WADING IN MURKY WATERS: THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE & TITLE III WIRETAPS

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INTRODUCTION

> *Before delving into Leon, we note that we do not decide whether the good-faith exception applies in the Title III context, a question unresolved in our circuit . . . and on which other circuits are split. We need not wade in these murky waters . . . .*[1]

The Tenth Circuit is not alone in its apprehension about wading in these "murky waters." The apprehension is a sentiment shared by numerous other circuits who have not affirmatively adopted the good-faith exception to the Fourth Amendment's exclusionary rule for Title III wiretap interceptions. But why the apprehension? After all, it appears that all a federal court has to do is simply expound that an exception—the good-faith exception—to a judicially created rule—the exclusionary rule—applies to Title III wiretap applications. These applications are, in effect, detailed search warrants. Of course, that is easier said than done. Perhaps the Tenth Circuit views this issue as "murky" because Title III already has a suppression mechanism for unlawful interceptions. Or perhaps the issue is with imputing a judicially created remedy for violations of a statutory nature which already have a statutory suppression remedy. Also, what do we do about violations that rise only to the level of a mere statutory violation, as opposed to a violation of a constitutional magnitude—does the exception apply? Maybe Congress, not the judiciary, should be the authority to address this issue and they should amend Title III to expressly include the good-faith exception. Lastly, what do we do about the fact that Title III was in place *before* the Supreme Court crafted the good-faith exception? Understandably, the Tenth Circuit's concerns are not unfounded to think twice about simply expounding such an exception applicable to Title III wiretap interceptions. However, just because there are some questions needing answers, that does not render this issue judicially impractical. These questions *can* be answered.

This note argues that the good-faith exception to the exclusionary rule *should* apply to Title III wiretap applications. More precisely, the exception should be applicable to a federal agent who acts with objective, reasonable reliance on a judicially approved wiretap application that was later found to be *constitutionally* deficient.[2] The federal judiciary, I argue, should promulgate such a rule, not necessarily Congress. This note will proceed as follows: Part I will provide background on the good-faith exception to the exclusionary rule; Part II will analyze Title III; Part III will survey the ongoing circuit split of this

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1. United States v. Barajas, 710 F.3d 1102, 1110 (10th Cir. 2013).

2. As opposed to *statutorily* deficient. *See infra* Part IV.A.ii.

issue; and lastly, Part IV will argue why applying this exception to constitutionally deficient wiretap orders (where the agent acted in objective reasonable reliance) is consistent with Title III.

I. THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE

> *The Fourth Amendment protects the right to be free from unreasonable searches and seizures . . . . The Amendment says nothing about suppressing evidence obtained in violation of this command. That rule—the exclusionary rule—is a prudential doctrine, created by this Court to compel respect for the constitutional guaranty*.[3]

The Fourth Amendment provides no remedy for individuals who have had that right violated by the federal government.[4] The Supreme Court, however, established the exclusionary rule to prohibit the use of evidence at trial resulting from a Fourth Amendment violation.[5] Exclusion, however, is not an absolute guarantee and the Court carved out exceptions.[6] The Supreme Court's seminal 1984 case, *United States v. Leon*, established the good-faith exception to the Fourth Amendment's exclusionary rule. In *Leon*, officers acting in reasonable reliance on a facially valid search warrant issued by a neutral and detached magistrate seized evidence pursuant to that warrant.[7] But, the approved search warrant was ultimately found to be unsupported by sufficient probable cause. The Supreme Court held that "evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded . . . ."[8] In reaching this holding, the Court explained that the exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'"[9] Additionally, the Court utilized a

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3. Davis v. United States, 564 U.S. 229, 231, 236 (2011) (internal citations omitted).

4. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

5. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that it was error for the lower court to allow evidence obtained in violation of the Fourth Amendment be used at trial); *see also* Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule to the states).

6. *See* Derik T. Fettig, *When "Good Faith" Makes Good Sense: Applying* Leon*'s Exception to the Exclusionary Rule to the Government's Reasonable Reliance on Title III Wiretap Orders*, 49 HARV. J. ON LEGIS. 373, 381 (2012) ("Exclusion is not a necessary result of a Fourth Amendment violation, however, and the exclusionary rule should only apply where the benefits of deterring future Fourth Amendment violations outweigh the 'substantial social costs' of 'letting guilty and possibly dangerous defendants go free . . . .'") (citing Herring v. United States, 555 U.S. 135, 141 (2009)).

7. United States v. Leon, 468 U.S. 897, 900–03 (1984).

8. *Id.* at 927 (Blackmun, J., concurring).

9. *Id.* at 906 (citing United States v. Calandra, 414 U.S. 338, 348 (1974)).

balancing approach, evaluating "the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate . . . ."[10]

The *Leon* Court then identified policy considerations underlying its new good-faith exception. First, the Court discussed the safeguards of search warrants. Here, the Court conceded that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause," and therefore, the magistrate must have a "substantial basis [in] determining the existence of probable cause."[11] Second, the Court analyzed the "extreme sanction of exclusion."[12] The Court observed that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates;" there is no evidence of judges ignoring the Fourth Amendment; and there is no evidence that excluded evidence seized pursuant to a warrant "will have a significant deterrent effect on the issuing judge or magistrate."[13] Third, the Court discussed the purpose of the exclusionary rule: the deterrence of unlawful police conduct. Importantly, the Court stated that given the exclusionary rule's purpose of deterring unlawful police conduct, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge . . . that the search was unconstitutional under the Fourth Amendment."[14] Overall, "when an officer acting with objective good[-]faith has obtained a search warrant from a judge or magistrate and acted within its scope . . . there is no police illegality and thus nothing to deter."[15]

However, this good-faith exception is not without its bounds. Evidence will still be suppressed where the judge "was misled by information in an affidavit that the affiant knew was false," where the judge "wholly abandoned his judicial role," where the affidavit is completely lacking in probable cause, and where the warrant is "so facially deficient."[16] Despite these instances where evidence could be suppressed, exclusion is a high bar to meet. "[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[17]

Traditionally, the good-faith exception allows the admissibility of evidence even though the *search warrant*—signed by a neutral judge and objectively relied on by an officer—is determined to be legally invalid. Today, federal search warrants need to meet the standards of Rule 41 of the Federal Rules of Criminal Procedure, which details the procedures and standards law

10. *Id.* at 913.
11. *Id.* at 914–15 (internal citations omitted).
12. *Id.* at 916.
13. *Id.*
14. *Id.* at 919.
15. *Id.* at 920–21.
16. *Id.* at 923.
17. *Id.* at 922.

enforcement officers need to follow to obtain such a warrant.[18] To search or seize property, for instance, law enforcement officers need only show probable cause exists for evidence of the crime, including contraband or fruits of the crime, or property designed for use or intended for use in committing a crime.[19]

II. TITLE III OF THE OMNIBUS CRIME CONTROL & SAFE STREETS ACT OF 1968

A. History

> *Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home . . . . Can it be that the Constitution affords no protection against such invasions of individual security?*[20]

Congress did not act in a vacuum regarding wiretap interceptions in 1968. Rather, Congress acted in response to developing Supreme Court jurisprudence over electronic surveillance that addressed technological advances.[21] First, in *Berger v. New York*, the Court struck down a New York eavesdropping statute that was "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protect area" that violated the "Fourth and Fourteenth Amendments."[22] Then in the same year, the Court in *Katz v. United States* rejected the "trespass doctrine" of Fourth Amendment jurisprudence (by overruling *Olmstead v. United States*)[23] and held that "wiretapping without court approval violated the Fourth Amendment as an unlawful search and seizure."[24] With *Katz*, there was "a paradigm shift in wiretap law,"[25] and in the next legislative session, Congress responded.

Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") for two broad goals: (1) "to protect effectively the privacy of wire and oral communications" and "safeguard the privacy of innocent persons;" and (2) to "aid law enforcement and the administration of justice" against "[o]rganized criminals [who] make extensive use of wire and oral communications in their criminal activities."[26] More directly, the problems

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18. FED. R. CRIM. P. 41.

19. FED. R. CRIM. P. 41(c)–(d)(1).

20. Olmstead v. United States, 277 U.S. 438, 474 (1967) (J. Brandeis dissenting).

21. *See* Fettig, *supra* note 6, at 378.

22. 388 U.S. 41, 43 (1967).

23. 277 U.S. 438 (1928).

24. Fettig, *supra* note 6, at 378.

25. Melanie B. Harmon, Comment, *Applying Leon: Does the Good Faith Exception Apply to Title III Interceptions?*, 2012 U. CHI. LEGAL F. 323, 327 (2012).

26. Pub. L. No. 90–351, 82 Stat. 197, 211 (1968) (codified as amended at 18 U.S.C. §§ 2510–2523); *see* Harmon, *supra* note 25, at 328 ("Title III thus aimed to serve seemingly antagonistic goals—the protection of privacy and the enhancement of law enforcement's investigative power.").

this legislation sought to address was twofold: (1) the "unauthorized 'use and abuse of electronic surveillance' to conduct 'employer-labor espionage;'" and (2) "to clarify the existing state of federal wiretap law . . . ."[27] The accompanying Senate Report described the existing law as "extremely unsatisfactory" given the "tremendous scientific and technological developments that have taken place in the last century [that has] made possible today the widespread use and abuse of electronic surveillance techniques."[28] Overall, Title III, as drafted in 1968, conformed to the Supreme Court's developments in *Berger* and *Katz* to address those technological deficiencies.[29]

For 18 years following Title III's enactment, federal officials had guidance from Congress as to only wire and oral communication interceptions. Meanwhile, technology was quickly advancing. Title III was silent as to interceptions of advancing wireless technologies such as cellular devices.[30] Consequently, in 1986 Congress passed the Electronic Communications Privacy Act ("ECPA"), which amended Title III "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies."[31] Specifically, the ECPA amended Title III to include "electronic communications" in the "regulatory protection against unauthorized interceptions."[32] Based on that language, it would appear that Congress simply included electronic communications alongside wire and oral communications within the statutory framework as a whole. However, Congress did *not* amend Title III's suppression section, § 2515, to include the ECPA's electronic communication and put it on equal remedial footing as wire and oral communications.[33] Rather, the ECPA amended § 2518 by stating that the "remedies and sanctions . . . with respect to the interception of electronic communications are the only judicial remedies and sanctions for non-constitutional violations . . . ."[34] Importantly, Congress "expressly exempted electronic communications from suppression for purely statutory violations . . . ."[35] The supplementary Senate Report reiterated that the electronic communications amendment "does not apply the statutory exclusionary rule

27. Fettig, *supra* note 6, at 378 n.28.

28. S. Rep. No. 90-1097, at 67 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2154; *see* Fettig, *supra* note 6.

29. *See* S. Rep. No. 90-1097, at 66–67, reprinted in 1968 U.S.C.C.A.N at 2153 ("Title III was drafted to meet these standards [from Berger] and to conform with Katz . . . ."); *see also* Fettig, *supra* note 6, at 378 n.28 ("to conform to the constitutional standards for government electronic surveillance laid out in Berger and Katz").

30. The original 1968 language of Title III only included wire and oral communication. Pub. L. No. 90–351, 82 Stat. 197, 213 (1968) (codified as amended at 18 U.S.C. §§2510–2523) ("§2511. Interception and disclosure of wire or oral communications prohibited").

31. S. REP. NO. 99-541, at 1 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 3555, 3555.

32. Fettig, *supra* note 6, at 380.

33. 18 U.S.C. § 2515, as amended, states "[w]henever any wire or oral communication has been intercepted . . . ." without mentioning electronic communication.

34. 18 U.S.C. § 2518(10)(c).

35. Fettig, *supra* note 6, at 380.

contained in Title III . . . to the interception of electronic communications."[36] Even more, the Senate Report clarified that "[i]n the event that there is a violation of law of a constitutional magnitude, the court . . . will apply the existing constitutional law with respect to the exclusionary rule.[37] Just like in 1968 when Congress enacted Title III to conform with the Supreme Court's evolving Fourth Amendment standards, the ECPA continued that purpose in which "the law must advance with the technology to ensure the continued vitality of the fourth amendment."[38]

B. The Statutory Mechanics

> *Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge . . . .*[39]

Title III, codified at 18 U.S.C. §§ 2510–2523, promulgates definitions, standards, procedures, and suppression mechanisms for wiretap interceptions by federal law enforcement for investigation of certain predicate offenses. [40] The purpose of this legislation "was effectively to prohibit . . . all interceptions of oral and wire communications, except those specifically provided for in the Act . . . ."[41]

Title III allows for interception of oral, wire, or electronic communications.[42] Specifically, § 2516 allows wiretap interceptions by federal law enforcement in connection with the investigations of certain serious crimes once a court order approves the application.[43] Importantly, before sending a wiretap application to a federal district court judge, the Attorney General—usually their designee—must authorize the application.[44] Wiretap applications are reviewed by numerous individuals within DOJ and scrutinized via DOJ's

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36. S. Rep. No. 99-541, at 23, *as reprinted in* 1986 U.S.C.C.A.N. 3555, 3577.

37. *Id.*

38. *Id.* at 5.

39. 18 U.S.C. § 2518(1) (italics added).

40. *See* 18 U.S.C. §§ 2510–2520. The predicate offenses to instigate a wiretap interception are located at 18 U.S.C. § 2516(1)(a)–(u).

41. United States v. Giordano, 416 U.S. 505, 514 (1974).

42. Wire communication means "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection . . . ." 18 U.S.C. § 2510(1). Oral Communication means "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception . . . ." 18 U.S.C. § 2510(2). Electronic Communication means "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic . . . system . . . ." 18 U.S.C. § 2510(12).

43. 18 U.S.C. § 2516.

