Appeal No. 24-CO-162

DISTRICT OF COLUMBIA COURT OF APPEALS

UNITED STATES OF AMERICA,

Appellant,

v.

DAMAIRZIO M. WELLS,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLEE

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DISCLOSURE STATEMENT

Appellant Damairzio Wells was represented in trial proceedings by Candace Mitchell of the Public Defender Service ("PDS"). On appeal, Mr. Wells is represented by PDS attorneys Samia Fam and Paul Maneri. The United States was represented below by Assistant United States Attorneys Megan E. McFadden and D. William Lawrence, and is represented on appeal by Chrisellen Kolb, John Mannarino, D. William Lawrence, Megan E. McFadden, and Daniel J. Lenerz of the United States Attorney's Office for the District of Columbia.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

[*] An asterisk denotes an authority upon which Mr. Wells chiefly relies.

Statutes

Regulations

Other Authorities

ISSUES PRESENTED

I. Whether the exclusionary rule applies where the Court Services and Offender Supervision Agency ("CSOSA"), a law enforcement agency, formally authorized its officers to conduct ultra vires searches of its supervisees, resulting in widespread unconstitutional searches like the one that occurred in this case.

II. Whether suppression is independently required because the CSOSA policy that an officer relied on as the authority to conduct the unlawful search of Mr. Wells did not in fact permit that search.

INTRODUCTION

From October 1, 2022 through September 30, 2023, the Court Services and Offender Supervision Agency for the District of Columbia ("CSOSA" or "the Agency") used GPS ankle monitors to track the location of 1,958 people under its supervision.[1] Each time CSOSA attached a GPS monitor to one of those people, and to the thousands of others it has monitored since the law enforcement agency began using GPS tracking in 2004,[2] it conducted a Fourth Amendment search. *See Grady v. North Carolina*, 575 U.S. 306, 309 (2015). Pursuant to CSOSA's regulations and formal policy, many of these searches were imposed unilaterally by the Agency as a "sanction" for "non-compliant behavior," bypassing the statutorily prescribed requirement that only the Superior Court (for probationers) or the United States Parole Commission (for supervised releasees) may so alter the supervisee's conditions of release.[3]

Each of these search "sanctions" violated the Fourth Amendment. *See Davis v. United States*, 306 A.3d 89, 99 (D.C. 2023). In *Davis*, this Court addressed for the first time "the legitimacy of CSOSA's administrative sanctions regulations." *Id.* at 97. The Court held that CSOSA's regulation allowing its officers to conduct

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[1] CSOSA, FY 2025 Budget Request: Summary Statement and Frequently Asked Questions at 25 (Mar. 11, 2024), https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2024/03/CSOSA-FY-2025-CBJ-Summary-StatementFAQs.pdf.

[2] *See United States v. Jackson*, 214 A.3d 464, 476 (D.C. 2019) (quoting 2016 CSOSA website as stating that "[o]n any given day, at least 100 offenders are on GPS monitoring").

[3] CSOSA, Policy Statement 4008, Global Positioning System (GPS) Tracking of Offenders at 5 (May 7, 2009), https://perma.cc/2DWK-CPQB (hereinafter "GPS Policy Statement"); *see also* 28 C.F.R. § 810.3.

warrantless searches as sanctions exceeded the limited authority given to CSOSA by Congress. *Id.* at 99. That regulation was therefore "not a reasonable regulation on which a special needs search may be based." *Id.* at 110. And because the search of Mr. Davis, who was on supervised release, was conducted without the express authorization of the Parole Commission, the search was unconstitutional.

In this case, CSOSA unilaterally sanctioned Mr. Wells with GPS monitoring after he tested positive for marijuana and submitted bogus urine samples. The government concedes that this GPS monitoring of Mr. Wells—who was also on supervised release—was an unconstitutional search under *Davis*. It argues, however, that the Court should create an exception to the exclusionary rule for circumstances where a law enforcement agency unlawfully expands its search and seizure authority by promulgating rules and policies that purport to give it powers it does not possess under the governing statutory law.

That argument must be rejected. Contrary to the government's claim, the deterrence purpose of the exclusionary rule is served most directly and efficiently when a law enforcement agency promulgates unlawful search and seizure rules to facilitate its law enforcement work. Applying the exclusionary rule here thus sits comfortably with precedent from the Supreme Court and with this Court's holdings that evidence must be suppressed when law enforcement agents are directly responsible for an unconstitutional search or seizure. Conversely, the government cites no decision from this or any other court of appeals recognizing an exception to the exclusionary rule when law enforcement agents rely on their own department's search policies. What's more, the interpretations of CSOSA's governing statute and

the Parole Commission regulations that the government now relies on for its good faith argument are objectively unreasonable.

Suppression is independently required because the CSOSA policy statement that the CSOSA officer relied on to search Mr. Wells plainly did not permit that search. CSOSA's GPS policy statement instructs that its officers may use GPS monitoring in only limited circumstances, such as loss of contact or a new arrest, none of which applied here. Thus, even an unprecedented good faith exception for a policy promulgated by law enforcement would not apply to the facts of this case.

STATEMENT OF THE CASE

Mr. Wells is pending trial on a grand jury indictment for armed robbery and firearm offenses. R.31. Shortly after this Court's decision in *Davis*, he moved to suppress the fruits of CSOSA's unlawful GPS search. R.42. Judge Errol R. Arthur granted the motion in an oral ruling. 2/1/24 Tr. at 8.[4] The government appealed. R.57. This Court has jurisdiction under D.C. Code § 23-104(a)(1).

STATEMENT OF FACTS

In January 2023, Mr. Wells was placed on supervised release as part of his sentence for a 2015 Superior Court case. Neither the Superior Court nor the Parole Commission imposed any conditions of release requiring Mr. Wells to submit to GPS monitoring or to any other warrantless searches.

CSOSA officers never sought a modification to Mr. Wells's conditions of release. Still, they twice subjected him to GPS monitoring. First, a Community

[4] The transcript of this hearing is included in the appellate record as Supplemental Record No. 2.

Supervision Officer ("CSO") required Mr. Wells to wear a GPS ankle monitor "as a sanction for testing positive for marijuana." R.43 at 6. CSOSA placed that monitor on Mr. Wells on March 28, 2023 and removed it on April 26, 2023. *Id.* Second, after Mr. Wells submitted bogus urine samples, a CSO again sanctioned Mr. Wells by requiring him to wear a GPS monitor. *Id.* CSOSA placed that monitor on Mr. Wells on June 9, where it remained until he was arrested on July 6 for an armed robbery that occurred earlier that evening. Using GPS location data from the device attached to Mr. Wells, officers of the Metropolitan Police Department ("MPD") learned that he was in the area of the robbery and tracked him to his home, where he was arrested.

Mr. Wells moved to suppress all evidence obtained as the result of CSOSA's GPS monitoring. R.42. He explained that this Court's decision in *Davis* established that CSOSA violated the Fourth Amendment when it sanctioned him by attaching a GPS monitor to his ankle and surveilling his movements. *Id.* at 3. The government did not dispute that point, arguing instead that the exclusionary rule should not apply because the CSO who imposed the unlawful GPS sanction "did so in objectively reasonable reliance on existing CSOSA regulations and policy." R.43 at 15.

In reply, Mr. Wells argued that the exclusionary rule must apply to deter CSOSA, a law enforcement agency, from promulgating regulations or policies that purport to authorize unconstitutional searches. *See generally* R.52 at 1 ("Neither the Supreme Court, the D.C. Court of Appeals, nor any federal court of appeals has ever held that the good faith exception applies when a law enforcement agency like CSOSA violates the Fourth Amendment pursuant to its own polices and regulations." (emphasis omitted)). At a hearing on the suppression motion, Mr.

Wells further argued that even if the good faith exception applied to searches conducted under the CSOSA policy, it cannot apply here, because the CSO who imposed GPS was not "actually even abiding by her own policies and regulations. The language of the policy does not indicate that she had the authority to give Mr. Wells aggravated extended supervision based on two, what she calls, bogus samples." 2/1/24 Tr. at 8.[5] The court granted the motion, suppressing the fruits of the unconstitutional GPS search. *Id.* at 51.

SUMMARY OF ARGUMENT

CSOSA had no lawful authority to attach a GPS monitor to Mr. Wells's ankle and track his every movement for the next 27 days. That unconstitutional search requires suppression. The exclusionary rule exists to deter law enforcement actors from committing constitutional violations, and CSOSA thus sits squarely within the rule's historical focus: as this Court has already recognized, CSOSA conducts GPS searches "in furtherance of" the Agency's and MPD's "mutual law enforcement objectives." *United States v. Jackson*, 214 A.3d 464, 486 (D.C. 2019).

No good faith exception to the exclusionary rule applies here. As this Court and others have long recognized, law enforcement actors may not rely on their own erroneous interpretations of the laws governing their search and seizure authority to perform searches without the threat of suppression. To hold otherwise would

[5] CSOSA's GPS policy statement instructs that its officers may use GPS as a sanction "under any of the following circumstances": "Loss of Contact," "Re-arrest," "Sex Offender Cases," "Mental Health Cases," "Domestic Violence Cases," "Recalcitrant, Unemployed Offenders," and "PCP Positive Drug Testing Offenders." GPS Policy Statement at 5–7.

essentially eviscerate the exclusionary rule, encouraging law enforcement to aggressively interpret their search and seizure authority rather than err on the side of constitutional behavior. This case illustrates the danger in that approach, as no reasonable interpretation of CSOSA's governing statute or the Parole Commission's regulations authorized CSOSA to unilaterally conduct warrantless searches. And the deterrence benefits of exclusion in this case are particularly strong, because the relevant decisions that suppression would influence are policy choices regarding searches. These sorts of decisions about law enforcement policies are inherently deliberate and their impact far-reaching, making them especially capable and worthy of deterrence.

