisdiction statute for serving warrants regarding electronic communications, Mont. Code Ann. § 46-5-605(3)(a), which provides:

> A warrant or investigative subpoena under 46-5-602 may be served only on a provider of an electronic communication that is a domestic entity or a company or entity otherwise doing business in this state under a contract or a terms of service agreement with a resident of this state if any part of that contract or agreement is to be performed in this state.

Mont. Code Ann. § 46-5-605(3)(a). The court first observed: "Under the plain language of the statute, the company must be operating or doing business in Montana under a contract or terms of service agreement with *at least one Montana resident*." *Webb*, 2021 U.S. Dist. LEXIS 1009 at *10 (emphasis added). However, the court ultimately ruled that the warrant was invalid, concluding so because Webb *himself* was not a Montana citizen and he held a cell phone with an out-of-state area

code. *Id*. *11. While the court explained that such facts were "critical as it relates to the statutory authorization," the court did not thereafter detail why the defendant's area code and residency status were relevant to interpreting the long-arm jurisdiction statute. *See id*. However, the court ultimately ruled that any error with the issuance of the warrant was irrelevant because the "good faith" exception prevented suppression of the cell phone warrant data. *Id*. *12-13.

In a motion for reconsideration, the United States urged the court to withdraw the warrant discussion from the opinion, analyzing the plain language of the statute to conclude "[t]here is simply no requirement in MCA 46-5-605(3)(a) that the warrant be limited to phones owned by Montana residents," but rather the statute only speaks to the phone provider having "the necessary contractual contacts in Montana to be served." (PACER, 19-121-BLC-SPW, Doc. 82-2 at 17-18.) The Government raised several federal decisions interpreting the federal Stored Communications Act (SCA) to confer jurisdiction in conjunction with state statutes to reason that jurisdiction existed here. (*Id*. at 11-13.)

The Government further explained it had no legal avenue to pursue correction of the extraterritorial warrant discussion through appeal "because the motion to suppress was denied." (*Id*.) The Government viewed the extraterritorial warrant discussion as dicta because the court resolved the claim under the good faith exception. The Government argued that "[t]he issue of the jurisdictional

limits of Montana courts is a matter of state law and is best left to Montana courts to determine in the first instance." (*Id*. at 16.) Accordingly, the Government offered that, the dicta on warrants had "potential to sow confusion for the future." (*Id*. at 17.) The court denied the Government's motion. (PACER, 19-121-BLC-SPW, Doc. 84.)

B. The district court's suppression order

Here, the district court first recognized that the SCA authorized Montana state courts to exercise jurisdiction "to issue extraterritorial search warrants" in compliance with 18 U.S.C. 121 § 2703(a). In turn, the court reasoned, Mont. Const. Art. VII, § 4(1) allowed jurisdiction to be delegated from the federal government. (App. A. at 18-19.)

However, the district court believed that the state statutes did not authorize the exercise of jurisdiction for out-of-state warrants. First, the court noted that the general "State warrant procedures" statute under Mont. Code Ann. § 46-5-220(2), which authorizes a search warrant to be issue by "a district court judge within this state[]" did not authorize jurisdiction because the "authority to issue search warrants is limited by the geographical boundaries of this State." (*Id*. at 19-20.)

Second, while the court recognized that the more specific electronic communication statute—Mont. Code Ann. § 46-5-605(3)(a)—does provide "limited" authority for extraterritorial search warrants and that the "language

appears to invoke the state's long-arm jurisdiction[,]" the court nonetheless ruled that the statute turned on whether Levine was "a resident of this state." (*Id*. at 20.) Heavily relying on *Webb*, the district court concluded that because Levine "only recently moved to the state to attend law school[,]" and because his phone had an out-of-state area code, the warrant was improvidently issued. (*Id*. at 20-21.)

But, unlike the *Webb* court's ultimate conclusion that the good faith exception nonetheless applied, the district court instead declined to apply the good faith exception to the exclusionary rule, reasoning that this Court's precedent in *Vickers* rendered an invalid warrant void *ab initio*. (*Id*. at 22, citing *State v. Vickers*, 1998 MT 201, ¶ 23, 290 Mont. 356, 964 P.3d 756.) Thus, the court suppressed the October 3, 2022 warrant previously issued to Verizon Wireless.

STANDARD OF REVIEW

This Court reviews a district court's suppression order's findings of fact for clear error, and, further, reviews whether the lower court correctly interpreted and applied the governing law *de novo*. *State v. Staker*, 2021 MT 151, ¶ 7, 404 Mont. 307, 489 P.3d 489 (citations omitted).