44. 18 U.S.C. § 2516(1); *see Giordano*, 416 U.S. at 514 ("§ 2516(1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General . . . and to any Assistant Attorney General [the Attorney General] might designate.").

"enhanced procedural requirements" and "several layers of vetting" that go "above and beyond the stringent statutory requirements."[45] Once the wiretap application makes it through the DOJ's internal procedures (along with review by an Assistant U.S. Attorney), the application then goes to a federal judge for approval.

A federal judge must make certain determinations based on the wiretap application to issue a wiretap order. The judge must determine whether: (a) probable cause exists for the belief "that an individual is committing, has committed, or is about to commit a particular offense;" (b) probable cause exists that "particular communications concerning that offense will be obtained through such interception;" (c) "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed;" and (d) probable cause exists for the belief that the facilities where the certain type of communications are to be intercepted are used "in connection with the commission of such offense . . . ."[46] Overall, there must be a dual showing of probable cause plus an additional showing of necessity (that other investigative techniques have failed).[47] If the judge approves the wiretap interception and makes such determinations, then the judge's order will specify certain particularities of that interception (identity of person, type of communication, offense, identity of the federal agency, etc.).[48] However, if a defendant challenges such approval of the wiretap interception, Title III outlines the wiretap's suppression procedures.

1. Title III's Suppression Mechanism

For intercepted wire and oral communications, Title III prohibits the use of such evidence when it would violate the statute.[49] There are three bases an "aggrieved person"[50] may challenge the interception of wire or oral communications and seek to suppress the evidence derived: (a) the communication was unlawfully intercepted; (b) the order of authorization was insufficient on its face; and (c) the interception was not made in conformity with the judge's order of authorization.[51] For such suppressions, the Supreme Court in *United States v. Giordano* identified that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the

45. Fettig, *supra* note 6, at 397.

46. 18 U.S.C. § 2518(3).

47. *See* Fettig, *supra* note 6, at 400.

48. *See* 18 U.S.C. § 2518(4).

49. 18 U.S.C. § 2515.

50. *See* 18 U.S.C. § 2518(10)(a) standing requirement ("Any aggrieved person . . . may move to suppress the contents of any wire or oral communication intercepted . . . ."); *see also* United States v. Kahn, 415 U.S. 143, 158 (1974) (holding that Title III does not require the suppression of lawfully intercepted communications to which the defendant was not a party).

51. 18 U.S.C. § 2518(10)(a).

employment of this extraordinary device."[52] Thus, "[n]ot every violation of the procedural requirements set forth in Title III results in suppression" of the evidence.[53] As mentioned in Title III's legislative history,[54] electronic communication interceptions promulgate different suppression standards.

Originally, Title III in 1968 only included wire and oral communications, with its accompanying suppression provision in § 2515. Almost two decades later in 1986 (the same year *Leon* was decided) Congress amended Title III via the Electronic Communications Privacy Act to include electronic communications, but it did not amend the suppression provision of § 2515. Rather, suppression rules for electronic communication are housed in § 2518(10)(c), but are much more limited. The aggrieved person seeking suppression for the interception of their electronic communication will have *no* remedy for statutory violations of Title III, only for violations of a constitutional magnitude.[55]

The Supreme Court's determination in *Giordano* that Congress intended to "limit resort to wiretapping to certain crimes and situations where probable cause is present"[56] marked the Court's "core statutory concerns"[57] analysis for Title III suppressions. The core statutory concerns analysis means that for allegations of a Title III statutory violation, only those violations that "directly and substantially implement the congressional intention to limit" wiretapping will be suppressed.[58] Consequently, mere technical violations of Title III's statutory requirements are exempted from exclusion.[59] Further, challenges to a wiretap interception authorization (and evidence derived thereof) usually involve either failure of the government to establish necessity (via § 2518(3)(c)) or, most germane here, deficient probable cause determinations rising to the level of a constitutional violation.

2. Probable Cause Standard

> *As a result of our decision in Berger v. New York . . . a wiretap -- long considered to be a special kind of a 'search' and 'seizure' -- was brought under the reach of the Fourth Amendment. The dominant feature of that Amendment was the command that 'no*

52. United States v. Giordano, 416 U.S. 505, 527 (1974).

53. Fettig, *supra* note 6, at 380.

54. *See infra* Part II.A.

55. *See* 18 U.S.C. § 2518(10)(c); S. REP. NO. 99-541, at 23, *as reprinted in* 1986 U.S.C.C.A.N. 3555, 3577 (the ECPA "does not apply the statutory exclusionary rule contained in title III."); *see also* Harmon, *supra* note 25, at 331 ("the target of an electronic communication intercept that violates Title III but not the Constitution has no suppression remedy available."); Fettig, *supra* note 6, at 380 ("Congress expressly exempted electronic communication from suppression for purely statutory violations.").

56. *Giordano*, 416 U.S. at 527.

57. *See* Dahda v. United States, 138 S. Ct. 1491, 1496 (2018) (identifying that *Giordano's* core concerns requirement applied to § 2518(10)(a)(i) and does not apply to § 2518(10)(a)(ii)).

58. *Giordano*, 416 U.S. at 527.

59. *See* Fettig, *supra* note 6, at 385.

> *Warrants shall issue, but upon probable cause" -- a requirement which Congress wrote into 18 U.S.C. § 2518.*[60]

This note argues that *constitutional* deficiencies in wiretap applications should still be admissible in evidence via the good-faith exception if an agent acted with objective reasonable reliance it. The primary constitutional violation in a wiretap application is an insufficient showing of probable cause, given that Title III applications are in effect detailed search warrants.[61]

Rule 41 search warrants—to which the good-faith exception traditionally applies—merely require the federal government show probable cause that the search will reveal evidence of a crime and be signed by a magistrate.[62] The good-faith exception applies to these search warrants when agents act in objective, good-faith reliance on a magistrate's probable cause determination that was later found to actually be deficient. To suppress evidence obtained pursuant to a Rule 41 search warrant, "the government's 'conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.'"[63] Consequently, the good-faith exception will not apply where agents "acted with deliberate knowledge, be it personal or constructive, that a search was unconstitutional."[64] Overall, however, a Rule 41 search warrant is a low bar, especially compared to the stringent requirements for a wiretap order.[65]

Compared to Rule 41 search warrants, obtaining authorization for a Title III wiretap interception is much more stringent. Obtaining a wiretap order requires detailed information, internal DOJ authorizations, dual showings of probable cause, and a further showing that traditional investigative techniques have failed (the "necessity" requirement).[66] The federal wiretap statute requires a wiretap application to establish probable cause in two ways: "probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense;" and "probable cause for belief that particular communications concerning that offense will be obtained through such interception."[67] However, Title III does not define what "probable cause" means.[68] Rather, courts have interpreted Title III's probable cause standard to be consistent with the Fourth Amendment's probable cause standard—a

60. United States v. Kahn, 415 U.S. 143, 158 (1974).

61. *See* Fettig, *supra* note 6, at 400.