Suppression is independently required because the officer who imposed GPS monitoring on Mr. Wells lacked authority to do so even under CSOSA's unlawful search policy. The Agency's formal GPS Policy Statement is clear on its face that GPS monitoring may be used as a sanction only in limited circumstances, none of which applied here. Thus, even an unprecedented good faith exception for a policy promulgated by law enforcement would not apply to the facts of this case.

ARGUMENT

I. Exclusion Is Required Here, Where CSOSA Unilaterally Authorized Its Officers to Systemically Conduct Impermissible GPS Searches.

A. CSOSA's warrantless search of Mr. Wells was not a constitutional special needs search, because it was founded on the Agency's usurpation of power.

The government does not dispute that the GPS search of Mr. Wells was unconstitutional under this Court's decision in *Davis v. United States*, 306 A.3d 89 (D.C. 2023). But to appreciate why exclusion is required, it helps to start with why the search was unconstitutional. That, in turn, requires understanding why "CSOSA's electronic monitoring regulation is not a reasonable regulation on which a special needs search may be based." *Davis*, 306 A.3d at 110; *see id.* at 96 (warrantless special needs searches are constitutional only if carried out pursuant to a regulation that satisfies the Fourth Amendment's reasonableness requirement, "such that the regulation effectively stands in for the warrant typically required").

In 1997, Congress passed the National Capital Revitalization and Self-Government Improvement Act, Pub. L. No. 105-33, §§ 11231–11233, 111 Stat. 712, 745–51 ("Revitalization Act"), which created CSOSA and established a new system of supervised release in the District of Columbia. Section 11233 of the Revitalization Act, codified as D.C. Code § 24-133, divided authority over people on supervised release between the United States Parole Commission and CSOSA. That division of authority expressly mirrored the division of authority in the federal system: "the Act specified that the 'United States Parole Commission shall have and exercise the same authority as is vested in the United States district courts' under 18 U.S.C. § 3583(d)–(i) and that CSOSA officers 'shall have and exercise the same powers and authority

as are granted by law to United States Probation and Pretrial Officers.'" *Davis*, 306 A.3d at 100 (quoting Revitalization Act § 11233(c)(2), (d)); *see also* D.C. Code § 24-133(c)(2), (d).

The federal statutes that Congress used to demarcate CSOSA's authority unambiguously provide district courts the sole power to impose or modify conditions of release. *See* 18 U.S.C. § 3583(d) ("[t]he court shall order" certain conditions of release in all cases, and "[t]he court may order" further special conditions if they are reasonably related to sentencing factors and "involve[] no greater deprivation of liberty than is reasonably necessary"); *id.* § 3583(e) ("[t]he court may" modify conditions of release); *Davis*, 306 A.3d at 100. By contrast, "[f]ederal probation and pretrial officers are assigned only administrative and supervisory duties over people on federal supervised release." *Davis*, 306 A.3d at 102; *see* 18 U.S.C. § 3603 (listing duties of probation officers). Federal probation officers may exercise "decisionmaking authority over certain *minor* details of supervised release—for example, the selection of a therapy provider or treatment schedule." *United States v. Matta*, 777 F.3d 116, 122 (2d Cir. 2015) (emphasis added). But their authority is limited to "executing the sentence, . . . not imposing it." *Id.* (cleaned up). Thus, "'any condition that affects a significant liberty interest . . . must be imposed by the district court,'" because deciding whether such conditions will be imposed "'is tantamount . . . to decid[ing] the nature or extent of the defendant's punishment.'" *Id.* at 123 (quoting *United States v. Mike*, 632 F.3d 686, 696 (10th Cir. 2011)).

"In the federal system, the division of authority between the courts and the probation officer holds for warrantless searches, including GPS monitoring, which

the courts alone can impose as a discretionary condition of release." *Davis*, 306 A.3d at 105. "This allocation of authority appears clear enough," the *Davis* majority emphasized, "that neither the government nor the dissent can identify any case from the federal courts of appeals where a federal probation officer sought to or did impose GPS monitoring on a person without court approval, let alone one where a court blessed this practice." *Id.* at 105 n.11. The upshot of the founding principle of CSOSA's statutory authority as relevant here, then, is that Congress did *not* authorize CSOSA to unilaterally subject supervisees to searches. Congress reserved that power for the Parole Commission and the Superior Court.

The Parole Commission too has long made clear that CSOSA officers may not conduct warrantless searches absent "'conditions of release that specifically permit such searches[,] or . . . the consent of the releasee freely and voluntarily given.'" *Id.* at 107 (quoting Parole Commission, Rules and Procedures Manual § 2.204-18(a) (2010), *available at* https://www.justice.gov/sites/default/files/uspc/legacy/2010/08/27/uspc-manual111507.pdf). The Commission's regulations thus list warrantless searches as a "[s]pecial condition[] of release." 28 C.F.R. § 2.204(b)(2)(iv). And further mirroring the federal system, imposition of a special condition of release requires the Commission to determine, among other things, that the condition is reasonably related to one of the purposes of sentencing and that it "involves no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence of criminal conduct, protection of the public from crime and offender rehabilitation." 28 C.F.R. § 2.204(b)(1); *see* 18 U.S.C. § 3583(d)(1)–(2).

In its brief, the government wholly ignores the Parole Commission's express and unwavering prohibition against CSOSA conducting warrantless searches. It suggests instead that the Commission implicitly authorized such searches through its regulation requiring supervised releasees to comply with CSOSA's schedule of graduated sanctions. Gov't Br. at 12–13 (citing 28 C.F.R. § 2.204(a)(6)(vi)). That regulation does not enumerate or authorize any particular sanctions, though. And while the Commission arguably once thought GPS monitoring was a permissible sanction—its 2010 Manual lists "curfew with electronic monitoring" as one of the graduated sanctions CSOSA may impose, *see Davis*, 306 A.3d at 106 n.14—that view is irrelevant to the current debate, because it predates the Supreme Court's 2015 decision in *Grady* clarifying that GPS monitoring is a search. *See id*. There is no ambiguity that, after *Grady*, the Parole Commission's express prohibition against warrantless searches conducted by CSOSA applies equally to GPS searches.

For its part, CSOSA recognized that "[h]istorically, electronic monitoring has been used as a special condition of release ordered by the Superior Court of the District of Columbia or the United States Parole Commission." GPS Policy Statement at 1. But in 2003, CSOSA nonetheless issued a regulation allowing its officers to unilaterally impose "electronic monitoring" as an "[a]dministrative sanction," and in 2004, the Agency began using GPS as a form of electronic monitoring. 28 C.F.R. § 810.3(b); *see* Gov't Br. at 13–14. In 2009, CSOSA issued a formal policy statement establishing procedures for GPS tracking, noting that the Agency uses GPS tracking as "a mechanism for collaborating with the Metropolitan

Police Department and other allied law enforcement agencies to track criminal behavior of designated CSOSA offenders." GPS Policy Statement at 1.

CSOSA's administrative sanctions regulation, 28 C.F.R. § 810.3(b), did not receive or require any outside approval to take legal effect.[6] As an agency, however, CSOSA's authority to issue such binding regulations extends only as far as that given to it by its organizing statute. *See Davis*, 306 A.3d at 110 ("Agencies may only wield the authority given to them by their organizing statutes."). In 2003, when CSOSA promulgated its final rule finalizing the administrative sanctions regulation, it claimed no statutory authority to do so; it merely noted a Parole Commission regulation that once authorized CSOSA officers to impose graduated sanctions. *See* Community Supervision: Administrative Sanctions, 68 Fed. Reg. 19,738, 19,738 (Apr. 22, 2003) (citing 28 C.F.R. § 2.85(a)(15)). But 28 C.F.R. § 2.85 has omitted any reference to graduated sanctions or electronic monitoring since the Parole Commission amended that regulation in July 2003. *See* Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes, 68 Fed. Reg. 41,696, 41,700 (July 15, 2003) (listing revisions to 28 C.F.R. § 2.85). Still, in 2009, CSOSA listed that same Parole Commission regulation and "D.C. Official Code § 24-133(c)"—the provision establishing that the Parole Commission "shall have and exercise the same authority

[6] The Administrative Procedure Act generally allows federal agencies to issue binding rules so long as they provide the public with notice and an opportunity to comment on the proposed rule. *See* 5 U.S.C. § 553(b)–(c).

as is vested in the United States district courts," D.C. Code § 24-133(c)(2)[7]—as the sole authorities that it relied on for its GPS Policy Statement. GPS Policy Statement at 2. And notwithstanding the Parole Commission's long-standing position that warrantless searches "should be conducted only . . . pursuant to conditions of release that specifically permit such searches," *Davis*, 306 A.3d at 107 (quoting Parole Commission Rules and Procedures Manual), CSOSA did not cite any new authority for its GPS policy after the Supreme Court held in 2015 that GPS monitoring is a Fourth Amendment search, *see Grady*, 575 U.S. at 309.