The interpretation of a statute is a question of law this Court reviews for correctness. *City of Missoula v. Fox*, 2019 MT 250, ¶ 8, 397 Mont. 388, 450 P.3d 898 (citation omitted).

APPLICABLE LAW

The Montana Constitution provides that district court judges shall "have original jurisdiction in all criminal cases amounting to a felony" and "shall have the power of . . . such additional jurisdiction as may be delegated by the laws of the United States or the state of Montana." Mont. Const. Art VII, § 4; *see also* Mont. Code Ann. § 3-5-302(1)(a).

Montana district courts exercise general jurisdiction over search warrants under Mont. Code Ann. § 46-5-220(2). District courts are specifically authorized to issue electronic communication search warrants to foreign companies pursuant to Mont. Code Ann. § 46-5-605(3)(a). This long-arm jurisdiction statute was enacted in 2017 as part of a suite of electronic communications statutes in response to the SCA. *See House Judiciary Committee Hearing* on HB 148 at 9:39:40-9:40:20[6]; App. A. at 20, n.2 ("The primary sponsor of the 2017 bill . . . specifically noted the Stored Communications Act.") The October 3, 2022 search warrant was sought and issued under the authority of the SCA. (App. B at 2, warrant pursuant to "18 U.S.C. 121 [§] 2703[.]" .)

[6]http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/28800?agendaId=110753#agenda_.

The SCA—codified at 18 U.S.C. 121 §§ 2701-2713—authorizes state courts to exercise jurisdiction over electronic communication search warrants. Congress enacted the SCA to allow direct issuance of electronic search warrants to correct the historical difficulty of indirect search warrants, specifically:

> Attempts to address the investigative delays caused by the cross-jurisdictional nature of the Internet. Currently, Federal Rules of Criminal Procedure 41 requires that the 'warrant' be obtained 'within the district' where the property is located. An investigator, for example, located in Boston who is investigating a suspected terrorist in that city, might have to seek a suspect's electronic e-mail from an Internet service provider (ISP) account located in California. The investigator would then need to coordinate with agents, prosecutors and judges in the district court California where the ISP is located to obtain a warrant to search. These time delays could be devastating to an investigation, especially where additional criminal or terrorist acts are planned. Section 108 amends § 2703 to authorize the court with jurisdiction over the investigation to issue the warrant directly, without requiring the intervention of its counterpart in the district where the ISP is located.

H.R. Rep. No. 107-236, 57 (2001).

The SCA further authorizes state district courts—as courts of "competent" or general jurisdiction—to issue extraterritorial electronic search warrants. Section 2703(b)(1)(A) of the SCA provides:

> (1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—
>
> > (A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure

> (or, in the case of a State court, issued using State warrant procedures) . . . by a court of competent jurisdiction; . . . .

18 U.S.C. 121 § 2703(b)(1)(A). A "governmental entity" includes a department or agency of a state. 18 U.S.C. 121 § 2711. A "court of competent jurisdiction" means "a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants." 18 U.S.C. 121 § 2711(3)(C).

SUMMARY OF THE ARGUMENT

Upon a *de novo* statutory examination, this Court should reverse the district court's determination that Mont. Code Ann. § 46-5-605(3)(a) requires a case-by-case assessment of the person subject to a warrant—particularly that individual's phone area code and the length of time the person has been in Montana—for an electronic communications warrant to be issued. Nothing in the plain language of Mont. Code Ann. § 46-5-605(3)(a) supports the unreasonable interpretation that the Legislature only intended to allow jurisdictional authority for extraterritorial electronic warrants over particular people in Montana.

Rather, the statute is a long-arm jurisdictional statute that merely requires that the foreign company at issue—in this case, Verizon Wireless—have the necessary contractual contacts with Montana. In other words, the plain language of the statute merely requires that, for the foreign company to "be served" with a warrant, that company must have conducted business with at least "a [Montana]

resident" to subject the foreign company to the long-arm reach of this state. Reasonably, this long-arm statute imports the notions of minimum contacts and fair notice through the foreign company's transactions in Montana. The clear focus of the statute is on the foreign company doing business in Montana, not on the individual subject to the warrant. This Court should avoid the unreasonable interpretation that would exclude certain people otherwise physically present in Montana from investigation based merely on the fact that they do not have a (406) cell phone number and they have not yet lived in Montana for some unspecified length of time, notwithstanding that probable cause exists that the same person committed a criminal offense in Montana.