62. *See* FED. R. CRIM. P. 41(c)–(d)(1).

63. *See* Fettig, *supra* note 6, at 395 (citing Herring v. United States, 555 U.S. 135, 144 (2009)).

64. *Id.* at 396

65. *See* Fettig, *supra* note 6, at 400.

66. *See* Fettig, *supra* note 6, at 400–401; *see also* 18 U.S.C. § 2518(3)(c) ("normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous").

67. 18 U.S.C § 2518(3).

68. *See* 18 U.S.C. § 2510 for definitions.

determination based on common sense, particularity, and the totality of the circumstances.[69]

Once a federal officer completes an application and receives internal approvals, Title III requires a district court judge[70] to make certain findings before authorizing interceptions, including the existence of probable cause.[71] Specifically, § 2518(3) states that probable cause is met when there is a "belief that an individual is committing, has committed, or is about to commit a particular offense . . . [and] there is probable cause for belief that particular communications concerning that offense will be obtained through such interception . . . ."[72]

Deficiencies in the wiretap authorization will not completely void the authorization and render it suppressible.[73] For example, the Supreme Court has upheld wiretap interceptions having insufficient particularity (a probable cause deficiency), stating "when there is probable cause to believe that a particular telephone is being used to commit an offense but no particular person is identifiable, a wire interception order may, nevertheless, properly issue under the statute."[74]

III. THE CIRCUIT SPLIT

We have never addressed whether Leon's good-faith exception applies to wiretaps, but other circuits are split on this issue.[75]

A. Rejected the Good-faith Exception to Title III

Some courts have rejected the opportunity to apply the good-faith exception to the exclusionary rule to Title III wiretap interceptions. Two cases stand out: the earliest case that rejected applying *Leon* and today's leading case from the Sixth Circuit.

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69. *See* United States v. Kahn, 415 U.S. 143, 158 (1974) (Douglas, J., dissenting) (probable cause was "a requirement which Congress wrote into 18 U.S.C. § 2518"); United States v. Giordano, 416 U.S. 505, 530 (1974) ("it must be found not only that there is probable cause in the traditional sense . . ."); *see also* United States v. Williams, 45 F.3d 1481, 1485 (10th Cir. 1995) ("A determination of probable cause is based on the totality of the circumstances."); United States v. Armendariz, 922 F.2d 602, 608 (10th Cir. 1990) ("[w]e review the district court's finding of probable cause for a wiretap under the same standard used for a search warrant").

70. *See* Fettig, *supra* note 6, at 407 ("applications for wiretaps must be reviewed by district court judges and not magistrates") (citing *In re* United States, 10 F.3d 931, 938 (2d Cir. 1993)).

71. *See Giordano*, 416 U.S. at 514.

72. 18 U.S.C §§ 2518(3)(a) and (b); *see Armendariz*, 922 F.2d at 607.

73. *See* Dahda v. United States, 138 S. Ct. 1491, 1499 (2018) ("not every defect [in the wiretap authorization] results in an insufficiency" rendering the evidence suppressible); *see also* United States v. Killingsworth, 117 F.3d 1159, 1165 (10th Cir. 1997) (where neither the wiretap application nor the authorization specifically mentioned the defendant by name, yet the court still held that those omissions "do not render the interception of communications . . . unlawful.").

74. *Kahn*, 415 U.S. at 157 (1974).

75. United States v. Heilman, 377 F. App'x 157, 185 n.21 (3d Cir. 2010).

The earliest case to reject the good-faith exception to Title III wiretap interceptions was decided the same year as *Leon* in 1986, *United States v. Orozco*.[76] The defendants in *Orozco* filed numerous suppression motions challenging the interceptions, with the government arguing that the new judicially-formulated good-faith exception in *Leon* should apply to wiretap applications.[77] The court rejected the argument, largely arguing that the statutory suppression mechanism in § 2515 and the exclusionary rule are not "interchangeable remedial sources."[78] The majority in *Orozco* did not view the issue as one of ambiguous statutory interpretation (or just deferring to Congress to fill in the gaps); rather, the court argued that Title III's statutory suppression mechanism in § 2515 "*expressly* states that evidence derived from wire or oral communications in violation of [Title III] *may not* be used . . . ."[79] Thus, this court focused on the alleged unambiguous statutory/judicial remedial argument in rejecting application of the good-faith exception to Title III wiretap applications.

The leading case rejecting application of the good-faith exception to Title III warrant applications comes from the Sixth Circuit in *United States v. Rice*.[80] There the court held that the "good faith exception to the warrant requirement is not applicable to warrants obtained pursuant to Title III."[81] In reaching this holding, the court analyzed Title III's language, legislative history, mode of suppression, and its relation to *Leon*. The court first examined Title III's language, concluding that its language is clear that Title III's suppression remedy is the exclusive remedy and that courts "*must* suppress illegally obtained wire communications."[82] With regard to Title III's legislative history, the *Rice* court argued that Congress only desired to incorporate the law *at the time* of the passage of Title III, not on-going evolutions (the court also identified that Title III was passed sixteen years before *Leon*, making it impossible for Congress to embrace the good-faith exception).[83] As in *Orozco*, the court determined that a judicially created exception to a judicially created exclusionary rule cannot modify a statutory suppression remedy.[84] Since *Leon* "is the product of judicial balancing of the social costs and benefits of the exclusionary rule," the court wrote, Congress in enacting Title III "has already balanced the social costs and benefits and has provided that suppression is the sole remedy for violations of the statute."[85]

76. 630 F. Supp. 1418 (S.D. Cal. 1986).
77. *Id.* at 1521.
78. *Id.* at 1522.
79. *Id.*
80. 478 F.3d 704 (6th Cir. 2007).
81. *Id.* at 711.
82. *Id.* at 712 (emphasis added).
83. *Id.* at 713.
84. *Id.*; *see also* Fettig, *supra* note 6, at 383.
85. *Rice*, 478 F.3d at 713.

After detailing their arguments—Title III's "clear" language, legislative history, statutory versus judicially created suppression, and *Leon*—the *Rice* court was simply "unpersuaded" by arguments to the contrary.[86]

B. Adopted the Good-faith Exception to Title III

In *United States v. Moore*, out of the Eight Circuit, the court was met with a wiretap order that was suppressed in a lower court because a judge failed to sign the approval order.[87] The court reversed the suppression and concluded that "the subsequently-developed Leon principle applies to § 2518(10)(a) suppression issues" and since "law enforcement officials acted reasonably and complied with the core statutory requirements of federal wiretap law . . . Leon requires that suppression be denied."[88] In making the jump between the good-faith exception and Title III suppression, the court identified that one, § 2518(10)(a) is discretionary ("*if* the motion is granted"); and two, the legislative history "expresses a clear intent" to adopt developing Fourth Amendment suppression principles.[89]