In *Davis*, however, the United States claimed that Congress had given CSOSA the power to conduct warrantless searches in a different part of the Revitalization Act, codified at D.C. Code § 24-133(b)(2), which lists the "[p]owers and duties" of the CSOSA Director. *See Davis*, 306 A.3d at 102. There, alongside provisions authorizing CSOSA's Director to "[s]ubmit annual appropriation requests," "[h]ire and supervise supervision officers," and "[e]nter into . . . contracts, leases, and cooperative agreements," D.C. Code § 24-133(b)(2)(A), (C), (E), Congress had authorized the Director to "[d]evelop and operate intermediate sanctions and incentives programs for sentenced offenders," *id.* § 24-133(b)(2)(F).

[7] *See* D.C. Code § 24-133(c)(2) ("The Agency shall supervise any offender who is released from imprisonment for any term of supervised release imposed by the Superior Court of the District of Columbia. Such offender shall be subject to the authority of the United States Parole Commission until completion of the term of supervised release. The United States Parole Commission shall have and exercise the same authority as is vested in the United States district courts by paragraphs (d) through (i) of § 3583 of title 18, United States Code.").

Davis rejected the argument that § 24-133(b)(2)(F) "can be read to authorize CSOSA to wield administrative sanctions authority that impinges on the Parole Commission's adjudicatory role." *Id.* at 102. When Congress included the term "intermediate sanctions" in the Revitalization Act, it "clearly described *sentencing options* between incarceration or probation or a fine *for courts*" and "did not confer power on the CSOSA Director . . . to unilaterally impose administrative penalties on a supervised releasee." *Id.* at 103 (emphases in original). And the Court saw no indication that Congress, by amending § 24-133(b)(2)(F) in 2016 to include reference to "incentives" alongside "intermediate sanctions," meant to "discard[] its previous understanding of 'intermediate sanctions' in D.C. Code § 24-133(b)(2)(F) as a sentencing option." *Id.* at 104. But even assuming that this amended provision gave CSOSA some new authority to unilaterally impose administrative sanctions—an issue the *Davis* Court did not decide, *see id.*—it could not be read "in such a way as to grant CSOSA an administrative sanction authority that encroaches upon or overtakes the Parole Commission's adjudicatory authority," *id.*[8]

Instead, reading the statute "as a coherent whole," *Davis* explained that "it is clear that (1) as the sole adjudicatory authority in the supervised released system, only the Parole Commission may impose or modify conditions of release, and

[8] The government asserts (at 36) that Congress "embraced CSOSA's use of GPS monitoring as an administrative sanction," but *Davis* flatly rejected that argument. *See Davis*, 306 A.3d at 104 n.10 ("We reject the . . . argument that Congress, with the passage of 2016 amendments to D.C. Code § 24-133(b)(2)(F), *knew* that CSOSA had already claimed unilateral authority to impose GPS monitoring as a sanction and legislatively blessed this practice." (emphasis in original)).

(2) whatever CSOSA's administrative sanctions authority is, it must not transgress on the Parole Commission's adjudicatory role." *Id.* And because both federal authorities and the Parole Commission clearly treat warrantless searches as a condition of release that must be imposed by the court (in the federal system), or the Commission (in D.C.), CSOSA did not have authority to conduct GPS searches as an administrative sanction. *Id.* at 105–07. The Court thus "conclude[d] that CSOSA's electronic monitoring regulation is not a reasonable regulation on which a special needs search may be based" and that the GPS search of Mr. Davis pursuant to that regulation was therefore unconstitutional. *Id.* at 110–11.[9]

For those same reasons, CSOSA's GPS search of Mr. Wells, conducted without express authorization of either the Superior Court or the Parole Commission, also violated the Fourth Amendment.

B. Exclusion is required.

"It has long been the law that evidence collected in violation of the Fourth Amendment is considered 'fruit of the poisonous tree' and generally may not be used by the government to prove a defendant's guilt." *Hooks v. United States*, 208 A.3d 741, 750 (D.C. 2019) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). This exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Herring v. United States*, 555 U.S. 135, 139–

[9] After *Davis*, the D.C. Council passed an Act that would amend D.C. Code § 24-133 to provide CSOSA officers with specific authority to impose GPS monitoring as a sanction "in response to a sentenced offender's violation of the conditions of release." Act A25-0411, 71 D.C. Reg. 2732, 2780 (Mar. 15, 2024), available at https://www.dcregs.dc.gov/Common/DCR/Issues/IssueDetailPage.aspx?issueID=1077. The Act is currently awaiting Congressional review.

40 (2009) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). By forbidding the use of unlawfully obtained evidence at trial, the rule "compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

Here, the fruits of CSOSA's unlawful search of Mr. Wells must be suppressed. The government's main argument to the contrary claims that CSOSA's policy of unilaterally conducting widespread warrantless GPS searches should go unsanctioned because it was done under cover of CSOSA's erroneous interpretation of D.C. Code § 24-133(b)(2)(F) and outdated Parole Commission regulations. But extending the good faith exception to situations like this one, where a law enforcement agency claims broad warrantless search powers based on an erroneous interpretation of the laws constraining its authority, would be unprecedented and fundamentally at odds with the deterrent purpose of the exclusionary rule. Such a rule would create an incentive for CSOSA and other law enforcement agencies to aggressively expand their coercive powers by adopting regulations of questionable legality. And eventual judicial overruling would be an ineffectual deterrence if CSOSA's unconstitutionally aggressive stance were rewarded by exempting its illegal searches from the exclusionary rule. That result cannot be squared with the exclusionary rule's deterrent purpose. And the deterrent remedy of exclusion is especially warranted here, where it would influence formal policy choices governing search procedures. Formal search policy decisions are inherently deliberate and unrushed, and thus especially likely to be influenced by the knowledge that the

exclusionary rule will apply to unconstitutional searches. Law enforcement search policies are also especially worthy of deterrence, because encouraging such policies to err on the side of constitutional behavior will avert widespread constitutional violations like the ones that occurred here.

i. CSOSA's status as a law enforcement agency with a strong institutional stake in the outcome of criminal prosecutions weighs heavily in favor of applying the exclusionary rule.

"[W]hether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence." *Illinois v. Krull*, 480 U.S. 340, 360 n.17 (1987). The relevant actor here is CSOSA, a law enforcement agency that "'train[s] and provide[s] MPD staff with direct access to [its] GPS system for monitoring purposes.'" *United States v. Jackson*, 214 A.3d 464, 476 (D.C. 2019) (quoting CSOSA, Electronic Monitoring (May 5, 2016) (since removed webpage, *see id.* at 477 n.38)); *see In re W.M.*, 851 A.2d 431, 455 (D.C. 2004) ("CSOSA is a law enforcement agency within the executive branch of the Federal Government.").

As the Supreme Court has often repeated, the "purpose of the exclusionary rule is to deter misconduct by law enforcement." *(Willie Gene) Davis v. United States*, 564 U.S. 229, 246 (2011). The need for such deterrence is simple and well-documented: "history shows that the police acting on their own cannot be trusted." *McDonald v. United States*, 335 U.S. 451, 456 (1948); *see also, e.g.*, *United States v. Leon*, 468 U.S. 897, 913–14 (1984) ("[T]he detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise

of ferreting out crime." (internal quotation marks omitted)); *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 317 (1972) ("The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."). The exclusionary rule responds to this historical reality "by removing the incentive to disregard" the Fourth Amendment. *Elkins*, 364 U.S. at 218.

As this Court has already recognized, CSOSA is not only "adjunct[] to the law enforcement team," *Leon*, 468 U.S. at 917, it is part of the team itself, *In re W.M.*, 851 A.2d at 455. "[I]t is well-settled that . . . the objectives and duties of probation officers and law enforcement personnel are often parallel and frequently intertwined." *Jackson*, 214 A.3d at 484 (internal quotation marks and alterations omitted). The threat of exclusion thus deters CSOSA officers just as much any other law enforcement official. The government resists this point, citing (at 44) *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357 (1998). But *Scott* undermines the government's argument. The Court held there that the exclusionary rule does not apply at parole revocation proceedings, *id.* at 364, but in reaching that conclusion, it relied on the fact that parole officers are already deterred from conducting unconstitutional searches because they "are undoubtedly aware that any unconstitutionally seized evidence that could lead to an indictment could be suppressed in a criminal trial," *id.* at 369. Thus, when CSOSA or parole officers unlawfully seize evidence, that evidence "must be suppressed in a subsequent criminal proceeding" just as if it had been seized by any other law enforcement

officer. *United States v. Payne*, 181 F.3d 781, 788 (6th Cir. 1999). "Exempting evidence illegally obtained by a parole officer from the exclusionary rule would greatly increase the temptation to use the parole officer's broad authority to circumvent the Fourth Amendment." *Id.*

Parole and probation officers "often work closely with the police," *id.*, and CSOSA is no different. CSOSA officers "work nights and weekends assisting DC MPD and other law enforcement in special crime initiatives." R.52 at 9 (quoting CSOSA, Strategic Plan: Fiscal Years 2022–2026 at 37, https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2022/05/CSOSA-Strategic-Plan-FY2022-2026.pdf). For instance, last year, "CSOSA partnered with MPD, the U.S. Marshals, and the Federal Bureau of Investigation to conduct a three-day 'fugitive apprehension operation' targeting people on supervised release or probation." *Id.* (quoting Press Release, MPD, Operation Trident Targets Violent Offenders (Oct. 5, 2023), https://mpdc.dc.gov/release/operation-trident-targets-violent-offenders). And "CSOSA and MPD officers jointly conduct 'accountability tours,' or visits to the homes of people living under CSOSA supervision, 'to increase awareness of the collaboration between MPD and CSOSA.'" *Id.* (quoting CSOSA, Strategic Plan: Fiscal Years 2022–2026 at 37).