Alternatively, if this Court concludes that the district court accurately interpreted Mont. Code Ann. § 46-5-605(3)(a) and the Legislature intended to exclude warrant-based phone data collection from people who commit offenses in Montana but are not yet residents of Montana, this Court should apply the good faith exception to the exclusionary rule. Unlike in *Vickers*, this is not a case where an improperly appointed official issued a search warrant. And the intent of the exclusionary rule is to deter police conduct, not judicial conduct. This Court should prevent suppression of Verizon's historical and geolocation data—otherwise validly obtained through sufficient probable cause—from the October 3, 2022 warrant and hold that the good faith exception is applicable here.

ARGUMENT

I. This Court should reverse the district court's order invalidating the warrant to Verizon Wireless and suppressing the evidence obtained from that warrant.

A. Principles of statutory interpretation

This appeal presents a question of statutory interpretation. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." *Fox*, ¶ 18 (citing Mont. Code Ann. § 1-2-101). "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426. The duty of this Court is to "read and construe each statute as a whole" so that it may "give effect to the purpose of the statute." *Fox*, ¶ 18 (citation omitted). This Court's "objective in interpreting a statute is to implement the objectives the Legislature sought to achieve." *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 20, 384 Mont. 503, 380 P.3d 771.

This Court's inquiry first begins with the words of the statutes themselves: "The legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used." *Heath*, ¶ 25 (citation omitted). If the statutory

language is "clear and unambiguous, no further interpretation is required." *Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶ 46, 302 Mont. 209, 14 P.3d 487. But, "[w]hen the plain meaning of a statute is subject to more than one reasonable interpretation," this Court will "examine the legislative history to aid [in its] interpretation." *State v. Legg*, 2004 MT 26, ¶ 27, 319 Mont. 362, 84 P.3d 648.

B. The district court incorrectly interpreted the plain language of Mont. Code Ann. § 46-5-605(3)(a).

In 2017, the Legislature enacted Mont. Code Ann. § 46-5-605 as part of a suite of new statutory provisions in House Bill 148 (HB 148)—creating a legislative framework related to the issuance and enforcement of electronic communications warrants. *Codified at* Mont. Code Ann. §§ 46-5-601 to -614. The statute confers extraterritorial jurisdiction to district court judges to issue electronic communication search warrants to foreign companies, providing:

> (a) A warrant or investigative subpoena under 46-5-602 may be served only on a provider of an electronic communication that is a domestic entity or a company or entity otherwise doing business in this state under a contract or a terms of service agreement with a resident of this state if any part of that contract or agreement is to be performed in this state.
>
> (b) The provider of an electronic communication shall produce all electronic customer data, contents of communications, and other information sought by the governmental entity pursuant to a valid warrant or investigative subpoena.

Mont. Code Ann. § 46-5-605(3)(a)-(b). Thus, the plain language of subsection (a) of the statute broadly encompasses the issuance of electronic communication

search warrants to any company, given that the company is either (1) a domestic entity; or (2) a foreign company "otherwise doing business in this state under a contract or a terms of service agreement with a resident of this state[,]" requiring only that "any part" of the "contract or agreement" be "performed in this state[.]" Subsection (b) is equally broad, requiring the disclosure of "all" such electronic data in the possession of the company.

Read in context, the statute appears to correlate to the personal jurisdiction concepts from M. R. Civ. P. 4(b) and the due process notion of sufficient "minimum contacts" from civil law. *See* Mont. R. Civ. P. 4(b) (delineating Montana personal jurisdiction for "the transaction of any business within Montana" and "entering into a contract for services to be rendered . . . in Montana by such person[.]"); *see also Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (due process requiring "minimum contacts" with the foreign entity and the forum territory "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (citations omitted). But even without this context, the totality of the plain language itself evinces a clear legislative intent to broadly encompass the long-arm reach of Montana jurisdiction over foreign companies for electronic communications.

Here, there is no question that Verizon Wireless does business in Montana under a contract with at least "a resident of this state[,]" which subjects Verizon to

the State's long-arm jurisdiction. The New Jersey company is registered with the Montana Secretary of State as an active corporation in good standing to do business in Montana.[7] From 2000 to 2011, Verizon Wireless invested more than "$252 million in its wireless network in Montana[.]"[8] More than 20 Verizon stores exist across Montana.[9] Verizon provides cellular coverage through cell towers across Montana,[10] and engages in direct marketing activities targeted to Montana residents.[11] Verizon has even acquired at least one Montana rural cell service company.[12]

While the district court initially correctly recognized that the statutory "language appears to invoke the state's long-arm jurisdiction[,]" the court

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[7]Located by searching "Verizon" on the Montana Secretary of State business poral, further locating Verizon Americas Inc., https://biz.sosmt.gov/search/business.