The Eleventh Circuit, in *United States v. Malekzadeh*, also applied the good-faith exception to Title III wiretaps.[90] The defendants challenged the lower court's denial of their motions to suppress a wiretap interception, alleging it was the fruits of an unconstitutional search.[91] Applying the principles of *Leon* and the goals of the exclusionary rule, the court affirmed the convictions. The court concluded that the agent objectively and reasonably relied on the search warrant, and "[e]xcluding the fruits of the wiretap would in no way work to deter the conduct of the officer who relied on . . . the wiretap application."[92]

Both the Eighth and Eleventh Circuits, however, do not address the differences between violations of a statutory nature compared to constitutional violations. This distinction becomes especially important because the three modes of interception—wire, oral, and electronic—do not share the same suppression "triggering" event. For instance, wire and oral communications may be suppressed when the evidence derived from those interceptions "would be in violation of this chapter."[93] Thus, suppression is warranted for wire or oral communications whenever there is a statutory violation or a constitutional violation. Importantly, electronic communication interceptions are not included in this suppression provision and rather, may only be suppressed for violations of a constitutional magnitude.[94] It then becomes clear that this distinction must be addressed when inquiring into a judicially crafted exception to statutory

86. *Id.* at 714 (countering the Eighth and Eleventh Circuit's reasoning for applying *Leon* to Title III).

87. 41 F.3d 370, 371 (8th Cir. 1994).

88. *Id.* at 376–77.

89. *Id.* at 376 (italics added).

90. 855 F.2d 1492 (11th Cir. 1988).

91. *Id.* at 1495.

92. *Id.* at 1497.

93. 18 U.S.C. § 2515.

94. *See supra* Part.II.A. (legislative history of Title III and the ECPA).

suppression procedures. This difference between constitutional violations and statutory violations contributes to why some courts refuse to adopt the good-faith exception in the Title III context. However, it is also a reason why some courts have adopted a "middle ground," applying the good-faith exception to constitutional violations but not "violations of the non-constitutional statutory requirements of Title III . . . ."[95]

Overall, courts have been divided over this issue since the inception of *Leon* in 1986 with *Orozco* making the first stand against applying the good-faith exception. Today, the Sixth Circuit's *Rice* opinion leads the side against applying the exception, and the Eighth and Eleventh Circuits leading the side for its application. Consequently, the split has only widened as more courts are eventually faced with this question. The Supreme Court has yet to resolve the question of whether the good-faith exception to Title III wiretaps applies and it should resolve it.

IV. THE GOOD-FAITH EXCEPTION SHOULD APPLY TO TITLE III WIRETAP APPLICATIONS

This section will detail why the good-faith exception to the Fourth Amendment's judicially created exclusionary rule should apply to Title III wiretap applications that are one, objectively and reasonably relied upon by an agent; and two, are subsequently found to be constitutionally deficient (i.e. deficient probable cause determination). This section also analyzes why the courts—not necessarily an amendment from Congress—can and should be the branch to apply the good-faith exception to Title III wiretap authorizations/orders. As an initial matter it is important to identify that a Title III wiretap application/order is, for the sake of the good-faith exception, a "search warrant."[96] This part will proceed as follows: subpart A will explain the rationale behind the two aspects of my thesis; subpart B will analyze the language and legislative history of Title III as supporting application of the good-faith exception; subpart C will analyze the issue of a judicially created exception from an exclusionary rule preempting a statutory suppression framework; and subpart D will address the "floodgates" concern.

A. Objective Reasonable Reliance & Constitutional Deficiency

i. Objective Reasonable Reliance

For any inquiry into whether the good-faith exception applies, there must be objective reasonable reliance (or, "good-faith") on the part of the executing agent.[97] Additionally, for the good-faith exception to apply, the agent who relied on the signed warrant/order must not have contributed to the warrant's

95. Fettig, *supra* note 6, at 384 (referring to United States v. Ambrosio, 898 F. Supp. 177, 187-89 (S.D.N.Y. 1995) and United States v. Ferrara, 771 F. Supp. 1266, 1273 (D. Mass. 1991)).

96. *See supra* Part II.B.2 (analyzing "traditional" Rule 41 search warrants and the standards of a wiretap order).

97. *See* United States v. Leon, 468 U.S. 897, 920 (1984).

invalidity by providing false information.[98] Therefore, it is crucial that in applying this exception to Title III wiretap applications, the agent must have acted with objectively reasonable reliance (good-faith) on the wiretap order (later challenged to be deficient) promulgated by a neutral district court judge. More specifically, "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant" issued must be objectively reasonable.[99] Evidence from such a deficient wiretap order will still be admissible into evidence, *Leon* suggests, because there is no police illegality and therefore, nothing to deter.[100]

ii. Constitutional Deficiency

I suggest that the good-faith exception should apply only to Title III orders that are later found to be *constitutionally* deficient, as opposed to being merely statutorily deficient. A constitutional deficiency in a wiretap order would be a judge's determination that there is indeed probable cause for the interception, when actually there is insufficient probable cause to justify the interception.[101] A statutory deficiency would be a wiretap order that fails to meet some aspect of Title III's requirements. For instance, the agent's affidavit failed to establish necessity (§ 2518(3)(c)), the communication was unlawfully intercepted (§ 2518(10)(a)(i)),[102] or the order was insufficient on its face (§ 2518(10)(a)(ii)).[103]

There are a few reasons for applying the good-faith exception to only constitutional deficiencies in the Title III interception order. First, *Leon's* good-faith rule is an exception to the Fourth Amendment's judicially created exclusionary rule. So, as an initial matter it would seem logically consistent to apply the good-faith exception to only those suppression challenges that rise to the level of a constitutional magnitude. In the Title III context, this would invariably be Fourth Amendment challenges to the district court judge's probable cause determination.[104]

Second, there is less of a need to apply the good-faith exception to statutory deficiencies in wiretap orders because not every deficiency will render

98. *See id.* at 923.

99. *Id.* at 922.

100. *Id.* at 921 ("Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.").

101. This would rise to the level of a Fourth Amendment violation, not merely a violation of Title III. *See, e.g.*, United States v. Barajas, 710 F.3d 1102, 1106 (10th Cir. 2013) (defendant challenging denial of his motion to suppress wiretap orders, arguing, *inter alia*, the orders lacked probable cause).

102. *See, e.g.*, United States v. Giordano, 416 U.S. 505, 527 (1974) ("The words 'unlawfully intercepted' are themselves not limited to constitutional violations . . . Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures . . . .").

103. *See, e.g.*, Dahda v. United States, 138 S. Ct. 1491, 1498 (2018) ("subparagraph (ii) covers at least an order's failure to include information that § 2518(4) specifically requires the order to contain").

104. *See* 18 U.S.C. § 2518(3)(a)–(b).

the interception suppressible.[105] Further, for constitutional deficiencies (i.e. probable cause insufficiency), it is the case that the judge *will have to* make their own determination as to whether probable cause exists;[106] whereas, in the case of Title III statutory violations, it is the agent's application (or method of interception) that is attacked[107]—not necessarily a judge's independent legal determination. My argument that there is more of a need to apply the good-faith exception to deficiencies in wiretap orders that rise to the level of a constitutional magnitude (and therefore less of a need for the exception to apply to statutory deficiencies) is even more clear when distinguished between the types of communications that Title III covers: wire, oral, and electronic.