This Court has also recognized that "CSOSA collects . . . GPS tracking data with a law enforcement objective" and shares that data with MPD "in furtherance of their mutual law enforcement objectives." *Jackson*, 214 A.3d at 486. In *Jackson*, for instance, CSOSA decided that Mr. Jackson "should be placed on GPS monitoring 'immediately'" after an MPD detective, who suspected Mr. Jackson "'may' have

been committing robberies and burglaries," requested that CSOSA place him on GPS monitoring. *Id.* at 468. In general, CSOSA shares GPS data with MPD "pursuant to a longstanding information-sharing agreement" that serves "MPD's own law enforcement ends" and, according to CSOSA, "'aid[s] in suspect apprehension.'" *Id.* at 476, 482 (quoting CSOSA webpage). Indeed, "CSOSA has trained and provided MPD staff with direct access to the GPS system for monitoring purposes." *Id.* at 476. That access allows MPD to "search[] the location records of *all people* on CSOSA GPS monitoring"—regardless of the presence or absence of individualized suspicion—"to identify those who were near the site at the time of [an] incident." *Davis*, 306 A.3d at 94 (emphasis added).

Contrary to the government's suggestion (at 32–34, 44–45), the fact that CSOSA promulgates regulations through the notice-and-comment procedures of the Administrative Procedure Act ("APA") does not make it anything like a legislature and does not diminish the need for deterrence. "[A]dministrative agencies enjoy in practice a significant degree of independence." *City of Arlington v. F.C.C.*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).[10] Of particular concern here, the broad

[10] Although "the Constitution empowers the President to keep federal officers accountable, . . . 'no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.'" *Id.* (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001)). Similarly, "congressional oversight of administrative decisionmaking is often limited, infrequent, and ad hoc rather than systematic." Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1355 (2011). And the APA's notice-and-comment procedures are "modest almost to the point of being merely precatory." Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 697 (2021). As a

independence that executive agencies enjoy breeds a tendency for them "to be extremely aggressive in seeking to squeeze [their] policy goals into ill-fitting statutory authorizations and restraints." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016). Noting this trend, one D.C. Circuit judge lamented that he has "too often seen agencies failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes . . . . In such cases, it looks for all the world like agencies choose their policy first and then later seek to defend its legality." David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2 (2010); *see also, e.g.*, *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (noting that the case involved "an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends").

Regardless of how a typical agency behaves, though, the most important point remains that "CSOSA is a *law enforcement* agency." *In re W.M.*, 851 A.2d at 455 (emphasis added). And in light of CSOSA's documented statements and this Court's precedents, there is no question that CSOSA (1) has a stake in the outcome of criminal prosecutions and (2) regards its search authority as an important tool to further its own law enforcement objectives, as well as those of its law enforcement

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practical matter, agencies often dismiss or ignore many of the comments they receive during the rulemaking process. *See* Mendelson, *supra*, at 1359–67.

partners. *See Jackson*, 214 A.3d at 486. The threat of exclusion can thus be expected to deter CSOSA like it would any other law enforcement actor.[11]

ii. The "good faith" exception does not apply to law enforcement's erroneous efforts to expand their search or seizure authority, especially when, as here, the error is objectively unreasonable.

In light of the exclusionary rule's prophylactic nature, the Supreme Court has held that its application in a particular case "must be resolved by weighing the costs and benefits" of suppression. *Leon*, 468 U.S. at 906–07. Applying that cost-benefit analysis in *Leon*, the Court held that exclusion is not required when police act "in objectively reasonable reliance on a subsequently invalidated search warrant." *Id.* at 922. In that case, "[t]he threat of exclusion . . . cannot be expected significantly to deter" judges and magistrates, because they "are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Id.* at 917. Nor would suppression deter police, the Court

[11] The handful of mostly unpublished district court orders holding that the good faith exception applies to reliance on agency regulations are unpersuasive and inapposite. *See* Gov't Br. at 32–33, 44–45 (citing cases). These cases either did not address the distinction between agencies and legislatures, or dealt with agencies, unlike CSOSA, that are far removed from traditional law enforcement. *See United States v. France*, 2020 WL 5229040, at *5–6 (N.D. Ga. May 4, 2020) (no discussion of difference between regulations and statutes); *United States v. Kolokouris*, 2015 WL 71763634, at *7 (W.D.N.Y. Nov. 13, 2015) (asbestos inspector conducted administrative search in reliance on state Department of Labor regulations relating to asbestos removal procedures); *United States v. Osgood*, 2007 WL 9757448, at *2, 7 (N.D. Ala. Sept. 11, 2007) (truck safety inspection conducted in reliance on Department of Transportation regulations); *United States v. Ortiz*, 714 F. Supp. 1569, 1579 (C.D. Cal. 1989) (search conducted by American Airlines employee pursuant to Federal Aviation Administration ("FAA") regulation, court held that FAA is not an adjunct to the law enforcement team because its regulations are carried out by private companies and their employees).

said, because "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921.

Leon "(perhaps confusingly) called this objectively reasonable reliance 'good faith.'" *Herring*, 555 U.S. at 142 (quoting *Leon*, 468 U.S. at 922). The Court has since applied *Leon*'s deterrence cost-benefit test to extend the so-called "good faith" exception to warrantless administrative searches performed in objectively reasonable reliance on a statute later declared unconstitutional,[12] arrests made in reasonable reliance on an erroneous arrest warrant from a court-maintained database,[13] searches conducted in reasonable reliance on binding precedent that specifically authorizes a particular police practice,[14] and unlawful arrests arising from police database errors that are isolated, negligent, and "attenuated from the arrest."[15] In each case, "the ultimate questions have always been, one, whether exclusion would result in appreciable deterrence and, two, whether the benefits of exclusion outweigh its costs." *(Willie Gene) Davis*, 564 U.S. at 252 (Sotomayor, J., concurring).[16]

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[12] *Illinois v. Krull*, 480 U.S. 340 (1987).

[13] *Arizona v. Evans*, 514 U.S. 1 (1995).

[14] *(Willie Gene) Davis*, 564 U.S. 229.

[15] *Herring*, 555 U.S. at 137.

[16] *See also* Orin Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1103 (2011) ("As the Supreme Court noted in *Herring*, the label 'good faith' arguably is a bit of a misnomer. . . . The good faith exception requires an objective inquiry into costs and benefits, not a subjective inquiry into good faith.").

The Court has never held that the exception extends to circumstances "when police officers act outside the scope of a statute, albeit in good faith." *Krull*, 480 U.S. at 360 n.17. To the contrary, the *Krull* Court expressly *declined* to recognize such an exception, and emphasized that such a holding would "not follow" from its reasoning. *Id.* Central to that reasoning was the Court's recognition that legislators, like judges, are not "adjuncts to the law enforcement team," *id.* at 350–51:

> As our opinion makes clear, the question whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence. The answer to this question might well be different when police officers act outside the scope of a statute, albeit in good faith. In that context, the relevant actors are not legislators or magistrates, but police officers who concededly are "engaged in the often competitive enterprise of ferreting out crime."

Id. at 360 n.17 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

Following that logic, Professor LaFave and several courts agree that "*Krull* is inapplicable when the officer merely claims that he made a reasonable but mistaken interpretation of the scope of his search authority under a certain statute." 4 LaFave, Search & Seizure § 1.3(h) (6th ed., Mar. 2024 update); *see also United States v. Wallace*, 885 F.3d 806, 811 n.3 (5th Cir. 2018) ("The holding of *Krull* does not extend to scenarios in which an officer 'erroneously, but in good faith, believes he is acting within the scope of a statute.'" (quoting *Krull*, 480 U.S. at 360 n.17)). This conclusion stems directly from the deterrence rationale of the Supreme Court's exclusionary rule cases: "Once the officer steps outside the scope of an unconstitutional statute, the mistake is no longer the legislature's, but the officer's. . . . Therefore, use of the exclusionary rule is once again efficacious in deterring

officers from engaging in conduct that violates the Constitution." *United States v. Warshak*, 631 F.3d 266, 289 (6th Cir. 2010) (citing *Krull*, 480 U.S. at 360 n.17).