[8]Verizon Wireless 2011 Press Release, https://www.verizon.com/about/news/vzw/2011/05/pr2011-05-31a.

[9]Montana Verizon Wireless Store Locations, https://www.verizon.com/stores/state/montana/?cjdata=MXxOfDB8WXww&CMP=afc_m_p_cj_na_ot_2022_99&SID=tuid:3AFD206FA6BB6416352833A4A70A6500&cjevent=f145881887e311ee80bf8c0d0a1cb825&vendorid=CJM&PID=10035719 1&AID=11365093.

[10]Verizon Wireless Coverage Map, https://www.verizon.com/coverage-map/.

[11]*See, e.g.*, Verizon Wireless Discounts for MSU Employees - Telephone Services | Montana State University, www.montana.edu/uit/telephone/verizon-discounts.html.

[12]S&P Global Market Intelligence, press release, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/verizon-acquires-lte-assets-of-triangle-mobile-63191562.

nonetheless erred in importing the flawed *Webb* analysis, incorrectly interpreting the phrase "a resident" to presumably mean "the resident subject to the particular warrant at issue." Then—in absence of any definitional term of "resident" in the compendium of 2017 legislative enactments of electronic warrant procedures for electronic communications—the district court divined the term to mean a person who must have a Montana-based area code in their phone number, and who has lived in Montana some unspecified but long-enough time.

The district court's erroneous conclusions violated a fundamental canon of statutory interpretation and inserted such language that the Legislature omitted. Mont. Code Ann. § 1-2-101. The court also failed to recognize that words and phrases used in Montana statutes are "construed according to the context and the approved usage of the language[.]" Mont. Code Ann. § 1-2-106.

Nowhere in Mont. Code Ann. § 46-5-605(3)(a) does the statute delineate a case-by-case inquiry focusing on whether the person subject to the warrant is a "resident" of the state. If the Legislature had intended such a result, it would have omitted the phrase "a resident" (connotating "any" or "one" resident) and would have instead specified that the foreign company must have contact with, for example, "the resident subject to the particular warrant at issue." Moreover, limiting the importance of the term "resident," the Legislature did not deem it

necessary to cross-reference the term with an associated definitional statute in Mont. Code Ann. § 46-5-601, despite defining other terms in that section.

The plain language of Mont. Code Ann. § 46-5-605(3)(a) is indeed plain and unambiguous. It provides no limitation regarding the subject matter of the warrant and provides no limitation on what communications can be sought based on the residency of those involved in the electronic communications. Instead, the clear focus of the statute is on the foreign company that is allowably subject to Montana jurisdiction by nature of the company's contacts with Montana, not the resident at issue for any particular warrant. This is why—rather than focusing on individualized residency assessments—the statute focuses on the minimal prerequisites for the *foreign company* to "be served" an electronic communications warrant. Thus, as here, "[w]here the statutory language is 'plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe.'" *State v. Wolf*, 2020 MT 24, ¶ 15, 398 Mont. 403, 457 P.3d 218 (citations omitted).

Nor is the district court's analysis buttressed by the mere fact that a federal district court engaged in the same analysis in 2021. To the contrary, rather than analyzing a novel Montana statutory interpretation issue in federal court in dicta, and assuming the resolution was then integral to the federal court's decision, the federal district court could have certified the issue to this Court. In any event, the

Webb court's cursory statutory analysis is not binding upon this Court. Instead, federal courts are bound by state court interpretations of state statutes. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). This Court should correct the federal district court's erroneous interpretation of Mont. Code Ann. § 46-5-605(3)(a).

Finally, the district court mistakenly foreclosed its overarching duty to endeavor to interpret the statute to confer jurisdiction and, accordingly, failed to harmonize the fact that Mont. Code Ann. § 46-5-605(3)(a) is a procedural statute related to the broad reach of the long-arm jurisdiction as dictated by the statute's plain language. In so doing, the district court failed to apply an essential canon of jurisdictional construction:

> When jurisdiction is, by the constitution or any statute, conferred on a court or judicial officer, all the means necessary for the exercise of such jurisdiction are also given. In the exercise of this jurisdiction, if the course of proceeding is not specifically pointed out by this code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

Mont. Code Ann. § 3-1-113. Based on the plain and unambiguous language of the statute, this Court should reverse the district court's holding invalidating the warrant based on Levine's residency status.

C. The legislative history of Mont. Code Ann. § 46-5-605(3)(a) does not support the district court's statutory interpretation.

Alternatively, if this Court concludes that the plain language in Mont. Code Ann. § 46-5-605(3)(a) is subject to more than one reasonable interpretation, this Court could be aided in examining the legislative history of the statute.