Title III, as originally enacted in 1968, covered only wire and oral communications,[108] and it was not until 1986 when Congress, via the ECPA, included electronic communications to Title III's statutory mechanics (as detailed in Part II.A). Importantly, the ECPA did not just include electronic communications into every aspect of Title III—especially not the suppression mechanisms. Thus, the suppression standard in § 2515 includes only wire and oral communication, not electronic communication—which is located at § 2518(c).[109] For electronic communications, "Congress expressly exempted electronic communications from suppression for purely statutory violations" and the accompanying Senate Report reiterated that electronic communication orders do "not apply the statutory exclusion rule contained in Title III."[110] Thus, suppression of electronic communication is available only for violations of a constitutional magnitude.

Since suppression is available (in the context of electronic communication interceptions) only for constitutional violations, applying the good-faith exception here will thus be consistent with my thesis and importantly, to § 2518(10)(c).[111] However, although there are suppression remedies available for some (*Giordano*) statutory violations of wire or oral interceptions (§ 2515), no such remedy will be available for pure statutory violations of electronic communication interceptions given the language of § 2518(10)(c). Additionally, my thesis is not so narrow as to only apply the good-faith exception to electronic communications; rather, I argue it should apply to all

105. *See Dahda*, 138 S. Ct. at 1498-1500 ("not every defect results in an insufficiency") (suppressible only if the interception "violates a statutory provision that reflects Congress' core concerns").

106. *See* § 2518(3) ("if the judge determines" that there is probable cause).

107. For instance, in *Giordano* the agent's wiretap application was internally authorized by someone not intended (an executive assistant) to be authorized under Title III. Thus, it is the agent's application being challenged as statutorily deficient, not a judge's determination after the fact. 416 U.S. 505, 510 (1974).

108. *See supra* note 42 for definitions of the different methods of interception.

109. "The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications." 18 U.S.C. § 2518(10)(c).

110. Fettig, *supra* note 6, at 380.

111. *See infra* Part IV.C. (discussing the legislative history to support application of existing constitutional law to Fourth Amendment inquiries by a judge).

forms of interceptions: wire, oral, and electronic.[112] The first reason is practical. Federal investigations do not simply utilize one type of interception for an investigation. Instead, the vast majority of surveillance/interceptions utilize a combination of wire, oral, or electronic surveillance.[113] Thus, it would be judicially impractical to sparse through which interceptions utilized which method of surveillance—and then what constitutional standards to apply—when in reality, a minority of interceptions tend to clearly utilize one method of interception.[114]

The second reason the exception should apply to all modes of interception is because despite the different suppression mechanisms between electronic and oral/wire communications, they all require the same probable cause standard.[115] This same standard probable cause standard is a constitutional requirement, one interpreted by the Supreme Court.[116] And since I argue the good-faith exception should apply only to violations of a constitutional magnitude (thus largely implicating Fourth Amendment probable cause issues), the fact that each mode of interception utilizes the same probable cause standard—despite differing statutory suppression standards—will result in a consistent application of the good-faith exception to wire, oral, or electronic communications (or a combination).

However, these are not the only reasons for applying the good-faith exception to all modes of interception provided for in Title III. The language and legislative history also provide reasons for applying the exception to all methods of interception.

B. The Language and Legislative History of Title III Allows for the Good-faith Exception

This section of my argument will proceed by analyzing the language, supported by the legislative history, of Title III to show that the good-faith exception is consistent with and applicable to the legislation.

Since the good-faith exception is an exception to the exclusionary rule, Title III's suppression provisions—§ 2515 and § 2518(10)—are most directly implicated. As one of its main reasons in rejecting the application of the good-faith exception to Title III, the Sixth Circuit in *Rice* identified that the "statute is clear on its face and does not provide for any exception," thus, courts "must

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112. *See infra* part IV.B on why the legislative history supports the application of *Leon* to Title III.

113. In 2020, out of 1,762 total wiretap orders approved, 940 of those were a "combination" of "which more than one type of surveillance was used." *See* Wiretap Report 2020 Table 6, UNITED STATES COURTS, https://www.uscourts.gov/statistics/table/wire-6/wiretap/2020/12/31 (last updated December 31, 2020).

114. In 2020, out of 1,762 total wiretap orders approved, 778 were wire interceptions, 21 were oral, 23 were electronic, and 940 were a combination. *See id.*

115. *See* 18 U.S.C. § 2518 (probable cause requirements for "interception of wire, oral, or electronic communications").

116. *See* S. Rep. No. 90-1097 (1986), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2191 (Title III's probable cause requirement "is intended to reflect the test of the Constitution").

suppress illegally obtained wire communications."[117] However, even ignoring the differences between statutory and constitutional violations (and differences between wire, oral, and electronic communication procedures), the statute is not so absolute as the *Rice* court suggests. First, § 2515. This section indeed states that "[w]henever any wire or oral communication has been intercepted, *no* part of the contents . . . and *no* evidence derived therefrom may be received in evidence . . . ."[118] Admittedly, that language seems to read as absolute—but there is more. § 2515 ends with a qualifier: "*if* the disclosure of that information would be in violation of this chapter."[119] In other words, the "violation of this chapter" is a statutory violation (except for electronic communication via § 2518(10)(c)).

Two points flow from this language in § 2515. First, it is not true that a blanket "statutory violation" (i.e. any and all statutory violation) of Title III is grounds for suppression—only those that violate Title III's "core concerns."[120] Second, if § 2515 stood for the proposition that suppression is automatic and express, then § 2518(10)(a) and (c) would be unnecessary.[121] The contradiction stems from the seeming "express" and "automatic suppression" language in § 2515, with the more permissive and discretionary language of § 2518(10)(a).[122] Given that Congress has included § 2518(10) to Title III's suppression framework, courts should interpret it consistent with its meaning—otherwise it is surplusage given § 2515.[123] Overall, the language of Title III's suppression mechanics is not so express and absolute as *Rice* suggests and the discretionary language alone in § 2518 could reasonably include the determination of whether the good-faith exception applies. However, the language alone need not support this view given the legislative history of Title III.

The legislative history of both the original Act in 1968 (for wire and oral communications) and the ECPA in 1986 (for electronic communications) supports the view that the good-faith exception to the Fourth Amendment's exclusionary rule should apply to Title III wiretap interceptions. First, starting with the easier inquiry: electronic communications.

Leon was decided in 1986, right before the ECPA amended Title III to include electronic communications. This point alone counters the *Rice* court's argument that Congress could not have intended a good-faith exception to Title III since it was enacted decades before the good-faith exception was even

117. 478 F.3d at 712.

118. 18 U.S.C. § 2515 (emphasis added).

119. *Id.* (emphasis added).