The exclusionary rule is even more efficacious here than in the case of stepping outside the bounds of an unconstitutional statute, because CSOSA was "acting in defiance of, not reliance on, the language of a statute limiting [its] authority." *People v. Madison*, 520 N.E.2d 374, 380 (Ill. 1988), *overruled on other grounds by Horton v. California*, 496 U.S. 128 (1990). Extending *Krull* to this scenario "would essentially eviscerate the exclusionary rule." *Id.* Law enforcement agencies and their officers "would be encouraged to defy the plain language of statutes as written in favor of their own interpretations," *id.*, in order to obtain a "grace period" during which they could "violate constitutional requirements with impunity," *Krull*, 480 U.S. at 361 (O'Connor, J., dissenting). During those grace periods, operating pursuant to their own interpretation of laws authorizing (or, in this case, prohibiting) searches, CSOSA and other law enforcement agencies could "conduct searches . . . until specifically restricted by the legislatures or the courts." *Madison*, 520 N.E.2d at 380. That perverse incentive to push the constitutional envelope "is fundamentally at odds with the central purpose of deterring police misconduct which underlies the exclusionary rule." *Id.*

Extending the good faith exception in this case would also be fundamentally at odds with this Court's cases applying the holding of *(Willie Gene) Davis*. To determine whether law enforcement may "block application of the exclusionary rule" by relying on a "binding appellate precedent" of this Court, the sole inquiry is whether this Court's precedent on the legality of the law enforcement conduct at

issue is "'binding' under *M.A.P. v. Ryan*." *United States v. Debruhl*, 38 A.3d 293, 297–98 (D.C. 2012).[17] If the law enforcement tactic falls within "a gap in precedent" from this Court, or if the decision that police rely on is "distinguishable," then the exclusionary rule applies. *Id.* at 297; *see also Jones v. United States*, 168 A.3d 703, 720 n.33 (D.C. 2017) (noting that "the good-faith exception for police reliance on binding judicial precedent would not apply where 'the precedent is distinguishable'" (quoting *(Willie Gene) Davis*, 564 U.S. at 248)). As other courts have put it, the good faith exception does not apply "to excuse mistaken efforts to *extend* controlling precedents." *United States v. Berrios*, 990 F.3d 528, 533 (7th Cir. 2021) (quoting *United States v. Jenkins*, 850 F.3d 912, 920 (7th Cir. 2017)).[18]

"[T]his emphasis on the clear application of the precedent to the case at hand is consistent with [*Willie Gene*] *Davis*'s focus on deterrence; where judicial

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[17] *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). The government points out (at 35) that before *Davis*, this Court had in several cases "rejected constitutional challenges to CSOSA's use of GPS monitoring." But it does not argue that, under *Debruhl*, CSOSA could have reasonably relied on any of these cases as "binding appellate precedent" authorizing the validity of CSOSA's regulations authorizing GPS searches as an administrative sanction. That argument is foreclosed by the Court's holding in *Davis* that because no one had raised CSOSA's "search or sanction authority (or the limits thereof) to the court's attention" in previous cases, "the legitimacy of CSOSA's regulations authorizing GPS monitoring as an administrative sanction [was] an open question." 306 A.3d at 97–98.

[18] *See also United States v. Lara*, 815 F.3d 605, 613 (9th Cir. 2016) ("We decline to expand the rule in [*Willie Gene*] *Davis* to cases in which the appellate precedent, rather than being binding, is (at best) unclear."); *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013) ("We reject the government's invitation to allow police officers to rely on a diffuse notion of the weight of authority around the country, especially where that amorphous opinion turns out to be incorrect."); *United States v. Sparks*, 711 F.3d 58, 64 (1st Cir. 2013).

precedent does not clearly authorize a particular practice, suppression has deterrent value because it creates an incentive to err on the side of constitutional behavior." *United States v. Sparks*, 711 F.3d 58, 64 (1st Cir. 2013) (internal quotation marks omitted); *see also (Willie Gene) Davis*, 564 U.S. at 250–51 (Sotomayor, J., concurring). Similarly, where the impetus for a search is law enforcement's erroneous interpretation of a statute or regulation that does not, in fact, authorize their conduct, suppression has significant deterrent value and the exclusionary rule applies.

As Justice Sotomayor explained in *(Willie Gene) Davis*, that conclusion holds true regardless of whether the law enforcement conduct "can be characterized as 'culpable.'" 564 U.S. at 251 (Sotomayor, J., concurring). A hypothetical helps to demonstrate. Suppose an officer knows that the law governing a particular search tactic is unsettled in this jurisdiction, and that courts elsewhere in the country are divided on the issue. After studying the competing cases, he forms an objectively reasonable and honestly held—but ultimately incorrect—belief that the practice is lawful. Having satisfied himself of the tactic's legality, he conducts a search of this type on the street and turns up evidence of a crime.

Now suppose that after the officer conducts his search, this Court decides that the search was unconstitutional. It would strain our familiar conceptions of *mens rea* to describe the officer as demonstrating a "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." *(Willie Gene) Davis*, 564 U.S. at 238. Still, *Debruhl* and *Jones* plainly, and appropriately, require that the evidence obtained from the officer's unlawful search be suppressed. That makes sense: regardless of

what the officer believed, the unconstitutional search was, by definition, objectively unreasonable. *See* U.S. Const. amend. IV. And in this hypothetical, the sole responsibility for the unreasonable search lies with a deliberate law enforcement decision. Absent "explicit protection or cover" from this Court or the Supreme Court, *Debruhl*, 38 A.3d at 297, the officer must use his own discretion, weighing for himself the pros and cons of conducting the possibly lawful (but possibly not) search. But "[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . . [H]istory shows that the police acting on their own cannot be trusted." *McDonald*, 335 U.S. at 456. The exclusionary rule applies in this scenario because it deters constitutional violations by "creat[ing] an incentive to err on the side of constitutional behavior" for the officer, who is susceptible to such incentives because he has a stake in the outcome of the prosecution. *Sparks*, 711 F.3d at 64; *(Willie Gene) Davis*, 564 U.S. at 250 (Sotomayor, J., concurring).

Here, by the same deterrence logic underlying *Debruhl*, *Jones*, and the Supreme Court's exclusionary rule cases, the exclusionary rule applies to the warrantless searches that CSOSA conducted based on a legally erroneous interpretation of its limited authority. No provision in CSOSA's enabling statute explicitly permitted the Agency to conduct warrantless searches; that law instead dictated that CSOSA's authority was the same as that possessed by federal probation officers, who clearly may not unilaterally conduct warrantless searches. CSOSA's GPS search policy rested on a series of inferences about whether it had authority to unilaterally impose "sanctions" and, crucially, whether that sanction authority

included the power to conduct warrantless searches. Even if under some strain of argumentation such inferences could be deemed reasonable, the lack of "explicit protection or cover" from a neutral third party necessarily should have left any objectively reasonable law enforcement agency with some doubt about the legality of its search policy. Left to decide between pursuing or abandoning the search policy of uncertain legality, the threat of exclusion encourages CSOSA to err on the side of constitutional behavior and thus deters Fourth Amendment violations. In other words, the deterrence rationale for exclusion in this circumstance is identical to that on which *Debruhl* turned, and dictates the outcome here.[19]

In any event, while *Debruhl* teaches that suppression does not hinge on the supposed reasonableness of law enforcement's interpretation of search and seizure authority, CSOSA's interpretation of its legal authority to conduct warrantless searches was decidedly unreasonable. CSOSA unreasonably relied for its warrantless search authority on a Parole Commission regulation, 28 C.F.R. § 2.85,

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[19] *Heien v. North Carolina*, 574 U.S. 54 (2014) (cited at Gov't Br. 37), is not to the contrary. That case did not address the question of remedies for a Fourth Amendment violation; its holding was limited to whether an officer's reasonable mistake about the scope of a penal law could support reasonable suspicion "that the defendant's conduct was illegal," such that there was no constitutional violation in the first place. *Id.* at 66; *see also id.* at 69 n.1 (Kagan, J., concurring) (noting that both the majority opinion and the Solicitor General agree that "one kind of mistaken legal judgment—an error about the contours of the Fourth Amendment itself—can never support a search or seizure"). Moreover, *Heien*'s rationale that officers in the field often "have to make a quick decision on the law" does not apply to official policy decisions like the one CSOSA made here. *Id.* at 66. And *Heien* certainly does not support extending the good faith exception to unreasonable interpretations of search authority like the one here. *See id.* at 67 ("[A]n officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce.").

that said *nothing* about warrantless searches and has said nothing about sanctions since 2003. *See supra* p. 12; 68 Fed. Reg. at 41,700 (listing 2003 amendments to 28 C.F.R. § 2.85). The only place where the Parole Commission's regulations mention warrantless searches is in the list of "*conditions*" that "we" (the Parole Commission) "may impose." 28 C.F.R. § 2.204(b)(2) (emphasis added). CSOSA could not reasonably read that regulation as authorizing *CSOSA officers* to unilaterally conduct warrantless searches as *sanctions*, especially given the Commission's unwavering position that CSOSA officers may not conduct such searches without consent or "conditions of release that specifically permit" them. *Davis*, 306 A.3d at 107 (quoting Parole Commission Rules and Procedures Manual § 2.204–18(d)(1)).

CSOSA has never relied on D.C. Code § 24-133(b)(2)(F) as authority for its officers to conduct warrantless searches—that argument appears to have been concocted by the United States post hoc—but even if it had, such reliance would be objectively unreasonable. As explained above, *see supra* pp. 8–9, Congress unambiguously gave CSOSA the same authority possessed by federal probation officers in the federal supervised release system. *Davis*, 306 A.3d at 100. Federal statutes, in turn, make clear that federal probation officers—and thus, CSOSA officers—have no authority to conduct warrantless searches unless the court (or here, the Parole Commission) explicitly includes such searches as a condition of release. *Id.* at 100, 105. Indeed, that "allocation of authority appears clear enough" that no one in *Davis* could "identify any case from the federal courts of appeals where a federal probation officer sought to or did impose GPS monitoring on a person

without court approval, let alone one where a court blessed this practice." *Id.* at 105 n.11.