As HB 148's sponsor, Rep. Daniel Zolnikov (R-Billings), explained at the 2017 House Committee Hearing, the bill was created to address "electronic communications" that are held by a "third-party." *House Committee Hearing* at 9:37:05-9:37:12.[13] Such third parties included companies such as "Verizon" and "Gmail." *Id*. at 9:27:20-9:37:30.

Rep. Zolnikov explained that there were two main goals of HB 148. The first was to ensure "warrant standards" such as probable cause for the issuance of an electronic extraterritorial search warrant. As further explained in the hearing, authorities had previously been relying on investigative subpoenas for obtaining electronic communications data. *Compare* Mont. Code Ann. § 46-5-602 (2017) (new probable cause requirement for electronic search warrants) *to* Mont. Code Ann. § 46-4-301 (investigative subpoenas requirements).

The second purpose was to "require disclosure to the consumer that a warrant has been issued." Hearing at 9:41:00-9:41:10. This statute provided a

[13] http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/28800?agendaId=110753#agenda_.

mechanism of delayed notification (to account for investigation and prosecution) to eventually inform the target of the warrant that their electronic information had been obtained. *See* Mont. Code Ann. § 46-5-605(1)-(2) (authorizing state to delay notification for up to 1 year with the possibility of 180-day follow-up extensions). As Rep. Zolnikov explained, "This was a clear-cut method to ensure that the clients or customers of these third-party providers are being protected but there's also methods to obtain the data when necessary." *Id*. at 10:00:45-10:00:55.

Finally, Rep. Zolnikov acknowledged that the SCA was intended to "protect [subscribers'] communications," but also explained that a more robust state statutory structure was needed to address the fact that "emails 180 days and older do not have any expectations of privacy," and that the SCA "didn't include other types of electronic communications that did not exist [when the SCA was enacted] in 1986, like snapchats and skype and texts and voicemails and Facebook messages." *Id*. at 9:39:40-9:40:20.

Accordingly, the legislative history shows that the intent of HB 148—in accordance with the express authorization from Congress by the enactment of the SCA—was not to hamstring law enforcement based on minute details concerning the residency of each person subject to a warrant, but rather to protect subscriber information while still allowing law enforcement to "obtain the data when necessary."

D. The Legislature did not intend to enact a meaningless or absurd statute, and this Court should give jurisdictional effect to the procedural, long-arm statute.

"Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Fox*, ¶ 18. Further, statutes must be "liberally construed with a view to effect their objects and to promote justice." Mont. Code Ann. § 1-2-103.

The district court's statutory interpretation would render an otherwise legitimate electronic communications search warrant—supported by probable cause and issued by a court of general jurisdiction, and concerning a crime committed in Montana—invalid merely on the basis that a defendant who had not lived in Montana for some unspecified amount of time and carried a cell phone without a (406) area code.[14] As the Government aptly argued in *Webb*:

> Imagine that a Montana child is abducted by a man who is unidentified except by a Verizon cell phone number. Under the court's logic, the State's ability to obtain a search warrant for cell location information would apparently be precluded by the absence of the evidence that the man was a Montana resident, even though the

[14]The district court erroneously assumed that a (406) cell phone number denotes residency in Montana. If anything, a Verizon customer's area code only signifies where the phone plan was purchased. Verizon operates throughout the United States. If a Verizon customer moves to Montana, they could elect to change their area code. But doing so also necessitates Verizon changing the customer's number itself by "automatically assign[ing]" the last four digits of a new phone number. https://www.verizon.com/support/change-mobile-number-faqs/. Convenience could reasonably dictate whether a Montana resident has a (406) cell phone number.

> residency of the abductor has no bearing on the State's interest in recovering the victim and stopping the criminal. This would apparently be true under the Court's reasoning even if the child had been abducted from a Montana Verizon Store while her parents signed a contract for Verizon phone service. It beggars belief that the Montana Legislature would have intended to create a scheme that would preclude investigation of a non-Montana resident under such circumstances but permit investigation of a Montana resident in the same place.

(PACER, 19-121-BLC-SPW, Doc. 82-2 at 8-9.) This is particularly true because the legislative history shows that the overall focus of the statutory changes was to *strengthen* privacy rights for Montanans and enact probable cause standards for electronic communications warrants, but also not to prevent law enforcement from doing its job. The Legislature surely did not intend to selectively enforce electronic communication warrants against well-established Montana citizens, while precluding the enforcement of such warrants as to transient offenders (committing crimes such as human trafficking, fentanyl distribution, and kidnapping) or people like Levine who have moved to Montana, but apparently have not lived here long enough. Such an unreasonable interpretation of the statute would encourage transient criminals to structure their operations in Montana to evade prosecution—first and foremost, by easily obtaining an out-of-state cell phone number to prevent capture of their phone's geo-tracking data.