120. *See* Dahda v. United States, 138 S. Ct. 1491, 1498 (2018) (rejecting the argument that "any defect that may appear on an order's face would render it insufficient").

121. Harmon, *supra* note 25, at 339.

122. § 2518(10)(a) states that an aggrieved person "*may* move to suppress the contents of any wire or oral communication intercepted *pursuant to this chapter . . . [i]f* the motion is granted . . . ."; *see also* Fettig, *supra* note 6, at 386 (§ 2518's language "impl[ies] that judges maintain discretion in deciding suppression motions and are not mandated to grant suppression under Title III.").

123. Harmon, *supra* note 25, at 339.

created. Even more, the accompanying Senate Report for the ECPA expressly states that "[i]n the event that there is a violation of the law of a constitutional magnitude, the court involved in a subsequent trial will apply the existing Constitutional law with respect to the exclusionary rule."[124] The House of Representatives, in its accompanying report, went even further and cited *Leon* to the very same sentence.[125] These reports indicate that Congress intended, at the very least, for electronic communications within Title III to incorporate Fourth Amendment developments.[126]

Concededly, an application of the good-faith exception to the original 1968 Title III is not so clear as the ECPA (as the *Rice* court identifies). However, there are indications that Congress intended Title III as a whole to incorporate such developing Fourth Amendment jurisprudence. First, when enacted in 1968, Title III "largely reflect[ed] existing law," while not "press[ing] the scope of the suppression role beyond present search and seizure law."[127] In effect, providing for a ceiling, not a floor, of suppression which is substantiated even further given the Senate Report specifically lists areas of Fourth Amendment law that are *not* to be changed.[128] Additionally, the probable cause requirement in § 2518(3) is a constitutional requirement[129] that would have to be interpreted consistent with developing Fourth Amendment jurisprudence. Otherwise, Congress would have to amend Title III further to provide a definition of what "probable cause" is, if it is not what the Supreme Court interprets it to be (consistent with the Fourth Amendment).

Second, since the 1986 ECPA incorporated electronic communications into Title III (with different standards only related to statutory suppression rules)—and with it the developments in constitutional law between 1968 and 1986[130]—Congress could have intended that to apply to Title III broadly. An argument against that is the fact that electronic communications, via ECPA, are suppressible only for constitutional violations, so it makes sense for Congress to incorporate developments in constitutional law up to 1986 only for that method. However, it seems even less plausible that Congress would require

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124. S. Rep. No. 99-541, *supra* note 31, at 23.

125. *See* H.R. Rep. No. 99-647, at 48 (1986).

126. *See* Fettig, s*upra* note 6, at 389.

127. S. Rep. No. 90-1097 at 96 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185.

128. *See id.* ("no intention to change the attenuation rule"); *see also* Fettig, *supra* note 6, at 388 ("this language could be interpreted as a [sic] providing a ceiling for the statutory suppression remedy . . . but not a floor").

129. *See* United States v. Kahn, 415 U.S. 143, 158 (1974) (Douglas, J., dissenting) (probable cause was "a requirement which Congress wrote into 18 U.S.C. § 2518"); United States v. Giordano, 416 U.S. 505, 530 (1974) ("it must be found not only that there is probable cause in the traditional sense . . ."); *see also* United States v. Williams, 45 F.3d 1481, 1485 (10th Cir. 1995) ("A determination of probable cause is based on the totality of the circumstances."); United States v. Armendariz, 922 F.2d 602, 608 (10th Cir. 1990) ("[w]e review the district court's finding of probable cause for a wiretap under the same standard used for a search warrant").

130. *See* S. Rep. No. 99-541, *supra* note 31, at 23 ("In the event that there is a violation of law of a constitutional magnitude, the court . . . will apply the existing Constitutional law with respect to the exclusionary rule.").

judges apply 1968 constitutional law to wire and oral communication suppression issues, yet apply 1986 constitutional law to suppression of electronic communications. Further, wire and oral communications are suppressible not only on statutory grounds, but on constitutional grounds as well like electronic communications. Indeed, some courts have adopted this view that the 1986 amendments incorporated developing law to all of Title III.

In *United States v. Ambrosio*, the court identified that the 1986 amendments to Title III were an effort by Congress "to keep the wiretap statute in line with the new developments in Fourth Amendment law . . . ."[131] Thus, the court adopted the view that the ECPA not only incorporated developing Fourth Amendment law for electronic communications, but the "wiretap statute" as a whole including wire and oral communications. Similarly, a district court in Massachusetts argued that the 1986 amendments clarified "that for oral, wire, and electronic communications Congress has incorporated the good faith exception for violations of a constitutional magnitude."[132]

C. Statutory Suppression versus Judicially Created Suppression

Perhaps the strongest argument against adopting the good-faith exception to Title III wiretap interceptions is that Title III already has suppression procedures in place. Therefore, imputing a judicially crafted rule—the good-faith exception to the exclusionary rule—to a statute that already has suppression procedures in place is inappropriate. This was the main argument for the Sixth Circuit in *Rice* which, among other things, concluded that the "rationale behind judicial modification of the exclusionary rule is, thus, absent with respect to warrants obtained under Title III's statutory scheme."[133] In other words, there is no need for the judiciary to impute their rule to a statute that already has its suppression procedures codified.[134] It is also for this reason that some argue that although the good-faith exception should apply to Title III wiretaps, it is not the judiciary that should (or has the power to) promulgate it to Title III; rather, it should be up to Congress to amend Title III to clearly adopt the exception to its suppression mechanism in Title III.[135] Though the question of "who decides" is certainly an important legal topic that is debated upon,[136] it

131. *Ambrosio*, 898 F. Supp. at 187.

132. *Ferrara*, 771 F. Supp. at 1304 (internal quotations omitted) (quoting J. Carr, *The Law of Electronic Surveillance*, § 6.3A, p. 6-84.2)

133. *See Rice*, 478 F.3d at 713.

134. *Id.* ("The judicial branch created the exclusionary rule, and thus, modification of that rule falls to the province of the judiciary. In contrast, under Title III, Congress has already balanced the social costs and benefits and has provided that suppression is the sole remedy for violations of the statute.").

135. *See* Fettig, *supra* note 6, at 393 ("it is time for Congress to amend Title III and address the statute's ambiguity by codifying a good faith exception for reasonable reliance on wiretap orders.").

136. *See, e.g.*, Adrian Vermeule, *"Who Decides?"*, THE POSTLIBERAL ORDER, (Jan. 11, 2022), https://postliberalorder.substack.com/p/who-decides?s=r ("In debates over law, politics, and political theology, one of the most frequently heard questions is 'who decides?'"); *see also* NFIB

is outside the scope of this article to fully dive into. However, although the *Rice* court's concern is not without merit (indeed it touches upon important separation of powers principles), imputing Fourth Amendment principles to a statute is by no means novel—especially in the Title III context.