It is unreasonable, within that statutory context, to interpret the Director's authority to "[d]evelop and operate intermediate sanctions" as allowing CSOSA officers to conduct warrantless searches that their federal counterparts clearly cannot. D.C. Code § 24-133(b)(2)(F). To start, it strains credulity to think that Congress would have wedged such immense liberty-affecting authority in a list that otherwise gives the CSOSA Director mundane administrative powers like the ability to submit appropriation requests, hire officers, and coordinate supervision with other jurisdictions. *See id.* § 24-133(b)(2)(A), (C), (J); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 487 (2006) ("A word is known by the company it keeps—a rule that is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." (internal quotation marks omitted)). Indeed, examining how Congress used the term elsewhere in the Revitalization Act, *Davis* emphasized that "intermediate sanctions" "clearly described *sentencing options . . . for courts*," giving the Director a power, much more in line with the others listed in § 24-133(b)(2), to develop alternate sentencing programs from which courts can choose. *Davis*, 306 A.3d at 103 (emphases in original).

Regardless, to read § 24-133 "as a coherent whole," the statute's provision granting certain powers to the Director cannot be understood "to grant CSOSA an administrative sanction authority that encroaches upon or overtakes the Parole Commission's adjudicatory authority." *Id.* at 104. Though the term "intermediate

sanctions" might be susceptible to two "permissible readings . . . when viewed in the abstract," *Pulsifer v. United States*, 144 S. Ct. 718, 737 (2024), courts (and agencies) do not read statutes in the abstract.[20] Here, following the cardinal rule of statutory construction that a term's meaning depends on context, § 24-133(d)'s unambiguous limitation of CSOSA's authority to that granted by law to federal probation officers definitively forecloses a broad construction of § 24-133(b)(2)(F). Thus, when the term "intermediate sanctions" is viewed in its statutory context, "[t]he two possible readings . . . reduce to one." *Pulsifer*, 144 S. Ct. at 737. These bedrock principles of statutory construction eliminate any ambiguity and leave no room for the interpretation that the government now seeks to attribute to CSOSA. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009) ("[S]urely if Congress has directly spoken to an issue then an agency interpretation contradicting what Congress has said would be unreasonable.").[21] Accordingly, "[t]he circumstances of this case"—a law enforcement agency expanding its search authority through unreasonable legal interpretations—"are precisely those we want to deter and amply justify the application of the exclusionary rule." *Hooks*, 208 A.3d at 750.

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[20] *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole.").

[21] *See also, e.g.*, *Michigan v. E.P.A.*, 576 U.S. 743, 751–54 (2015) (examining statutory context to hold that agency interpretation was unreasonable); *D.C. Off. of Tax & Revenue v. BAE Sys. Enter. Sys., Inc.*, 56 A.3d 477, 481–85 (D.C. 2012) (holding that "agency interpretation . . . [was] unreasonable in light of statutory text, history, and purpose," *id.* at 481, in part because it ran afoul of principle that statute "should be interpreted as a harmonious whole," *id.* at 483).

iii. Exclusion is especially warranted here, where the relevant decision is a deliberate policy choice.

The justification for the exclusionary rule is even stronger than usual here, because "the relevant decision[s]" that the rule will alter are deliberate, agencywide policy choices. *Krull*, 480 U.S. at 360 n.17. The Supreme Court has always maintained that exclusion is appropriate if it would meaningfully "alter the behavior of individual law enforcement officers *or the policies of their departments*." *(Willie Gene) Davis*, 564 U.S. at 246 (emphasis added) (quoting *Leon*, 468 U.S. at 918). Here, exclusion would accomplish that goal directly, by requiring CSOSA policymakers to weigh the consequence of suppression when choosing among policies that directly implicate Fourth Amendment rights.

It is common sense that law enforcement policies related to search procedures are especially responsive to the threat of exclusion. There is no question that the exclusionary rule applies to on-the-fly police judgment calls about whether to stop or search someone on the street. *See, e.g.*, *T.W. v. United States*, 292 A.3d 790,792–93 (D.C. 2023) ("The government concedes that, if officers did in fact seize T.W. before he consented to a pat-down search, . . . the motion to suppress should have been granted."). And if the threat of suppression has a salutary effect on the conduct of the hurried officer on the street, it must all the more beneficially affect formal search policies, which are made with study and deliberation. If CSOSA knew that it could reap the benefits of any given search policy without sowing the costs of suppression when that policy is later held unlawful, it "would have little incentive to err on the side of constitutional behavior." *(Willie Gene) Davis*, 564 U.S. at 250

(Sotomayor, J., concurring) (quoting *United States v. Johnson*, 457 U.S. 537, 561 (1982)). "[T]he message of a 'good-faith' exception operating in this area" would be "that even if a regulation does not satisfy the requirements of the [Fourth] Amendment, it will nonetheless provide 'a grace period during which the police may freely perform unreasonable searches.'" 4 LaFave, Search & Seizure § 1.3(i) (6th ed., Mar. 2024 update) (quoting *Krull*, 480 U.S. at 366 (O'Connor, J., dissenting)).

Experience backs up common sense. Scholars and courts alike have noted that law enforcement policies are consistently shaped "according to admissibility rather than legality." Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court*, 85 CHI.-KENT L. REV. 209, 210 (2010). As just one example, consider the law enforcement response to *Oregon v. Elstad*, 470 U.S. 298 (1985). The Court held there that an officer's failure to give *Miranda* warnings required suppression of the immediately resulting statements, but not of subsequent statements made after a *Miranda* waiver. 470 U.S. at 309. Twenty years later, "[t]he technique of interrogating in successive, unwarned and warned phrases," designed to deliberately circumvent *Miranda*, was taught in national police training seminars and had become "departmental policy" in law enforcement agencies across the country. *Missouri v. Seibert*, 542 U.S. 600, 609–11 (2004). As the Court noted, "some training programs advise officers to omit *Miranda* warnings altogether or to continue questioning after the suspect invokes his rights," knowing that any resulting statements may still be used for impeachment. *Id.* at 610 n.2.[22]

[22] The sort of law enforcement policies described in *Seibert* are not an anomaly. *See also, e.g.*, *United States v. Payner*, 447 U.S. 727, 730–31 (1980) (describing how

In at least one case, this Court has not hesitated to apply the exclusionary rule to a search where the law enforcement officer "acted in accordance with official policy." *Akinmboni v. United States*, 126 A.3d 694, 700 (D.C. 2015). That case illustrates the vast difference between searches conducted in reliance on law enforcement policy and those conducted in reliance on specific judicial or legislative authorization. The Court held that a search of Mr. Akinmboni's anal cavity in the Superior Court cellblock was unreasonable because it was conducted "without the involvement of medical personnel." *Id.* at 697. In so holding, the Court noted that the U.S. Marshal who conducted the search "acted in accordance with official policy," explaining that this "does not by itself establish that the search was reasonable." *Id.* at 700. The Court held that the evidence obtained as a result of the unconstitutional search was "inadmissible as evidence of Mr. Akinmboni's guilt." *Id.* at 701 (citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). That straightforward application of the exclusionary rule would certainly have looked different if the officer had acted, not in accordance with official law enforcement policy, but instead in strict compliance with binding appellate precedent authorizing the search, *see (Willie Gene) Davis*, 564 U.S. at 240–41, or in reliance on a statute authorizing the

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government agents deliberately conducted an unconstitutional search of one person in order to obtain evidence against a third party, knowing that the third party would lack standing to challenge the search); Dripps at 238 ("[T]here are plenty of reported cases in which the police deliberately exploited the standing rule to obtain incriminating evidence against a target other than the search victim."); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580–81 (2008) (explaining that "[w]ithout the remedy of the exclusionary rule . . . California police officers are now trained to ignore" "the ban that California constitutional law places on warrantless searches of trash placed at curbside").

search, *see Krull*, 480 U.S. at 342. *Akinmboni* thus supports the common-sense thesis that constitutional violations directed by official law enforcement policies are just as capable and worthy of deterrence—if not more so, given the deliberate nature of policymaking—as those caused by other law enforcement decisions.

The Supreme Court has also recognized a heightened need for deterrence when responsibility for a constitutional violation lies with official policy rather than individual action. While individual officers may raise the good faith defense of qualified immunity in lawsuits brought under 42 U.S.C. § 1983, municipalities have no such defense where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by" the municipality. *Monell v. N.Y. City Dep't of Soc. Services*, 436 U.S. 658, 690 (1978); *see also (Willie Gene) Davis*, 564 U.S. at 248 n.9. Similarly, the Court cautioned that the clerical database error in *Herring*, which was far removed from any search or seizure decision, might nevertheless warrant exclusion if the error was "systemic" or "routine" rather than "isolated." 555 U.S. at 137, 146–47.

The rationale of *Owen v. City of Independence*, 445 U.S. 622 (1980), where the Court held that municipalities are not entitled to "qualified immunity for their good-faith constitutional violations," is instructive here. 445 U.S. at 650. *Owen* emphasized that "§ 1983 was intended not only to provide compensation for the victims of past abuses, but," like the exclusionary rule, "to serve as a deterrent against future constitutional deprivations, as well." *Id.* at 651. Holding municipalities liable for constitutional violations, "whether committed in good faith

or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52. And the concern for *over*-deterrence—the risk that an individual actor might be deterred from exercising reasonable or desirable discretion—evaporates at the policy-setting level, where "liability for constitutional violations is quite properly" a consideration that *should* inform official decisionmaking. *Id.* at 656.

These principles further compel the conclusion that the unconstitutional search implementing CSOSA's policy statement and regulations requires exclusion. As discussed above, this Court's cases and the deterrent logic of the exclusionary rule already require suppression where an individual officer conducts an unlawful search without the "explicit protection or cover" of binding precedent or clearly applicable statutory authority. *Debruhl*, 38 A.3d at 297. That logic applies with even greater force here, where the law enforcement decision causing the constitutional violation is a deliberate policy choice rather than a rushed judgment on the street.

iv. The government's attempt to inject a subjective culpability standard into the exclusionary rule analysis must be rejected.