But a reasonable interpretation of the statute would foreclose such loopholes that the Legislature could never have intended. The "law favors rational and sensible construction." *Yunker v. Murray*, 170 Mont. 427, 433, 554 P.2d 285 (1976) (citation omitted); *see also* Mont. Code Ann. § 1-3-233 ("Interpretation must be reasonable."). This Court should reasonably give effect to the Legislature's broad jurisdictional grant of authority to issue electronic communication warrants under Mont. Code Ann. § 46-5-605. *See* Mont. Code Ann. § 3-1-113. This Court should also reasonably give effect to the rule that statutes should be construed to promote justice, and the State should be able to pursue justice regardless of the residency status of those who commit offenses in Montana. *See* Mont. Code Ann. § 1-2-103.

E. Conclusion

In summary, the *Webb* court was at least correct in viewing Mont. Code Ann. § 46-5-605(3)(a) as requiring Verizon to have a contract or service agreement with "at least one Montana resident." And the district court was correct that Mont. Code Ann. § 46-5-605(3)(a) is a long-arm jurisdictional statute. But both courts unreasonably diverged from the plain meaning of the statute in concluding that the individual to which the warrant was directed had to be a Montana resident.

Properly applying the statute, once the requisite contact between the foreign corporation and Montana has been established, the only remaining question should

be whether the warrant is supported by probable cause of a Montana crime and sufficiently particular to meet the requirements of Mont. Code Ann. § 46-5-221. This Court should reject the district court's erroneous statutory analysis and give effect to the jurisdictional grant the Legislature intended. *See* Mont. Code Ann. § 3-1-113.

II. Alternatively, the good faith exception applies.

A. *Vickers* is distinguishable based on the status of the person issuing the warrant.

While the *Webb* court correctly concluded that the good faith exception applied even for a warrant that was void *ab initio*, the district court incorrectly reached the opposite conclusion based on *Vickers*. (*See* App. A at 22.)

Vickers stems from *Potter v. Dist. Court of the Sixteenth Judicial Dist. Court*, 266 Mont. 384, 880 P.2d 1319 (1994). In *Potter*, this Court ruled that an improperly appointed substitute justice of the peace was "not a judge" and suppressed evidence seized pursuant to that warrant. *See Potter,* 266 Mont. at 393, 880 P.2d 1325. The *Potter* Court reached its decision on a writ under circumstances in which the State had failed to advance any argument

> that the evidence could have been seized under any exception to the written warrant requirement. Under such circumstances, because we conclude that the search warrants are void *ab initio*, it would be fundamentally unfair and prejudicial, not to mention a waste of time

> and the limited resources of the court and counsel, to require this case to proceed further . . . .

Potter, 266 Mont. at 389, 880 P.2d at 1322. In *Vickers*, this Court seemingly adopted the base reasoning in *Potter*, notwithstanding the procedural constraints of *Potter*. *Vickers*, ¶ 23 (correspondingly holding that a search warrant was "void *ab initio*" when the issuer of the search warrant was "not a duly authorized justice of the peace"). The *Vickers* Court explained that "[w]e have held that failure to have search warrants issued by a properly appointed judge renders them void *ab initio*, of no force or effect." *Id*. (citing *Potter*, 266 Mont. at 393, 880 P.2d at 1325).

But, in *Dasen*, this Court rejected the assertion that a search warrant was void *ab initio* when a district court issued a warrant after a substituted district court judge had already taken over a proceeding. This Court contrasted *Dasen* with *Vickers*, which "held that an improperly appointed substitute justice of the peace, who had no power to act at all, could not issue a valid search warrant." *State v. Dasen*, 2007 MT 87, ¶ 26, 337 Mont. 74, 155 P.3d 1282 (citing *Vickers*, ¶ 29). This Court reasoned that, despite substitution, a "properly elected" district court judge nonetheless issued the warrant, pursuant to its inherent authority of "all properly elected district court judges in the state" in Mont. Code Ann. § 46-5-220(2)(b). Thus, this Court rejected the assertion that the warrant was

"void *ab initio*" because a district court had nonetheless issued the warrant. *Dasen*, ¶¶ 26-27.