In *Franks v. Delaware*, the Supreme Court held that evidence is suppressible if an officer's affidavit in support of a facially valid search warrant contains materially false or misleading information (or material omissions).[137] And if a defendant's "allegations of deliberate falsehood or of reckless disregard for the truth," accompanied by an offer of proof, is established, then that defendant is entitled to a hearing under the Fourth and Fourteenth Amendments to challenge such warrant.[138] Importantly, this is a good-faith analysis and "[a]llegations of negligence or innocent mistake" on the part of the office are insufficient.[139] Pertinent here to the Title III context, "courts have almost unanimously agreed that affidavits made in support of a wiretap application may be subject to a good faith analysis pursuant to [*Franks*]."[140] Although Title III requires wiretap applications to have a "full and complete statement of the facts relied upon by the applicant,"[141] courts applying a *Franks* analysis look outside Title III's exclusion/suppression procedures and utilize the judicially pronounced rule in *Franks*. The Second Circuit, faced with a suppression motion of evidence seized pursuant to Title III, concluded that "application of the *Franks* standard in Title III cases . . . 'enhanced the protection of the defendants by applying to the wiretap statute an important constitutional principle that has been accepted by all courts.'"[142]

Overall, the seeming unanimous adoption of *Franks* to Title III wiretaps demonstrates that "judicial modification of Title III's statutory exclusion rule through adoption of Fourth Amendment principles is not without precedent."[143] Given the widespread adoption of a *Franks* analysis to Title III, the Sixth Circuit's concern of adopting a judicially crafted rule to a statute with suppression mechanisms proves such an application is not without precedent.

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v. OSHA, 595 U.S. 662, 1 (2022) (J. Gorsuch concurring) ("The central question we face today is: Who decides?").

137. Franks v. Delaware, 438 U.S. 154, 171 (1978).

138. *Id.* at 171.

139. *Id.*

140. United States v. Ambrosio, 898 F. Supp. 177, 188 (S.D.N.Y. 1995); *see* Fettig, *supra* note 6, at 391 ("Courts have almost uniformly adopted the Franks analysis in cases that allege falsehoods or omissions in a wiretap affidavit or application.").

141. 18 U.S.C. § 2518(1)(b).

142. Fettig, *supra* note 6, at 391 (citing United States v. Bianco, 998 F.2d 1112 (2d Cir. 1993)).

143. *Id.* at 391-92; *see Ambrosio*, 898 F. Supp. at 189 ("[S]ince the Franks standard of good faith is applicable to an affidavit made in support of a wiretap application, even in light of the statute's exclusionary rule, the good faith exception to the probable cause requirement, as set forth in *Leon*, should also apply to wiretap warrants.").

D. The "Floodgates" Concern

Some may fear that allowing a deficient wiretap order—and its fruits— to still be admissible into evidence (if the good-faith analysis is established) will result in an increase in law enforcement misconduct and further intrusions on privacy. These fears are unwarranted for numerous reasons. First, it is true that the purpose of the *exclusionary rule* is to deter unlawful police misconduct;[144] however, that is not the case for the *good-faith exception*. The good-faith exception requires that for evidence to still be admissible, the officer must have acted with objective good-faith—without knowledge of deficient probable cause—and therefore, there is no police illegality nor anything to deter.[145] Overall, there won't be an increase in police misconduct solely because of application of this exception because this rule's primary aim is *not* to punish good-faith officers for the mistake of a neutral judge.

Second, there is also little concern for an increase in the use of Title III wiretap interceptions (resulting in further privacy intrusions) solely because of the application of the good-faith exception to wiretap applications/orders. First, § 2518 minimizes the length of the interception to only 30 days, with any extensions requiring further justification and court approval.[146] Second, wiretaps are incredibly expensive and use a large amount of agency labor/resources.[147] For example, the average cost of a federal wiretap—including installation and monitoring—in 2020 was $101,046 which is an increase of about 7% from 2019.[148] The concern of funds and resources alone acts as a natural deterrent of widespread wiretap interception use. Third, the overall use of wiretap interceptions has decreased by 45% from 4,336 interceptions in 2010 to 2,377 in 2020.[149] Fourth, the "floodgates" argument was also made when Congress was passing the 1986 electronic communications amendments to Title III, with many fearing that the result would be widespread interceptions of private electronic communications. However, "[s]ince Congress passed the 1986 ECPA amendments to Title III . . . the number of applications seeking to intercept e-mails remains a small fraction of the total number of wiretap applications."[150] For instance, in 2020 there were only fourteen orders of electronic communication interceptions, but 422 orders of

144. *See* United States v. Leon, 468 U.S. 897, 919 (1968).

145. *Id.* at 919–20.

146. *See* 18 U.S.C. § 2518(5).

147. *See* Fettig, *supra* note 6, at 405.

148. *See* Wiretap Report 2020 Table 5, UNITED STATES COURTS, https://www.uscourts.gov/statistics/table/wire-5/wiretap/2020/12/31 (last updated December 31, 2020); *see also* Wiretap Report 2019 Table 5, UNITED STATES COURTS, https://www.uscourts.gov/statistics/table/wire-5/wiretap/2019/12/31 (last updated December 31, 2019).

149. Wiretap Report 2020 "Summary of Reports for Years Ending December 31, 2010, Through December 31, 2020," UNITED STATES COURTS, https://www.uscourts.gov/statistics-reports/wiretap-report-2020 (last updated December 31, 2020).

150. Fettig, *supra* note 6, at 406.

wire communication interceptions.[151] Given these statistics, there is little concern overall for the proposition that applying the good-faith exception to Title III will result in an increase in law enforcement misconduct or an increase in unlawful intrusions on privacy.

CONCLUSION

The good-faith exception to the Fourth Amendment's exclusionary rule should be applied to Title III wiretap applications/orders that were relied on by an agent who acted with objective reasonable reliance and in good-faith but were later found to be constitutionally deficient. Applying this exception to Title III does not necessarily require Congressional action (though they certainly could unambiguously make such clarification). Rather, applying the good-faith exception to Title III is well within the purview of federal courts (preferably action by the Supreme Court to resolve the ongoing circuit split) and would not be unprecedented as proven by the unanimous adoption of *Franks* to Title III.

This note inquired into the background of the good-faith exception to the Fourth Amendment's exclusionary rule via *Leon*; then analyzed the text of Title III (codified at 18 U.S.C. §§ 2510–2523), its legislative history, and the state of the current split over this issue. With the legal context established, this note then argued why the courts should—and could—adopt the exception to Title III. This conclusion was based upon Title III's text and legislative history, while also based upon confronting the arguments posed by the leading case that rejected the good-faith exception, *Rice*. Although merely applying a well-known judicially crafted exception to the rule seems straightforward, concededly there are issues and questions that arise. Namely, issues of a statute that already has suppression procedures in place, issues of who decides, and issues of alleged legislative history ambiguity. Perhaps it is for these reasons the Tenth Circuit thought twice before expounding that the exception applies in the context of Title III wiretap orders. Yet, as has been shown and articulated, these questions do not render the issue judicially impractical and overall, the waters might not be as murky as the Tenth Circuit fears.

151. *Supra* note 113.