The Supreme Court has "said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement," *(Willie Gene) Davis*, 555 U.S. at 246, and its cases therefore apply an objective cost-benefit analysis that "focus[es] on the efficacy of the rule in deterring Fourth Amendment violations in the future." *Herring*, 555 U.S. at 141; *see also Leon*, 468 U.S. at 906–07 (whether to apply the exclusionary rule in a particular case "must be resolved by weighing the

costs and benefits" of suppression). Throughout its brief, however, the government implies that *Herring* and *(Willie Gene) Davis* silently overruled decades of the Court's exclusionary rule precedents to add a requirement that law enforcement acted with subjective bad faith or "culpability" when violating the Fourth Amendment in order for suppression to be warranted. *See, e.g.*, Gov't Br. at 7–8 ("Neither Wells's CSO nor CSOSA as an agency acted with the requisite deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights necessary to justify exclusion."); *see also id.* at 33, 36–37, 39, 47.

As the First Circuit recently emphasized, "[t]hat cannot be the law." *United States v. Sheehan*, 70 F.4th 36, 55 (1st Cir. 2023); *see id.* at 54 ("We do not read *Herring* to require an additional or individualized assessment of the deliberateness and culpability of police conduct . . . ."). The government's attempt to add an unprecedented bad faith requirement to when the exclusionary rule may apply has been explicitly rejected by several federal courts that have considered it and obviously cannot be squared with this Court's precedents. And the Supreme Court has "never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground that the officer's conduct could be characterized as nonculpable." *(Willie Gene) Davis*, 564 U.S. at 251 (Sotomayor, J., concurring). Instead, as routinely borne out by cases from this Court applying the exclusionary rule to run-of-the-mill police searches and seizures, the exclusionary rule applies whenever it results in appreciable deterrence that outweighs the costs of suppression. *Id.* at 252.

"Far from breaking new ground, *Herring* applied the rationale elaborated in *Leon*: that the exclusionary rule should not be invoked when the rule's social costs outweigh the benefits derived from deterring police misconduct." *Sheehan*, 70 F.4th at 55. While *Leon* and its progeny recognize that "these deterrence principles var[y] with the culpability of law enforcement conduct," the "pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of [law enforcement]." *Herring*, 555 U.S. at 143, 145 (internal quotation marks omitted). Far from inquiring about scienter, the Court's examination of "culpability" has therefore always been limited to the objective determination of whether the officers conducting the search or seizure are (or should be) deemed responsible for the constitutional violation. *See Krull*, 480 U.S. at 350 ("To paraphrase the Court's comment in *Leon*: 'Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."); *(Willie Gene) Davis*, 564 U.S. at 241 ("The same should be true of Davis' attempt here to 'penalize the officer for the appellate judges' error.'" (quoting *Krull*, 480 U.S. at 350) (cleaned up)); *Evans*, 514 U.S. at 15 ("If it were indeed a court clerk who was responsible for the erroneous entry on the police computer, application of the exclusionary rule also could not be expected to alter the behavior of the arresting officer.").

Herring similarly addressed a situation where the error that led to the unconstitutional search was not attributable to the officer conducting the search, but instead to a different police employee whose mistake was wholly attenuated from any conscious decision to arrest or search Mr. Herring. *See* 555 U.S. at 137 ("Here

the error was the result of isolated negligence attenuated from the arrest."). The mistake was that of a sheriff department's warrant clerk who, "[f]or whatever reason," had not updated her employer's database to reflect that Mr. Herring's arrest warrant had been recalled. *Id.* at 137–38. Due to that error, she misinformed an officer from a different department that the warrant was still outstanding, and acting on that misinformation, the officer arrested Mr. Herring, finding drugs in a search incident to the arrest. *Id.* at 137. It was this combination of negligence *and* attenuation from the search that led the Court to conclude that "when police mistakes are the result of negligence *such as that described here*, . . . any marginal deterrence does not 'pay its way.'" *Id.* at 147–47 (emphasis added) (quoting *Leon*, 468 U.S. at 907–08 n.6). The Court maintained, however, that if the officer who conducts the search can reasonably be considered responsible for the constitutional violation, then no additional inquiry into culpability is required. *Id.* at 145 (explaining that when officer relies on external source for search authority, the "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal'" (quoting *Leon*, 468 U.S. at 922 n.23)).

The First Circuit's decision that *Herring* does not "require an additional or individualized assessment of the deliberateness and culpability of police conduct," *Sheehan*, 70 F.4th at 54, is just the latest in a number of cases rejecting the unsupportable reading of *Herring* and *(Willie Gene) Davis* that the government now urges. The Sixth Circuit similarly rejected the government's argument that *Herring* "greatly expanded the Good Faith Expansion [sic] and . . . changed the applicable

standard in determining if the Good Faith exception applies." *United States v. Lazar*, 604 F.3d 230, 237 & n.6 (6th Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1140 (2011). The Ninth Circuit likewise explained that *Herring* is limited to *attenuated* negligence, holding that reckless or deliberate misconduct is not required when the officer "directly" responsible for the unlawful search is the one who erred. *See United States v. Camou*, 773 F.3d 932, 945 & n.3 (9th Cir. 2014). And several circuits have implicitly rejected a separate culpability requirement when "declin[ing] . . . to apply [*(Willie Gene)*] *Davis* to excuse mistaken efforts to *extend* controlling precedents." *United States v. Berrios*, 990 F.3d 528, 533 (7th Cir. 2021) (internal quotation marks omitted); *see also supra* note 18 (citing additional cases declining to apply *(Willie Gene) Davis* to unclear appellate precedent).

This Court's vast Fourth Amendment jurisprudence also forecloses the government's untenable interpretation of *Herring* and *(Willie Gene) Davis*. Never has this Court refused to apply the exclusionary rule on the ground that the government now urges—that the unlawful search or seizure was done in *subjective* good faith and therefore not "culpable." It is always sufficient that the police who conduct the search or seizure are responsible for the unconstitutional action. As explained above, *Debruhl* instructs that "culpability" in the sense that the government uses the word has no place in determining whether "binding appellate precedent" "block[s] application of the exclusionary rule." 38 A.3d at 297. The sole question is whether responsibility for the constitutional error lies with the officer, or instead with the court that provided "explicit protection or 'cover'" for the officer's actions. *Id.*; *see supra* pp. 25–28. Nor was there any question that suppression was

required in *Akinmboni*, when the officer who conducted the unreasonable search did so "in accordance with official policy." 126 A.3d at 700; *see id.* at 701 (holding that evidence obtained in violation of the Fourth Amendment was "inadmissible as evidence of Mr. Akinmboni's guilt" (citing *Mapp*, 367 U.S. at 655)).

A litany of decisions from this Court in the decade-plus since *(Willie Gene) Davis* confirm that culpability is not a separate requirement for suppression. The Court has expressly held that the exclusionary rule applies when the constitutional violation was not "flagrant," "knowing," or "reckless." *Green v. United States*, 231 A.3d 398, 414 & n.54 (D.C. 2020). To the contrary, suppression is required even when the constitutionality of the law enforcement action is a "close question" for appellate judges. *Posey v. United States*, 201 A.3d 1198, 1200, 1205 (D.C. 2019).[23] Similarly, in *Burns*, the Court applied the test in *Leon*, which looks solely at the objective reasonableness of a well-trained officer, not to any illusive and near impossible to prove subjective motivation or recklessness: "Ultimately, the inquiry comes down to 'whether a reasonably well trained officer,' reasonably knowledgeable about what the law prohibits, 'would have known that the search was illegal despite the magistrate's authorization.'" *Burns v. United States*, 235 A.3d 758, 778 (D.C. 2020) (quoting *Leon*, 468 U.S. at 922). The exclusionary rule thus applied in *Burns* even though it was "the first case in which this court ha[d] been called on

[23] *See also, e.g.*, *Smith v. United States*, 283 A.3d 88, 95–97 (D.C. 2022) (noting that the Court has upheld arguably similar searches as lawful but reversing denial of suppression motion); *Miles v. United States*, 181 A.3d 633, 645 (D.C. 2018) (reversing denial of suppression motion and noting that "we . . . consider this to be a close case").

to analyze the validity of a cell phone search warrant," and even though the officer responsible for the search had consistently and openly been relying on nearly identical warrants in many other cases. *Id*. at 767, 771.

The government's position here would mean that each of these cases—in addition to countless more of this Court's mine-run Fourth Amendment cases over more than a decade—was wrongly decided. "That cannot be the law." *Sheehan*, 70 F.4th at 55. Rather than inquiring into the state of mind of law enforcement actors, this Court's cases have consistently and correctly turned on the same "ultimate questions" that underly the Supreme Court's exclusionary rule jurisprudence: "one, whether exclusion would result in appreciable deterrence, and two, whether the benefits of exclusion outweigh the costs." *(Willie Gene) Davis*, 564 U.S. at 252 (Sotomayor, J., concurring). Because the answer to both of those questions here is a resounding "yes," the exclusionary rule applies.

v. The benefits of deterrence outweigh the costs.

Suppression is required here because, as explained above, the deterrent value of exclusion is strong. *See (Willie Gene) Davis*, 564 U.S. at 238 (noting that when "the deterrent value of exclusion is strong[,] [it] tends to outweigh the resulting costs"). Two additional points further illustrate that the cost-benefit analysis tilts decisively toward exclusion in this case.