The bookends of *Vickers* and *Dasen* merely constitute a recognition of the fundamental Fourth Amendment principle that a search warrant must be issued by a "neutral and detached magistrate." *See Johnson v. United States*, 333 U.S. 10, (1948). In other words, no matter how neutral and detached, or generally capable, an improperly appointed "judge" may be, anyone other than a public officer authorized by law to issue search warrants cannot be a magistrate for Fourth Amendment purposes. But here, like in *Dasen*, the warrant was issued by a "properly elected" district court judge, and the warrant was properly issued pursuant to the district court's general jurisdiction under Mont. Code Ann. § 46-5-220(2)(b). *Dasen*, ¶¶ 26-27. Moreover, *Vickers* and *Potter* turned on the specific statutory language defining a properly appointed judge. Accordingly, this Court should hold that, like in *Dasen*, the warrant was not suppressible because it was issued by a properly elected district court judge.

B. Alternatively, this Court should clarify its precedent considering further development of Supreme Court precedent.

If this Court finds *Vickers* and *Potter* indistinguishable here, it should nonetheless reconsider its precedent in light of the overwhelming weight of authority concluding that void *ab initio* warrants do not prevent the application of the good faith exception to the exclusionary rule. In so doing, this Court should

acknowledge that: (1) exclusion does not turn upon judicial error; and (2) exclusion turns upon a balancing of interests.

In 2009 and 2011, the Supreme Court reaffirmed that—before automatically applying the exclusionary rule—courts must balance the substantial social costs of exclusion against a police officer's culpability. *Herring v. United States*, 555 U.S. 135, 137 (2009) ("[S]uppression is not an automatic consequence of a Fourth Amendment violation."); *Davis v. United States*, 564 U.S. 229, 237 (2011) ("For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs."). Exclusion is "not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Davis*, 564 U.S. at 236. Instead, it is a "prudential doctrine created by [the Supreme Court] to compel respect for the constitutional guaranty." *Id*. The "sole purpose" of the exclusionary rule is to deter future Fourth Amendment violations. *Id*. This deterrence, however, can come at a heavy cost on both the judicial system and society at large. Therefore, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id*. at 237.

Whether to suppress evidence under the exclusionary rule is a separate question from whether a Fourth Amendment violation has occurred. *See Herring*, 555 U.S. at 140. And application of the exclusionary rule is only intended for certain circumstances. "[E]vidence obtained in objectively reasonable reliance on

a subsequently invalidated search warrant" is not one of them and "cannot justify the substantial costs of exclusion[.]" *United States v. Leon*, 468 U.S. 897, 922 (1984). As the Supreme Court explained in *Leon*:

> The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.
>
> * * *
>
> To the extent that the [exclusionary] rule is thought to operate as a systemic deterrent on a wider audience, it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors . . . .

Leon, 468 U.S. at 917; *see also Herring*, 555 U.S. at 145 ("The exclusionary rule was crafted to curb police rather than judicial misconduct."). Thus, in *Leon*, the Supreme Court first recognized the good faith exception, holding that when the agents executing a search warrant "act with an objectively reasonable good-faith belief that their conduct is lawful," improperly obtained evidence remains admissible because in such circumstances "the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Davis,* 564 U.S. at 238 (citing *Leon*, 468 U.S. at 909, 919).

Every federal circuit court agrees that warrants that are "void *ab initio*" do not prevent the application of the good faith exception:

- *United States v. Eldred*, __ F.3d__, No. 17-3367-CR at *26 (2d Cir. 2019) ("We therefore agree with our sister circuits that the good-faith exception is applicable even when a warrant is void *ab initio*, so long as the law enforcement agents executing such a search warrant had an objectively reasonable belief that it was valid.");

- *United States v. Werdene*, 883 F.3d 204, 216-17 (3d Cir. 2018) (holding the "good-faith exception applies to warrants that are void ab initio because the issuing magistrate's lack of authority has no impact on police misconduct, if the officers mistakenly, but inadvertently, presented the warrant to an innocent magistrate"), *cert. denied*, 139 S. Ct. 260 (2018);

- *United States v. McLamb*, 880 F.3d 685, 691 (4th Cir. 2018) (concluding that "[s]uppressing evidence merely because it was obtained pursuant to a warrant that reached beyond the boundaries of a magistrate's jurisdiction would not, under the facts of this case, produce an 'appreciable deterrence' on law enforcement" based on *Leon*), *cert denied*, 139 S. Ct. 156 (2018);

- *United States v. Kienast*, 907 F.3d 522, 528 (7th Cir. 2018) (concluding that "whether the magistrate judge lacked authority has no impact" on availability of good-faith exception), *cert denied,* 139 S. Ct. 1639 (2019);

- *United States v. Henderson*, 906 F.3d 1109, 1118 (9th Cir. 2018) ("We find no support for such a sweeping assertion[]" that the good faith exception does not apply to warrants that are "void *ab initio*"), *cert denied*, 139 S. Ct. 2033 (2019); and

- *United States v. Taylor*, 935 F.3d 1279, 1290 (11th Cir. 2019) (Joining "every court of appeals to consider the question" and holding "that the good-faith exception to the exclusionary rule can apply when police officers reasonably rely on a warrant later determined to be void ab initio.").

Accord United States v. Levin, 874 F.3d 316, 324 (1st Cir. 2017); *United States v. Ganzer*, 922 F.3d 579, 587 (5th Cir. 2019), *cert denied*, 140 S. Ct. 276 (2019);

United States v. Moorehead, 912 F.3d 963, 969 (6th Cir. 2019), *cert denied,* 140 S. Ct. 270 (2019); *United States v. Horton*, 863 F.3d 1041, 1051 (8th Cir. 2017), cert denied, 138 S. Ct. 1440 (2018); *United States v. Workman*, 863 F.3d 1313, 1318 (10th Cir. 2017), *cert denied*, 138 S. Ct. 1546 (2018).

For example, in *Henderson*, the Ninth Circuit explained that "[a]pplication of the good faith exception does not depend on the existence of a warrant, but on the executing officers' objectively reasonable belief that there was a valid warrant." *Henderson*, 906 F.3d at 1118. The court further explained that "[t]he good faith exception applies to warrants that are void *ab initio* because the issuing magistrate's lack of authority has no impact on police misconduct." *Id*.

The Supreme Court has repeatedly admonished that the exclusionary rule cannot be used to penalize law enforcement officers for a judge's error. *See Leon*, 468 U.S. at 921 ("Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."); *see also Davis*, 564 U.S. at 246 ("[W]e have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement."); *Herring*, 555 U.S. at 145 ("The exclusionary rule was crafted to curb police rather than judicial misconduct."); *Massachusetts v. Sheppard*, 468 U.S. 981, 989-90 (1984) ("[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the

warrant he possesses authorizes him to conduct the search he has requested."). Resultingly, "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987) (citation omitted). Here, there is no evidence that the officers issuing the warrant had knowledge that the warrant was invalid; therefore the evidence seized pursuant to the October 3, 2022 warrant should not be suppressed.

Even the few courts that have previously held that the good faith exception is inapplicable to void *ab initio* warrants have reversed course. For example, in 2001, the Sixth Circuit held that a retired judge lacked authority to issue a search warrant and held that such warrant was void *ab initio*, declining to apply the good faith exception. *United States v. Scott*, 260 F.3d 512, 513 (6th Cir. 2001). The *Scott* court concluded, "[d]espite the dearth of case law, we are confident that *Leon* did not contemplate a situation where a warrant is issued by a person lacking the requisite legal authority." *Id.*

Nine years later, the Sixth Circuit reversed course in *Master*, which involved a warrant issued by a state judge to search property outside his district, which the judge had "no authority to issue" under Tennessee law. *United States v. Master*, 614 F.3d 236, 239, 241 (6th Cir. 2010). While finding the warrant invalid, the

court nonetheless held that the good faith exception was applicable because *Scott*'s reasoning was "no longer clearly consistent with current Supreme Court doctrine." *Id.* at 240, 242. The court concluded that the "Supreme Court has effectively created a balancing test by requiring that in order for a court to suppress evidence following the finding of a Fourth Amendment violation, 'the benefits of deterrence must outweigh the costs.'" *Id*. at 243 (quoting *Herring*, 555 U.S. at 142). Thus, while not expressly overruling *Scott*, the Sixth Circuit determined that *Scott* was abrogated by more recent Supreme Court authority. *See Id*.

Here, like the Sixth Circuit, if this Court finds *Potter* and *Vickers* indistinguishable, it should hold that *Potter* and *Vickers* have been abrogated by *Herring* and *Davis*, and that the application of the exclusionary rule requires a balancing of the substantial social costs of exclusion against a police officer's culpability.

CONCLUSION

This Court should reverse the district court's September 29, 2023 order invalidating and suppressing the October 3, 2022 search warrant issued to Verizon Wireless.

Alternatively, if the warrant invalidation is upheld, this Court should apply the good faith exception to the exclusionary rule to prevent suppression of the phone data gleaned pursuant to the search warrant.

Respectfully submitted this 22nd day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,965 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0613

STATE OF MONTANA,

Plaintiff and Appellant,

v.

COLE LARSON LEVINE,

Respondent.

EXHIBITS

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