First, the deterrent benefits of the exclusionary rule are particularly high here because suppression is realistically the only remedy available. In other cases, the Court has noted that civil liability from § 1983 litigation already deters law enforcement misconduct, such that "[r]esort" to suppression "is unjustified." *Hudson*

v. Michigan, 547 U.S. 586, 599 (2006); *see id.* at 597–99; Gov't Br. at 41 (quoting *Hudson*). But unlike municipalities and individual officers, CSOSA, as a federal agency, is absolutely immune from civil liability for constitutional torts. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 477–78 (1994); *see also id.* at 486 ("If we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government."). Nor is "internal discipline," Gov't Br. at 41 (quoting *Hudson*, 547 U.S. at 599), a likely consequence for the CSOSA higher-ups responsible for setting agency policy. In the absence of those other deterrents, the threat of suppression is the first—and only—line of defense against constitutional violations caused by official CSOSA policy.

Second, the costs to suppression here are no higher than in the typical case where exclusion is justified. The "many pending cases where the government's investigation relied upon GPS data" from an unlawful CSOSA search have all already become final on appeal, Gov't Br. at 46; the government points to only one case that is actually pending in the Superior Court. *See* Rule 28(k) Citation of Supplemental Authority (Apr. 4, 2024). More to the point, the fact that CSOSA has violated the rights of so many people hurts, rather than helps, the government's cause. *See Hudson*, 547 U.S. at 604 (Kennedy, J., concurring) ("If a widespread pattern of violations were shown . . . there would be reason for grave concern."); *Krull*, 480 U.S. at 353 ("[T]he number of individuals affected may be considered when weighing the costs and benefits." (internal quotation marks omitted)).

For years, CSOSA has tracked hundreds of people a day by attaching GPS monitors to their ankles. *See Jackson*, 214 A.3d at 476; CSOSA, FY 2025 Budget

Request, *supra* note 1, at 25. The constitutional violations caused by this policy are no petty indignities. "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Riley v. California*, 573 U.S. 373, 396 (2014) (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)). Such records are "indefinitely maintained" for people under CSOSA's supervision. *Davis*, 306 A.3d at 94 (internal quotation marks and alterations omitted). Those people are also "forbidden from removing the GPS tracking device, [and] required to charge the device for an hour twice every day (once in the morning and once in the evening), during which [they] ha[ve] to remain awake and next to an electrical outlet." *Id.* at 93–94. The invasion of privacy even extends to those not on supervision: if the person under CSOSA's supervision does not own or lease their place of residence, the owner or lessee must allow GPS staff to "install, service, inspect, disconnect and remove the GPS tracking equipment in the residence." GPS Policy Statement at 11. If they refuse to grant this permission, CSOSA policy requires its officers to report the person under supervision to the releasing authority. *Id.* at 7.

By all appearances, only a tiny fraction of CSOSA's thousands of unconstitutional searches resulted in evidence that the government sought to use at trial. The whole point of the exclusionary rule rests on the very premise that those constitutional violations which do not bear fruit, which rarely command the same attention as those that do, require a prophylactic remedy: because "many unlawful searches . . . turn up nothing incriminating," "this invasion of the personal liberty of

the innocent too often finds no practical redress." *Elkins*, 364 U.S. at 217–18 (internal quotation marks omitted). "Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Id.* at 218.

II. Suppression Is Independently Required Because the GPS Policy Statement That the CSO Relied on to Search Mr. Wells Plainly Did Not Permit That Search.

Even if there were a good faith exception for searches authorized by ultra vires law enforcement policies such as CSOSA's GPS Policy Statement, that exception would not apply in this case because the CSO responsible for the search of Mr. Wells was not "even abiding by [CSOSA'S] own policies and regulations." 2/1/2024 Tr. at 8. Indeed, even if *Davis* had not held that CSOSA categorically lacked authority to conduct warrantless searches, the CSO's search of Mr. Wells in this case would have violated the Fourth Amendment because it was not "carried out *pursuant to*" CSOSA's GPS Policy Statement, and therefore it could not be a valid special needs search. *United States v. Jackson*, 464, 474 (D.C. 2019) (emphasis added) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); *see also United States v. Payne*, 181 F.3d 781, 787 (6th Cir. 1999) ("A search not authorized by the regulatory scheme is unreasonable unless it independently satisfies traditional Fourth Amendment requirements."). The government cannot claim that the good faith exception applies to this independent basis upon which the GPS search of Mr. Wells violated the Fourth Amendment: just as "the *Leon* good faith exception . . . cannot apply when the officer's search exceed[s] the scope of the warrant," *United States v. Wagner*, 951 F.3d 1232, 1244 (10th Cir. 2020) (internal quotation marks omitted),

any good faith exception for reliance on a formal law enforcement policy cannot apply when the search in question is not authorized by that policy.

"CSOSA's published" GPS Policy Statement "sets forth the procedures CSOSA follows in connection with the imposition of GPS tracking of offenders." *Jackson*, 214 A.3d at 468 n.2; *see also* GPS Policy Statement at 1. The Policy Statement describes two broad types of GPS monitoring: first, monitoring imposed "pursuant to an order of the releasing authority," and second, monitoring "as a sanction" "[i]n response to non-compliant behavior or identified risk." GPS Policy Statement at 5. Under a section titled "GPS as a Sanction," the Policy Statement enumerates the seven types of non-compliant behavior or identified risk for which "[o]ffenders may be placed on GPS tracking": (1) loss of contact; (2) re-arrest; (3) when a person convicted of a sex offense is "presenting high-risk behavior" such as "unsupervised contact with children" or "violation of stay-away orders"; (4) when a "[m]ental health offender" is "non-compliant with their supervision plan, as it relates to infractions other than the failure to use their prescribed psychotropic medication"; (5) "[d]omestic violence offenders who are subject to stay away conditions"; (6) when the person on supervision is "unemployed and not enrolled in school or a training program; [is] at maximum or intensive level of supervision; and [is] not actively, aggressively searching for employment"; and (7) when the person on supervision "test[s] positive for the drug PCP." GPS Policy Statement at 5–7.

None of those circumstances applied when a CSO ordered the GPS search that Mr. Wells now challenges. Instead, the CSO ordered that search because Mr. Wells, who was employed at the time, had submitted two "bogus urine tests" that "were

over 100 degrees." R.43 at Ex. 5. The only previous issue that was documented with Mr. Wells's supervision was that he tested positive for marijuana in March 2023, resulting in another month-long GPS tracking sanction. R.43 at 6.

On those facts, the CSO who imposed the GPS search of Mr. Wells cannot claim objectively reasonable reliance on CSOSA's GPS Policy Statement. The Policy Statement plainly limits the use of GPS monitoring as a sanction to seven enumerated circumstances. Given that short and unambiguous list, any objectively reasonable officer should have known that the Policy Statement did not authorize GPS monitoring for either a positive marijuana test or a bogus urine sample. *See D.C. v. Brookstowne Cmty. Dev. Co.*, 987 A.2d 442, 448 (D.C. 2010) ("[W]hen a list is enumerated it may be presumed to be exhaustive unless otherwise provided."). That is especially true because the Policy Statement specifies a limited subset of drug tests that may trigger a sanction of GPS monitoring: only those people "testing positive *for the drug PCP*" may be sanctioned with warrantless searches. GPS Policy Statement at 7 (emphasis added). In short, the CSO could not have conducted the search of Mr. Wells in objectively reasonable reliance on CSOSA policy when the policy plainly did not authorize that search. Suppression is therefore required. *Cf. Hooks*, 208 A.3d at 750 (holding that an "unlawful seizure by officers unaware of the letter of the law they were trying to enforce" is "precisely th[e] [conduct] we want to deter and amply justif[ies] the application of the exclusionary rule").

That conclusion is further compelled by the rule that suppression is required when officers obtain a warrant but conduct a search that exceeds its scope. The Court described this principle when it limited *Leon*'s good faith exception to situations

where "the officers properly executed the warrant and *searched only those places and for those objects that it was reasonable to believe were covered by the warrant*." 468 U.S. at 918 n.19 (emphasis added). Courts have therefore recognized that "[s]uppression remains an appropriate remedy . . . if a reasonable officer would know from the face of the warrant . . . that the search goes beyond its scope." *United States v. Grisanti*, 943 F.3d 1044, 1049 (7th Cir. 2019) (citing *Leon*, 468 U.S. at 923); *see also Wagner*, 951 F.3d at 1244 ("[T]he *Leon* good faith exception . . . cannot apply when the officer's search 'exceed[ed] the scope of the warrant.'" (quoting *United States v. Angelos*, 433 F.3d 738, 746 (10th Cir. 2006)).

The same logic applies here. Even if the exclusionary rule were held to not apply to searches conducted in objectively reasonable reliance on CSOSA's GPS Policy Statement, suppression would "remain an appropriate remedy" in this case, where any "reasonable officer would know from the face of the [policy]" that the GPS search of Mr. Wells "goes beyond [the policy's] scope." *Grisanti*, 943 F.3d at 1049. This Court must therefore affirm.

CONCLUSION

This Court should affirm the trial court's grant of Mr. Wells's motion to suppress the fruits of CSOSA's unlawful GPS search.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served, through the Court's electronic filing system, upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney, and Daniel J. Lenerz, Esq., Office of the United States Attorney, this 1st day of May, 2024.

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